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file*

THE WHITE HOUSE

WASHINGTON

March 12, 1984

MEMORANDUM FOR FRED F. FIELDING
RICHARD A. HAUSER

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: D.C. Chadha Overview

- The Department of Justice concluded that the Supreme Court's decision in INS v. Chadha applies to the legislative vetoes in the D.C. Self-Government and Governmental Reorganization Act (popularly known as the Home Rule Act). An argument can be made -- and has been made by D.C. officials -- that Chadha does not apply to the Home Rule Act, because of Congress's plenary powers with respect to District affairs. Justice considered and rejected this argument.
- The Home Rule Act has two types of legislative vetoes: a two-house veto for most matters and a one-house veto for criminal matters. Congress has, therefore, always retained more control over District criminal matters.
- In the wake of Chadha the District proposed amending the Home Rule Act to delete the legislative vetoes and replace them with "report and wait" provisions. To block District actions Congress would have to pass a law before the actions took effect. This proposal passed the House after OMB erroneously advised the House that the Administration had no objection. Justice and our office found out about it in time to stop Senate passage; the matter is currently pending before Senator Mathias's committee.
- The Administration formally proposed that the Home Rule Act be amended so that a "report and wait" provision would apply to most District actions, with the exception of criminal laws. District proposals affecting criminal laws would only become effective if affirmatively approved by Congress. All other proposals would become effective unless Congress passed a law disapproving them during the specified "wait" period.
- [^]District officials objected that we were turning back the clock on Home Rule. We responded that we were simply carrying forward the distinction in the original Home Rule Act giving Congress greater control over criminal

laws. We also stressed the Federal interest in the criminal area: Federal prosecutors bring the cases, judges appointed by the President hear them, and U.S. Marshals are responsible for the convicts. 4

- The District next proposed the so-called "short form" D.C. Chadha bill, which would ratify all past D.C. Council acts and provide that any unconstitutional provision in the Home Rule act was severable. The Administration refused to accept this. The effect of the "short form" bill would be the same as the original District proposal: the unconstitutional legislative vetoes would be severed, requiring Congress to pass a law if it wanted to block D.C. Council proposals. 5
- A crisis loomed because of the District's inability to enter the bond market with the Chadha "cloud" over the government's authority. This crisis was defused when OMB and the District were able to agree on short-term borrowing for the District.
- Another crisis developed in the area of criminal prosecutions. In United States v. Cole, the defendant, charged with various sexual assault crimes, contended that he was improperly charged. He argued that he should have been charged under the more liberal sexual assault bill proposed by the D.C. Council but vetoed by Congress, pursuant to the unconstitutional legislative veto provision. Judge Smith, hearing the case, asked for the views of the United States. The U.S. Attorneys office originally tried to dodge the issue, but the judge demanded a response. The government has now filed a response arguing that Chadha does apply to the Home Rule Act, but that no convictions need be overturned. According to Justice, the vetoed sexual assault bill never became a law on which the defendant can be said to have relied.
- Negotiations continue between Justice and Mayor Barry. Lowell Jensen met with the Mayor last week, although they made little progress.
- The Mayor called Mike Horowitz yesterday, generally raising several possibilities, including different treatment for different types of criminal laws (felonies/misdemeanors), and removing fast-track provisions, which make it easier for Congress to disapprove acts in the civil area, in exchange for accepting the requirement of approval in the criminal area.

- ° The proposal to trigger the requirement of Congressional approval in the criminal area by Attorney General objection has been raised in meetings between Justice and the Mayor. The Mayor, who originally suggested this compromise, is now backing away from it and, according to Horowitz, will deny having proposed it.

Important Points to Make:

- Negotiations with District officials are being handled by the Justice Department, not the White House directly.
- The Administration position does not turn back the clock on Home Rule. Under the Administration's proposal, the District will have a freer hand than ever before. The narrow exception for criminal law matters is consistent with the distinction in the original Home Rule Act.
- No criminal convictions need be overturned because of the Administration's position.

Judge Orders U.S. Attorney To Explain Home-Rule Effect

By Ed Bruske

Washington Post Staff Writer

A D.C. Superior Court judge, in a highly unusual move, has ordered the U.S. Attorney's office to spell out how a U.S. Supreme Court ruling barring legislative vetoes may affect the District's home rule charter.

Judge Donald S. Smith has given prosecutors until March 5 to answer a series of questions central to claims that criminal convictions under the city's sexual assault statute should be overturned because of the ruling.

Until now, prosecutors have avoided addressing in court the issue of whether the Supreme Court decision applies to the District, apparently hoping Congress would resolve it.

The Supreme Court ruled last year that Congress cannot veto actions of the executive branch of government. The U.S. Justice Department has taken the position that the ruling applies to the District, where criminal laws passed by the city government are subject to veto by either house of Congress.

Smith's order was made in the case of Sylvester Cole, who was convicted of having sex with a minor. Cole's attorneys from the D.C. Public Defender Service argue that the criminal code

he was charged under is void because of the high court ruling.

Under the ruling, defense lawyers contend that the convictions of defendants such as Cole should be overturned because the House had no right to veto reform legislation the city passed in 1981 to replace the sexual assault statute under which Cole was charged. City attorneys argue the Supreme Court decision doesn't apply to the District.

Prosecutors have been placed in the position of, on the one hand, supporting the Justice view that the Supreme Court ruling applies to the District and, on the other, trying to uphold hundreds of criminal convictions.

They have told Smith in court briefs that the judge need not address the question of whether the ruling applies here because the Supreme Court previously has held that its decision should not be applied retroactively if doing so would upset the criminal justice system.

City officials have accused Justice of avoiding the issue as part of a broader scheme to increase federal controls over city lawmaking.

A source in the U.S. Attorney's office said yesterday that Justice officials would comply with Smith's order.

Home Rule Issue Puts Sex Assault Cases on Hold

By Ed Bruske

Washington Post Staff Writer

A D.C. Superior Court judge yesterday suspended all action on sexual assault cases in his court until the U.S. Attorney's office responds to challenges lodged against the District's home rule charter.

Judge Donald S. Smith said he will not hold any trials, accept any guilty pleas or hand out any sentences in cases involving the city's sexual assault codes until prosecutors respond to defense arguments that the criminal statutes are unconstitutional.

"If there's a substantial legal problem, we may have to dismiss all the indictments" in sexual assault cases, Smith said yesterday. "To keep trying them could prove to be a real problem. That's a waste of my time."

A Supreme Court ruling last year barring legislative vetoes—the mechanism by which Congress can overturn laws passed by the city—prompted defense attorneys to challenge both the District's home rule charter and the city's sexual assault laws.

The lawyers argue that under the Supreme Court ruling, the city's current sexual assault statutes are void because the House exercised its veto authority when it rescinded the city's 1981 Sexual Assault Reform Act.

The highly unusual action yesterday by Smith, one of three judges on the court who hear the most serious felony cases, came amid fears that thousands of criminal convictions could be overturned as a result of the high court ruling.

U.S. Attorney Joseph E. diGenova yesterday said he has met with Deputy Attorney General Edward C. Schmults and Solicitor General Rex E. Lee to formulate a response to the defense claims. It will be filed with the court in the next few days, he said.

"We understand the court's concerns and that's exactly why we've spent a little more time filing our ultimate position," diGenova said. "We're just trying to be professional."

DiGenova declined to state Justice's position on the matter, but he said his office would continue to indict and prosecute sexual assault cases despite Smith's ruling. "The law is on the books. It is to be enforced until it is struck down," he said.

The Justice Department has taken the position that the Supreme Court ruling applies to the D.C. home rule charter. That stance has put officials in the U.S. attorney's office in the awkward position of, on the one hand, contending that home rule is affected by the high court's decision, and, on the other, trying to protect thousands of local criminal convictions that could be jeopardized by the ruling.

Smith's action yesterday is not binding on any of the court's other judges and there was no indication that any other judges would take similar steps.

In two cases pending before Smith, the D.C. Public Defender Service has appealed the convictions of two men charged with sexual assault, arguing that the Supreme Court ruling voids the criminal statutes.

Attorneys for the city have filed a request to intervene in at least one case, arguing that the Supreme Court never intended for its decision to apply to District laws, and that the issue of legislative vetoes should be viewed separately. The Public Defender Service filed its appeal in one of the cases Dec. 19.

Smith yesterday postponed one trial after the defendant's lawyers said he would file a similar appeal by

the end of the week. Smith summoned Steven Gordon, chief of the felony division of the U.S. attorney's office, into court and explained his decision.

Smith said that in recent weeks he had repeatedly asked Gordon for a response, and until yesterday had held off acting because Gordon had assured him the defense arguments "were just fluff."

"I know it's a very important problem, but I'd like to get their [federal prosecutors'] answer," Smith said. "As soon as we get some idea of what the government's position is, it shouldn't be any problem. We can rule one way or the other."

One other appeal has been filed in Superior Court since the Supreme Court ruling. In that case, Judge Paul F. McArdle is considering a challenge to one of the city's theft statutes.

Larry P. Polansky, D.C. Court System executive officer, said Smith's action was not without precedent and that he knew of no action the court might take against Smith to force the judge to hear cases.

Following the Supreme Court decision last year, Justice told congressional leaders that all criminal laws passed by the city should be approved by both houses of Congress and sent to the president.

City officials maintain this would be a step backward from home rule and have been pressing Congress to pass legislation clarifying the city's lawmaking authority.

D.C.
Cholha

10

So Much for Democracy in D.C.

GIVE THE White House and Congress "credit" for underscoring two unpleasant facts of life in the District of Columbia. 1) Local democracy—self-government like that enjoyed in every other American city—is fragile enough to be undermined by colonial thinking in the Reagan administration. 2) The functioning of an elected city government is easily obstructed by negligence on Capitol Hill. So it is that the standing and authority of its elected local government are in legal jeopardy in the District today.

First the Reagan administration launched a surprise attack on local self-determination, proposing that Congress reclaim tight control over all criminal laws in the District. To make matters worse, the administration went to work on certain senators to hold out for this regressive move. The result was Senate opposition to a bill that would clarify the District's home rule authority in the wake of a Supreme Court ruling on legislative vetoes.

Right there, sad to report, is just where Congress left everything as it bolted, not to return until Jan. 23. From now until some indefinite moment of resolution—either in Congress or the courts—the very

existence of this D.C. government is in question.

Previous Republican administrations had a fine record in helping to bring local democracy to the capital city—the D.C. home rule bill was enacted during the Nixon administration. So you might think the Reagan White House would care just a bit about pulling the rug out from under self-government. Far from it: "We are taking the position that the present [home rule] law is unconstitutional," says an administration official who asked not to be named.

No matter—the federal fathers will take care of the District. Just look at how well Congress took care of things already:

- It failed to pass legislation adding seven desperately needed judgeships to the D.C. Superior Court. Talk about criminal laws—what about justice? The backlog of cases is huge and growing.

- It failed to pass legislation to permit a more efficient, local ownership of the Robert F. Kennedy Stadium.

- It failed even to enact a proposal for establishing a formula for the annual federal payment to the District.

What a grand example for the free world.

Justice Letter Slaps D.C. Laws as Safety Threat

By Ed Bruske

Washington Post Staff Writer

The U.S. Justice Department, in an attempt to get support for its proposal for tighter congressional control of the District's criminal code, is suggesting that actions taken by city officials threaten public safety here.

In a draft letter obtained by The Washington Post, Robert A. McConnell, assistant attorney general for legislative affairs, cited several pieces of city legislation as examples that raised "substantial concern" for the safety of congressmen, government executives, foreign officials, visiting tourists, government property and the general public in Washington.

A top White House official said the letter is expected to be approved by the federal Office of Management and Budget today and will become a part of the Reagan administration's official policy on the matter. The letter is intended for a Senate subcommittee on Governmental Affairs.

Specifically, McConnell named three bills pending before the City Council's judiciary committee that concern Justice officials. One bill would reduce minimum prison sentences for some offenders convicted

See CODE, A4, Col. 1

Justice Letter Is Called Slap at D.C. Home Rule

CODE, From A1

of rape, murder and armed offenses. Another would give the mayor emergency powers to release some prisoners when prisons become overcrowded, and a third would give judges more time to reconsider sentences they have meted out.

McConnell also cited a 1981 city measure to reform sexual assault laws in the city, the only criminal legislation, city officials said, ever vetoed by Congress.

"We believe that Congress, through the legislative process, should retain the opportunity to review the wisdom of such proposals," McConnell wrote. "We believe that the primary responsibility of the Congress and the President should be maintained in this area."

The letter immediately caused concern among home rule proponents in Congress and ignited tempers in the District Building. One District official called it "a slap in the face at home rule government" and "a mark of distrust."

"It destroys home rule," said an aide to Sen.

Charles Mathias (R-Md.), a key member of the Senate's Committee on Governmental Affairs, which will consider the proposal. "We don't want that provision in there. We are totally opposed."

"It's so anti-home rule," said Pauline Schneider, D.C. director of intergovernmental relations. "They don't think the District of Columbia can manage in terms of criminal affairs."

City Council Chairman David Clarke, while declining to comment on the letter directly, said Justice's position ignores years of cooperation between the city and federal officials.

A high-ranking official with the U.S. Attorney's office downplayed the letter and its examples, saying it only reflects normal procedure for lobbying the Hill and that the office continues to have a "good relationship" with the city.

"I think they're doing what anybody would do when they go before the legislative body. They want to pick examples to support their position," said the official in the U.S. Attorney's office. "Using examples is a normal way of going about advising the committees."

"I don't think there's any bad faith here or a desire to go back on home rule," the official said. "There have been some strong differences of opinion [between the U.S. Attorney's office and the city] but nothing widespread. The office's attitude what I think fundamentally is a good relationship with everybody."

In the draft, McConnell wrote that "the size of the diplomatic community underscores the federal interest in the enactment, enforcement and interpretation of the criminal laws governing the District."

The recommendations were made by the Justice Department as part of discussions over a bill already passed by the House and pending in the Senate, to change the way Congress can veto approved legislation.

Justice has proposed that any changes in the city's criminal code must be approved by both houses of Congress and then sent to the president instead of the present procedure in which they become law automatically unless vetoed by the House or Senate.

THE WHITE HOUSE

WASHINGTON

April 19, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS 

SUBJECT: D.C. Chadha Testimony

OMB has asked for our views by close of business Friday, April 20, on testimony U.S. Attorney Joseph DiGenova proposes to deliver on April 25 before the Subcommittee on Government Efficiency and the District of Columbia of the Senate Governmental Affairs Committee. DiGenova's brief testimony simply reiterates the Department's position on the D.C. Chadha bill. DiGenova notes that the Home Rule Act must be changed because it contains legislative vetoes that are unconstitutional in light of INS v. Chadha. He generally supports the approach of S. 1858 and H.R. 3932, requiring Congress to pass a joint resolution of disapproval to block D.C. Council acts, but notes that a joint resolution of approval should be required in the criminal area. The testimony stresses that such a distinction in the treatment of the criminal area was present in the original Home Rule Act, and is appropriate in light of the pervasive Federal role in the District criminal justice system. DiGenova points out that even under the Administration proposal the District will have significantly more Home Rule power than it has ever had before. He also notes that Administration officials have been working with District representatives in an attempt to resolve the impasse that has developed.

I have reviewed the testimony, and have no objections.

Attachment

cc: Richard A. Hauser

THE WHITE HOUSE

WASHINGTON

April 19, 1984

MEMORANDUM FOR JANET M. FOX
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: D.C. Chadha Testimony

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

FFF:JGR:aea 4/19/84

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

April 19, 1984

MEMORANDUM FOR JANET M. FOX
LEGISLATIVE ANALYST
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FROM: FRED F. FIELDING
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cc: FFFielding/JGRoberts/Subj/Chron

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Anna Dixon	Take necessary action	<input type="checkbox"/>
John Cooney	Approval or signature	<input type="checkbox"/>
John Roberts ✓	Comment	<input type="checkbox"/>
Connie Horner	Prepare reply	<input type="checkbox"/>
Mike Horowitz	Discuss with me	<input type="checkbox"/>
	For your information	<input type="checkbox"/>
	See remarks below	<input type="checkbox"/>
FROM Jan Fox <i>Jan Fox</i>	DATE 4/18/84	

REMARKS

Attached for clearance is draft Justice Department testimony for next Wednesday on S. 1858/H.R. 3932, re D.C. Chadha issues.

Please get me your comments on this by COB Friday, April 20. If I don't hear from you by then, I will assume you have no objections to it.

Attachment

APR 18 1984

4:30

DRAFT

STATEMENT

OF

JOSEPH DIGENOVA
UNITED STATES ATTORNEY
DISTRICT OF COLUMBIA

BEFORE

THE

SUBCOMMITTEE ON GOVERNMENT EFFICIENCY
AND THE DISTRICT OF COLUMBIA
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ON

APRIL 25, 1984

DRAFT

Mr. Chairman, I am honored to appear before your subcommittee in response to your invitation for the views of the Department of Justice on S. 1858, a bill to amend the District of Columbia Self-Government and Governmental Reorganization Act, Pub.L. 93-198, 87 Stat. 774 (1973), as amended, popularly known as the "Home Rule Act."

S. 1858 is a thoughtful attempt to correct a constitutional problem in the Home Rule Act -- a problem that became even more apparent with the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, No. 80-1832 (June 23, 1983).

As you know, Chadha, a case involving the Immigration and Nationality Act, struck down the so-called legislative veto device as violative of the Presentment Clause of Article I, section 7, of the Constitution and the principle of separation of powers. We have identified at least 126 separate statutes and 207 individual sections that contain unconstitutional legislative veto mechanisms. The Home Rule Act contains four such provisions:

(1) section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment";

(2) section 602(c)(1) provides that with respect to acts of the District of Columbia Council effective immediately due to emergency circumstances and acts proposing amendments to Title IV of the Home Rule Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act";

(3) section 602(c)(2) provides that any act of the D.C. Council affecting Title 22,

23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act"; and

(4) section 740(a) provides that either house may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

S. 1858 apparently agrees with our judgment that these provisions are constitutionally invalid, for it would amend the Act to require Congressional action disapproving D.C. Council enactments to take the form of legislation, passed by both houses and presented to the President for approval or disapproval.

S. 1858, and its counterpart, H.R. 3932, which passed the House on October 6 of last year, represent one of the first attempts by Congress to address by legislation Chadha's holding. Because the legislative veto mechanism is employed to balance conflicting Legislative and Executive Branch interests, there is no ready replacement. Rather, Congress and the Executive must examine each individual statute to determine how best to reallocate the varying interests that the individual legislative veto device in question sought to accommodate, consistent with Chadha's holding that legislation must be presented to the President for his signature. This is what must be done with the Home Rule Act.

Generally, we agree with the approach taken by S. 1858: by converting the legislative veto to, in effect, a joint resolution of disapproval, the Home Rule statute will be brought into compliance with the Constitution as required by Chadha.

It should be noted, however, that in the Home Rule Act, Congress did not permit the D.C. Council to amend title 11 of the D.C. Code, the court structure title, and gave special treatment to D.C. Council amendments to three titles of the D.C. Code. Amendments to these titles, titles 22, 23, and 24, were subject to a one house veto, as opposed to the two house, or concurrent resolution veto, that applied to the other parts of the D.C. Code. These three titles, the criminal justice titles of the D.C. Code, were treated differently in 1973, and should be treated differently today, because of the special federal interest in the criminal justice system of our nation's capital. While we heartily endorse the use of a joint resolution of disapproval mechanism for the bulk of the amendments to the D.C. Code, we believe, for the following reasons, that amendments to titles 22, 23, and 24 should continue to receive separate treatment.

In the District of Columbia, prosecutions are brought in the name of the United States of America. The Department of Justice, through the United States Attorney for the District of Columbia, is the District's chief prosecutor. Similarly, the Department of Justice through the United States Marshal for the District of Columbia is responsible for the service of process, courtroom security, the transportation of prisoners, and the return to the District of Columbia of defendants arrested in other jurisdictions and wanted for prosecution in the District. All persons convicted in the District of Columbia are committed to the custody of the Attorney General, who, through the Department's Bureau of Prisons, designates the place of confinement. A longstanding agreement

with the District of Columbia Department of Corrections places most male prisoners in the Lorton facility.

The court of general jurisdiction in the District of Columbia, the Superior Court of the District of Columbia, is a federal court, and the judges of the Superior Court and the District of Columbia Court of Appeals are appointed by the President with the advice and consent of the Senate. A single jury system for grand and petit juries serves both the Superior Court and the United States District Court for the District of Columbia, and a grand jury of one court may return indictments to the other.

That Congress has determined that District of Columbia criminal justice system should be controlled by the federal government is not surprising when one considers the extent of the federal interest in the District. Approximately 41% of all land in the District is owned by the federal government. More than 200 buildings are owned or leased by the federal government. Over 445,000 federal employees work in the Washington Metropolitan area. Countless Americans visit their capital city each year for purposes ranging from conducting business with the federal government to touring the capital. The presence of a substantial permanent diplomatic community and innumerable foreign visitors underscore the federal interest in the enactment, enforcement and interpretation of the criminal laws governing the District of Columbia.

We believe that D.C. Council amendments to the criminal justice titles of the D.C. Code should continue to receive the special scrutiny that their importance to the federal government requires. Last fall the Department suggested that the primary authority of

the Congress and the President in District of Columbia criminal justice matters could best be preserved by subjecting D.C. Council amendments to the criminal justice titles to a joint resolution of approval, and this continues to be our position. In informal discussions with representatives of the District Government we have explored other alternatives.

I should emphasize, however, that even under our resolution of approval proposal, the District Council would have far more independence from the Congress and the President than it has under current law. Thus, D.C. Council enactments to those provisions of the D.C. Code other than the criminal justice provisions, the bulk of the D.C. Code, that before Chadha would be subject to a concurrent resolution veto, would now be subject only to a joint resolution veto, which requires the approval of the President. It would, in other words, take a statute to overturn a Council amendment to the non-criminal justice provisions -- a Congressional authority that even the Council would not quarrel with and a substantial diminution of federal authority over the greatest part of the D.C. Code.

While we oppose the enactment of S. 1858, unless amended as suggested above, we will continue to work with representatives of the District of Columbia government to propose to Congress an amendment to the Home Rule Act that will satisfy all of our concerns.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Don Cluff <i>DC</i>	Take necessary action <input type="checkbox"/>
Don Crabill	Approval or signature <input type="checkbox"/>
Randy Davis	Comment <input type="checkbox"/>
	Prepare reply <input type="checkbox"/>
	Discuss with me <input type="checkbox"/>
	For your information <input type="checkbox"/>
	See remarks below <input type="checkbox"/>
FROM <i>E. Carlson</i> Ernie Carlson - NRD	DATE 6/14/85

REMARKS

Carlson file

MEMORANDUM TO: Randy Davis
FROM: Ernie Carlson *ECarlson*
SUBJECT: Mechanics of P.L. 566

Enclosed is a copy of the SCS public law and several documents indicating recent Administration actions which might influence the findings regarding the applicability of the Chaddha decision to P.L. 566.

P. L. 566 - Operative Language

Sec. 3 ... the Secretary is authorized ... (4) to cooperate and enter into agreements with and to furnish financial and other assistance.

Sec. 5 (3) whenever the estimated Federal financial contribution ... exceed(s) \$5,000,000 ... the Secretary shall transmit a copy of the plan and the justification therefore to the Congress [Note: not committees] through the President.

Sec. 2 (3) ... No appropriation shall be made for any plan involving an estimated Federal contribution of \$5,000,000 ... unless such plan has been approved [Note: not authorized] by resolutions adopted by the appropriate committees of the Senate and House of Representatives.

The Secretary is authorized, once a lot ^{of} hoops have been jumped, to furnish financial assistance to local interests for the construction of small watershed projects. The requirement that projects be sent to the Congress only applies to projects with an estimated cost in excess of \$5 M. There has been a long-standing controversy as to whether the President has some control over what is to be sent to the Congress or is to act as a post-office.

Pre Chaddha OMB General Counsel took ^{the} ~~that~~ position the language like that of Sec. 2 (3) involving approval of projects for appropriations by the substantive committees is a private deal on the Hill. The Secretary can ignore it if he wishes. Needless to say it is unlikely that the Secretary would provide financial assistance for a project that has not been approved by the committees but nevertheless he does have authority if he chooses to exercise it.

The resolutions adopted by the substantive committees contain an expenditure ceiling along with other restrictions. To be enforced the appropriations committees would have to write them into the SCS appropriations language.

By way of example the substantive committees have appropriations ceilings in the law [not committee resolutions] for various Corps

projects. The appropriations committees did enforce these ceilings for many years but in 1979 removed the enforcement language. Since that time the Corps has ignored these ceilings. It is unlikely that the SCS ceilings -- being only committee resolutions -- would be more enforceable than the Corps ceilings without specific appropriation language.

As we see it, the question needing resolution is "Given that the Secretary has authority to expend money on the projects without regard to the cost ceiling, does an Administration request to raise the cost ceiling establish an Administrative record that is contrary to the Chaddha decision." By extension, we can also ask whether "waiting for committee resolutions approving appropriations" might not also create the same problem.

Attachment

P.L. 566

§500.70 Watershed Protection and Flood Prevention Act, as amended*

To authorize the Secretary of Agriculture to cooperate with States and local agencies in the planning and carrying out of works of improvement for soil conservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the United States, causing loss of life and damage to property, constitute a menace to the national welfare; and that it is the sense of Congress that the Federal Government should cooperate with States and their political subdivisions, soil or water conservation districts, flood prevention or control districts, and other local public agencies for the purpose of preventing such damages, of furthering the conservation, development, utilization, and disposal of water, and the conservation and utilization of land and thereby of preserving, protecting, and improving the Nation's land and water resources and the quality of the environment.

SEC. 2. For the purposes of this Act, the following terms shall mean:

The "Secretary" --the Secretary of Agriculture of the United States.

"Works of improvement" --any undertaking for--

- (1) flood prevention (including structural and land-treatment measures),
- (2) the conservation, development, utilization, and disposal of water, or

(3) the conservation and proper utilization of land in watershed or subwatershed areas not exceeding two hundred and fifty thousand acres and not including any single structure which provides more than twelve thousand five hundred acre-feet of floodwater detention capacity, and more than twenty-five thousand acre-feet of total capacity. No appropriation shall be made for any plan involving an estimated Federal contribution to construction costs in excess of \$5,000,000 or which includes any structure which provides more than twenty-five hundred acre-feet of total capacity unless such plan has been approved by resolutions adopted by the appropriate committees of the Senate and House of Representatives: Provided, That in the case of any plan involving no single structure providing more than 4,000 acre-feet of total capacity the appropriate committees shall be the Committee on Agriculture and Forestry of the Senate and the Committee on Agriculture of the House of Representatives and in the case of any plan involving any single structure of more than 4,000 acre-feet of total capacity the appropriate committees shall be the Committee on Public Works of the Senate and the Committee on Public Works of the House of Representatives, respectively. A number of such subwatersheds when they are component parts of a larger watershed may be planned together when the local sponsoring organizations so desire.

"Local organization" --any State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement; or any irrigation or reservoir company, water users' association, or similar organization having such authority and not being operated for profit that may be approved by the Secretary.

SEC. 3. In order to assist local organizations in preparing and carrying out plans for works of improvement, the Secretary is authorized, upon application of local organizations if such application has been submitted to, and not disapproved within 45 days by, the State agency having supervisory responsibility over programs provided for in this Act, or by the Governor if there is no State agency having such responsibility--

- (1) to conduct such investigations and surveys as may be necessary to prepare plans for works of improvement;
- (2) to prepare plans and estimates required for adequate engineering evaluation;
- (3) to make allocations of costs to the various purposes to show the basis of such allocations and to determine whether benefits exceed costs;
- (4) to cooperate and enter into agreements with and to furnish financial and other assistance to local organizations: Provided, That, for the land-treatment measures, the Federal assistance shall not exceed the rate of assistance for similar practices under existing national programs;
- (5) to obtain the cooperation and assistance of other Federal agencies in carrying out the purposes of this section;
- (6) to enter into agreements with landowners, operators, and occupiers, individually or collectively, based on conservation plans of such landowners, operators, and occupiers which are developed in cooperation with and approved by the soil and water conservation district in which the land described in the agreement is situated, to be carried out on such land during a period of not to exceed ten years, providing for changes in cropping systems and land uses and for the installation of soil and water conservation practices and measures needed to conserve and develop the soil, water, woodland, wildlife, and recreation resources of lands within the area included in plans for works of improvement, as provided for in such plans, including watershed or subwatershed work plans in connection with the eleven watershed improvement programs authorized by section 13 of the Act of December 22, 1944 (58 Stat. 887), as amended and supplemented. Applications for assistance in developing such conservation plans shall be made in writing to the soil and

* (P.L. 566, 83d Cong., 68 Stat. 666; P.L. 1018, 84th Cong., 70 Stat. 1088; P.L. 85-624, 85th Cong., 72 Stat. 563; P.L. 85-865, 85th Cong., 72 Stat. 1605; P.L. 86-468, 86th Cong., 74 Stat. 131, 132; P.L. 86-545, 86th Cong., 74 Stat. 254; P.L. 87-170, 87th Cong., 75 Stat. 408; P.L. 87-703, 87th Cong., 76 Stat. 608; P.L. 89-337, 89th Cong., 79 Stat. 1300; P.L. 90-361, 90th Cong., 82 Stat. 250; P.L. 92-419, 92d Cong., 86 Stat. 667; P.L. 95-113, 95th Cong., 91 Stat. 913.)

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water conservation district involved, and the proposed agreement shall be reviewed by such district. In return for such agreements by landowners, operators, and occupiers the Secretary shall agree to share the costs of carrying out those practices and measures set forth in the agreement for which he determines that cost sharing is appropriate and in the public interest. The portion of such costs, including labor, to be shared shall be that part which the Secretary determines is appropriate and in the public interest for the carrying out of the practices and measures set forth in the agreement, except that the Federal assistance shall not exceed the rate of assistance for similar practices and measures under existing national programs. The Secretary may terminate any agreement with a landowner, operator, or occupier by mutual agreement if the Secretary determines that such termination would be in the public interest, and may agree to such modifications of agreements, previously entered into hereunder, as he deems desirable to carry out the purposes of this paragraph or to facilitate the practical administration of the agreements provided for herein. Notwithstanding any other provision of law, the Secretary, to the extent he deems it desirable to carry out the purposes of this paragraph, may provide in any agreement hereunder for (1) preservation for a period not to exceed the period covered by the agreement and an equal period thereafter of the cropland, crop acreage, and allotment history applicable to land covered by the agreement for the purpose of any Federal program under which such history is used as a basis for an allotment or other limitation on the production of any crop; or (2) surrender of any such history and allotments.

SEC. 4. The Secretary shall require as a condition to providing Federal assistance for the installation of works of improvement that local organizations shall--

(1) acquire, or with respect to interests in land to be acquired by condemnation provide assurances satisfactory to the Secretary that they will acquire, without cost to the Federal Government from funds appropriated for the purposes of this act, such land, easements, or rights-of-way as will be needed in connection with works of improvement installed with Federal assistance: Provided, That when a local organization agrees to operate and maintain any reservoir or other area included in a plan for public fish and wildlife or recreational development, the Secretary shall be authorized to bear not to exceed one-half of the costs of (a) the land, easements, or rights-of-way acquired or to be acquired by the local organization for such reservoir or other area, and (b) minimum basic facilities needed for public health and safety, access to, and use of such reservoir or other area for such purposes: Provided further, That the Secretary shall be authorized to participate in recreational development in any watershed project only to the extent that the need therefor is demonstrated in accordance with standards established by him, taking into account the anticipated man-days of use of the projected recreational development and giving consideration to the availability within the region of existing water-based outdoor recreational developments: Provided further, That the Secretary shall be authorized to participate in not more than one recreational development in a watershed project containing less than seventy-five thousand acres, or two such developments in a project containing between seventy-five thousand and one hundred and fifty thousand acres, or three such developments in projects exceeding one hundred and fifty thousand acres: Provided further, That when the Secretary and a local organization have agreed that the immediate acquisition by the local organization of land, easements, or rights-of-way is advisable for the preservation of sites for works of improvement included in a plan from encroachment by residential, commercial, industrial, or other development, the Secretary shall be authorized to advance to the local organization from funds appropriated for construction of works of improvement the amounts required for the acquisition of such land, easements or rights-of-way; and, except where such costs are to be borne by the Secretary, such advance shall be repaid by the local organization, with interest, prior to construction of the works of improvement, for credit to such construction funds.

(2) assume (A) such proportionate share, as is determined by the Secretary to be equitable in consideration of national needs and assistance authorized for similar purposes under other Federal programs, of the costs of installing any works of improvement, involving Federal assistance (excluding engineering costs), which is applicable to the agricultural phases of the conservation, development, utilization, and disposal of water or for fish and wildlife development, recreational development, ground water recharge, water quality management, or the conservation and proper utilization of land: Provided, That works of improvement for water quality management shall consist primarily of water storage capacity in reservoirs for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source, and shall be consistent with standards and regulations adopted by the Water Resources Council on Federal cost sharing for water quality management, and (B) all of the cost of installing any portion of such works applicable to other purposes except that any part of the construction cost (including engineering costs) applicable to flood prevention and features relating thereto shall be borne by the Federal Government and paid for by the Secretary out of funds appropriated for the purposes of this Act: Provided, That, in addition to and without limitation on the authority of the Secretary to make loans or advancements under section 8, the Secretary may pay for any storage of water for present or anticipated future demands or needs for municipal or industrial water included in any reservoir structure constructed or modified under the provisions of this Act as hereinafter provided: Provided further, That the cost of water storage to meet future demands may not exceed 30 per centum of the total estimated cost of such reservoir structure and the local organization shall give reasonable assurances, and there is evidence, that such demands for the use of such storage will be made within a period of time which will permit repayment within the life of the reservoir structure of the cost of such storage: Provided further, That the Secretary shall determine prior to initiation of construction or modification of any reservoir structure including such water supply storage that there are adequate assurances by the local organization or by an agency of the State having authority to give such assurances, that the Secretary will be reimbursed the cost of water supply storage for anticipated future demands, and that the local organization will pay not less than 50 per centum of the cost of storage for present water supply demands: And provided further, That the cost to be borne by the local

organization for anticipated future demands may be repaid within the life of the reservoir structure but in no event to exceed fifty years after the reservoir structure is first used for the storage of water for anticipated future water supply demands, except that (1) no reimbursement of the cost of such water supply storage for anticipated future demands need be made until such supply is first used, and (2) no interest shall be charged on the cost of such water supply storage for anticipated future demands until such supply is first used, but in no case shall the interest-free period exceed ten years. The interest rate used for purposes of computing the interest on the unpaid balance shall be determined in accordance with the provisions of section 8.

(3) make arrangements satisfactory to the Secretary for defraying costs of operating and maintaining such works of improvement, in accordance with regulations presented by the Secretary of Agriculture.

(4) acquire, or provide assurance that landowners or water users have acquired, such water rights, pursuant to State law, as may be needed in the installation and operation of the work of improvement.

(5) obtain agreements to carry out recommended soil conservation measures and proper farm plans from owners of not less than 50 per centum of the lands situated in the drainage area above each retention reservoir to be installed with Federal assistance; and

(6) submit a plan of repayment satisfactory to the Secretary for any loan or advancement made under the provisions of section 8.

SEC. 5. (1) At such time as the Secretary and the interested local organization have agreed on a plan for works of improvement, and the Secretary has determined that the benefits exceed the costs, and the local organization has met the requirements for participation in carrying out the works of improvement as set forth in section 4, the local organization may secure engineering and other services, including the design, preparation of contracts and specifications, awarding of contracts, and supervision of construction, in connection with such works of improvement, by retaining or employing a professional engineer or engineers satisfactory to the Secretary or may request the Secretary to provide such services: Provided, That if the local organization elects to employ a professional engineer or engineers, the Secretary shall reimburse the local organization for the costs of such engineering and other services secured by the local organization as are properly chargeable to such works of improvement in an amount not to exceed the amount agreed upon in the plan for works of improvement or any modification thereof: Provided further, That the Secretary may advance such amounts as may be necessary to pay for such services, but such advances with respect to any works of improvement shall not exceed 5 per centum of the estimated installation cost of such works.

(2) Except as to the installation of works of improvement on Federal lands, the Secretary shall not construct or enter into any contract for the construction of any structure: Provided, That if requested to do so by the local organization, the Secretary may enter into contracts for the construction of structures.

(3) Whenever the estimated Federal contribution to the construction cost of works of improvement in the plan for any watershed or subwatershed area shall exceed \$1,000,000 or the works of improvement include any structure having a total capacity in excess of twenty-five hundred acre-feet, the Secretary shall transmit a copy of the plan and the justification therefor to the Congress through the President.

(4) Any plan for works of improvement involving an estimated Federal contribution to construction costs in excess of \$1,000,000 or including any structure having a total capacity in excess of twenty-five hundred acre-feet (a) which includes works of improvement for reclamation or irrigation, or which affects public or other lands or wildlife under the jurisdiction of the Secretary of the Interior, (b) which includes Federal assistance for floodwater detention structures, (c) which includes features which may affect the public health, or (d) which includes measures for control or abatement of water pollution, shall be submitted to the Secretary of the Interior, the Secretary of the Army, the Secretary of Health, Education, and Welfare, or the Administrator of the Environmental Protection Agency, respectively, for his views and recommendations at least thirty days prior to transmission of the plan to the Congress through the President. The views and recommendations of the Secretary of the Interior, the Secretary of the Army, the Secretary of Health, Education, and Welfare, and the Administrator of the Environmental Protection Agency, if received by the Secretary prior to the expiration of the above thirty-day period, shall accompany the plan transmitted by the Secretary to the Congress through the President.

(5) Prior to any Federal participation in the works of improvement under this Act, the President shall issue such rules and regulations as he deems necessary or desirable to carry out the purposes of this Act, and to assure the coordination of the work authorized under this Act and related work of other agencies, including the Department of the Interior and the Department of the Army.

SEC. 6. The Secretary is authorized in cooperation with other Federal and with States and local agencies to make investigations and surveys of the watersheds of rivers and other waterways as a basis for the development of coordinated programs. In areas where the programs of the Secretary of Agriculture may affect public or other lands under the jurisdiction of the Secretary of the Interior, the Secretary of the Interior is authorized to cooperate with the Secretary of Agriculture in the planning and development of works or programs for such lands.

SEC. 7. The provisions of the Act of June 22, 1936 (49 Stat. 1570), as amended and supplemented, conferring authority upon the Department of Agriculture under the direction of the Secretary of Agriculture to make preliminary examinations and surveys and to prosecute works of improvement for runoff and waterflow retardation and soil erosion prevention on the watersheds of rivers and other waterways are hereby repealed: Provided, That (a) the authority of that Department of Agriculture, under the direction of the Secretary, to prosecute the works of improvement for runoff and waterflow retardation and soil erosion prevention authorized to be carried out by the Department by the Act of December 22, 1944 (58 Stat. 887), as amended, and (b) the authority of the Secretary of Agriculture to undertake emergency measures for runoff retardation and soil erosion prevention authorized to be carried out by section 7 of the Act of June 28, 1938 (52 Stat. 1215), as amended by section 216 of the Act of May 17, 1950 (64 Stat. 163), shall not be

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affected by the provisions of this section: Provided further, That in connection with the eleven watershed improvement programs authorized by section 13 of the Act of December 22, 1944 (58 Stat. 887), as amended and supplemented, the Secretary of Agriculture is authorized to prosecute additional works of improvement for the conservation, development, utilization, and disposal of water in accordance with the provisions of section 4 of this Act or any amendments hereafter made thereto.

SEC. 8. The Secretary is authorized to make loans or advancements (a) to local organizations to finance the local share of costs of carrying out works of improvement provided for in this Act, and (b) to State and local agencies to finance the local share of costs of carrying out works of improvement (as defined in section 2 of this Act) in connection with the eleven watershed improvement programs authorized by section 13 of the Act of December 22, 1944 (58 Stat. 887), as amended and supplemented: Provided, That the works of improvement in connection with said eleven watershed improvement programs shall be integral parts of watershed or subwatershed work plans agreed upon by the Secretary of Agriculture and the concerned State and local agencies. Such loans or advancements shall be made under contracts or agreements which will provide, under such terms and conditions as the Secretary deems appropriate, for the repayment thereof in not more than fifty years from the date when the principal benefits of the works of improvement first become available, with interest at the average rate, as determined by the Secretary of the Treasury, payable by the Treasury upon its marketable public obligations outstanding at the beginning of the fiscal year in which the loan or advancement is made, which are neither due nor callable for redemption for fifteen years from date of issue. With respect to any single plan for works of improvement, the amount of any such loan or advancement shall not exceed \$10,000,000.

SEC. 9. The provisions of this Act shall be applicable to Hawaii, Alaska, Puerto Rico, and the Virgin Islands.

SEC. 10. There are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act, such sums to remain available until expended. No appropriation hereafter available for assisting local organizations in preparing and carrying out plans for works of improvement under the provisions of section 3 or clause (a) of section 8 of this Act shall be available for any works of improvement pursuant to this Act or otherwise in connection with the eleven watershed improvement programs authorized by section 13 of the Act of December 22, 1944 (58 Stat. 887), as amended and supplemented, or for making loans or advancements to State and local agencies as authorized by clause (b) of section 8.

SEC. 11. This Act may be cited as the "Watershed Protection and Flood Prevention Act".

SEC. 12. When the Secretary approves the furnishing of assistance to a local organization in preparing a plan for works of improvement as provided for in section 3:

(1) The Secretary shall so notify the Secretary of the Interior in order that the latter, as he desires, may make surveys and investigations and prepare a report with recommendations concerning the conservation and development of wildlife resources and participate, under arrangements satisfactory to the Secretary of Agriculture, in the preparation of a plan for works of improvement that is acceptable to the local organization and the Secretary of Agriculture.

(2) Full consideration shall be given to the recommendations contained in any such report of the Secretary of the Interior as he may submit to the Secretary of Agriculture prior to the time the local organization and the Secretary of Agriculture have agreed on a plan for works of improvement. The plan shall include such of the technically and economically feasible works of improvement for wildlife purposes recommended in the report by the Secretary of the Interior as are acceptable to, and agreed to by, the local organization and the Secretary of Agriculture, and such report of the Secretary of the Interior shall, if requested by the Secretary of the Interior, accompany the plan for works of improvement when it is submitted to the Secretary of Agriculture for approval or transmitted to the Congress through the President.

(3) The cost of making surveys and investigations and of preparing reports concerning the conservation and development of wildlife resources shall be borne by the Secretary of the Interior out of funds appropriated to his Department.

As amended October 1, 1977.

Scientists and engineers to improve their knowledge of new developments in their fields. Coastal engineering field data are collected to evaluate alternative solutions to coastal problems to develop coastal project designs, and for general planning applications. Transportation systems studies will permit keeping the inland navigation system and analysis program current and will permit analysis of navigation systems operation and the impact of alternative operational assumptions on other transportation modes.

3. *Research and development.*—These investigations are conducted to improve the Corps capability to execute the civil works program with maximum effectiveness, economy, and safety, and with due regard for protecting and enhancing environmental values. The current program comprises investigations in the areas of: Design, materials, and construction management, primarily soils, rock, concrete, structural engineering, and electrical and mechanical engineering; coastal engineering; flood control and navigation, including waterways, locks and dams, improvement of operation and maintenance techniques, hydrology of flood regions, and ice engineering; environmental quality, including environmental impact and wastewater management; water resources planning studies, including planning methodologies, analytical techniques for water resources management, and recreation; and testing and evaluation of earth resources satellite applications to civil works activities.

Object Classification (in thousands of dollars)

Classification code 96-3121-0-1-301	1976 act.	TQ act.	1977 est.	1978 est.
CORPS OF ENGINEERS—CIVIL				
Direct obligations:				
Personnel compensation:				
Permanent positions.....	30,085	7,767	33,879	34,066
Positions other than permanent.....	2,379	359	2,980	3,537
Other personnel compensation.....	1,162	217	1,307	1,446
Pay to commissioned officers.....	412	150	635	669
Total personnel compensation.....	34,038	8,493	38,801	39,718
Personnel benefits:				
Civilian.....	3,156	805	3,672	3,747
Military.....	82	29	115	120
Benefits for former personnel.....	1	-----	7	-----
Travel and transportation of persons.....	1,040	238	1,350	1,400
Transportation of things.....	17	5	35	30
Rent, communications, and utilities:				
Standard level user charges.....	1,345	357	1,492	1,524
Other rent, communications, and utilities.....	72	93	41	76
Printing and reproduction.....	533	122	600	600
Other services.....	21,373	5,281	24,332	34,172
Supplies and materials.....	598	203	525	800
Equipment.....	106	38	250	350
Lands and structures.....	1,462	-----	35	1,600
Total direct obligations.....	63,823	15,664	71,255	84,137

Program and Financing (in thousands of dollars)

Classification code 96-3122-0-1-301	Total estimate	Obligations				1978 estimate	Appropriation required 1978	Balance to complete
		To June 30, 1975	1976 actual	TQ actual	1977 estimate			
Program by activities:								
Direct program:								
1. Advance engineering and design.....	-----	-----	24,168	4,601	27,489	25,366	23,366	-----
2. Navigation projects:								
(a) Channels and harbors:								
(1) Projects specifically authorized by Congress:								
(1) Mobile Harbor (Theodore Ship channel), Ala.....	42,800	301	228	35	86	4,000	4,000	38,150
(2) Humbolt Harbor and Bay, Calif.....	5,970	113	180	120	502	3,500	3,500	1,755
(3) Port San Luis, San Luis Obispo Harbor, Calif.....	6,040	418	191	19	1,500	2,600	2,600	1,422
(4) San Diego River and Mission Bay, Calif.....	14,900	10,593	-----	-----	90	100	100	4,117
(5) San Francisco Bay to Stockton (John F. Baldwin and Stockton ship channels), Calif.....	108,000	4,531	727	118	1,193	2,100	2,100	99,331
(6) Santa Cruz Harbor, Calif.....	2,562	1,852	-----	-----	110	110	110	600
(7) Tampa Harbor (main channel), Fla.....	127,000	1,316	3,426	400	11,591	15,000	15,000	95,267
(8) Waianae Small Boat Harbor, Hawaii.....	3,440	179	167	15	1,002	2,187	2,187	-----
(9) Kaskaskia River, Ill.....	127,100	90,648	5,093	216	5,543	5,300	5,300	20,300
(10) Mississippi River between Ohio and Missouri Rivers (regulating works), Illinois and Missouri.....	151,000	73,855	3,456	1,086	3,639	3,000	3,000	65,964
(11) Missouri River, Sioux City to mouth, Iowa, Kansas, Missouri, and Nebraska.....	450,000	403,673	2,784	1,026	1,876	4,300	4,300	36,341
(12) Atchafalaya River, Bayou Chene, Boeuf and Black, La.....	20,300	5,581	102	43	4,522	5,100	5,100	4,952

1. Advance engineering and design.

ALLOCATION TO U.S. FISH AND WILDLIFE SERVICE—DEPARTMENT OF THE INTERIOR

Personnel compensation:			
11.1 Permanent positions.....	851	220	1,187
11.3 Positions other than permanent.....	119	31	166
11.5 Other personnel compensation.....	8	2	11
Total personnel compensation.....	978	253	1,364
Personnel benefits: Civilian.....			
12.1 Personnel benefits: Civilian.....	112	33	156
21.0 Travel and transportation of persons.....	71	26	99
22.0 Transportation of things.....	28	12	37
23.2 Rent, communications, and utilities: Other rent, communications, and utilities.....			
24.0 Printing and reproduction.....	31	12	43
24.0 Printing and reproduction.....	4	1	5
25.0 Other services.....	190	22	326
26.0 Supplies and materials.....	18	6	25
31.0 Equipment.....	1	1	2
Total obligations, allocation accounts.....	1,433	366	2,057
99.0 Total obligations.....	65,256	16,030	73,312
			84,137

Personnel Summary

CORPS OF ENGINEERS—CIVIL			
Total number of permanent positions.....	2,021	2,023	2,023
Full-time equivalent of other positions.....	257	302	372
Average paid employment.....	2,070	2,130	2,140
Average GS grade.....	8.64	8.69	8.69
Average GS salary.....	\$16,387	\$17,178	\$17,521
Average salary of ungraded positions.....	\$14,259	\$15,513	\$15,823

ALLOCATION TO U.S. FISH AND WILDLIFE SERVICE—DEPARTMENT OF THE INTERIOR

Total number of permanent positions.....	62	65
Full-time equivalent of other positions.....	12	17
Average paid employment.....	74	82
Average GS grade.....	9.62	9.68
Average GS salary.....	\$17,531	\$17,555

CONSTRUCTION, GENERAL

For the prosecution of river and harbor, flood control, shore protection, and related projects authorized by laws; and detailed studies, and plans and specifications, of projects (including those for development with participation or under consideration for participation by States, local governments, or private groups) authorized or made eligible for selection by law (but such studies shall not constitute a commitment of the Government to construction [\$1,436,745,000] \$1,489,585,000, to remain available until expended: Provided, That no part of this appropriation shall be used for projects not authorized by law or which are authorized by law limiting the amount to be appropriated therefor, except as may be within the limits of the amount now or hereafter authorized to be appropriated: Provided further, That \$2,000,000 of this appropriation shall be transferred to the United States Fish and Wildlife Service for studies, investigations, and reports thereon as required by the Fish and Wildlife Coordination Act of 1958 (72 Stat. 563-565) to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs of the Department of the Army]. (Public Works for Water and Power Development and Energy Research Appropriation Act, 1977; additional authorizing legislation to be proposed for \$258,000,000.)

Corps Authorized ceiling Enforce-ment language Never passed

civil works program. The objectives are to effectiveness, economy, and safety, with due protecting and enhancing the environment. program includes investigations relating materials, structural engineering, elec- mechanical engineering; coastal engineering; and navigation, locks and dams, improve- operation and maintenance techniques, hydrol- regions, and ice engineering; environmental including environmental impact and wastewater ment; water resources planning studies, includ- ing methodologies, analytical techniques for resources management, recreation, and flood plain ment; and testing and evaluation of earth re- satellite applications to civil works activities.

Object Classification (in thousands of dollars)—Continued

Identification code	96-3121-0-1-301	1978 actual	1979 est.	1980 est.
32.0	Lands and structures.....	309	325	341
99.0	Total obligations.....	104,962	136,862	140,166

Personnel Summary

Total number of permanent positions.....	2,042	2,272	2,170
Full-time equivalent of other positions.....	176	291	281
Total compensable work-years.....	2,285	2,632	2,519
Average GS grade.....	8.71	8.75	8.78
Average GS salary.....	\$18,435	\$19,725	\$20,021
Average salary of ungraded positions.....	\$17,439	\$18,642	\$18,921

Object Classification (in thousands of dollars)

96-3121-0-1-301	1978 actual	1979 est.	1980 est.
Personnel compensation:			
Permanent positions.....	37,558	47,447	48,396
Positions other than permanent.....	2,011	3,674	3,776
Other personnel compensation.....	1,570	1,555	1,454
Pay to commissioned officers.....	501	610	610
Total personnel compensation.....	41,640	53,286	54,236
Travel benefits:			
General.....	4,452	5,353	5,460
Military personnel.....	54	64	64
Pay for former personnel.....	17	8	8
Travel and transportation of persons.....	1,594	1,876	2,010
Transportation of things.....	42	45	48
Contract level user charges.....	2,137	2,259	2,297
Communications, utilities, and other rent....	276	311	351
Printing and reproduction.....	738	759	846
Postage and services.....	52,033	70,814	72,638
Supplies and materials.....	1,208	1,275	1,364
Contract administration.....	462	487	503

CONSTRUCTION, GENERAL

For the prosecution of river and harbor, flood control, shore protection, and related projects authorized by laws; and detailed studies, and plans and specifications, of projects (including those for development with participation or under consideration for participation by States, local governments, or private groups) authorized or made eligible for selection by law (but such studies shall not constitute a commitment of the Government to construction), **[\$1,343,711,000] \$1,774,694,000** to remain available until expended: **Provided**, That funds appropriated for the Willow Creek Lake, Oregon project shall be used to construct that project in accordance with the Special Report of the Chief of Engineers dated May 15, 1974: **Provided further**, That an amount not to exceed \$4,000,000 may be allocated to the Streambank Erosion Demonstration Program authorized in section 32 of the Water Resources Development Act of 1974 for such bank stabilization measures on the North Branch of the Susquehanna River in the vicinity of Forty Fort, Pennsylvania, at approximate river mile 189.4 as the Chief of Engineers deems necessary and subject to the favorable findings and recommendation from the Chief of the Army Corps of Engineers and approval of the Committees on Appropriations of the House of Representatives and the Senate. **(Additional authorizing legislation to be proposed for \$536,000,000.)**

*Authorization
citing
language
deleted.*

*Never
passed*

Note.—The 1979 appropriation for this account was provided in a continuing resolution (Public Law 95-482), which references the Energy and Water Development Appropriation Act, 1979 (H.R. 12928).

Program and Financing (in thousands of dollars)

96-3122-0-1-301	Costs to this appropriation					Analysis of 1980 financing			
	Total estimate	To Sept. 30, 1977	1978 actual	1979 estimate	1980 estimate	Deduct selected resources and unobligated balance, start of year	Add selected resources, end of year	Appropriation required, 1980	Appropriation required to complete
by activities:									
program:									
Advance engineering and design.....			38,214	32,000	25,239	16,800	14,000	22,439	
Navigation projects;									
(a) Channels and harbors:									
(I) Projects specifically authorized by Congress.....	2,069,156	672,537	92,664	117,500	153,735	34,464	25,000	144,271	1,007,720
(II) Projects not specifically authorized by Congress.....			7,500	9,321	7,500	1,500	500	6,500	
(III) Mitigation of shore damages attributable to navigation projects.....			847	1,320	1,350	50		1,300	
b) Locks and dams.....	4,364,800	1,325,642	225,637	240,000	256,290	23,755	49,000	281,535	2,268,231
Beach erosion control projects:									
a) Projects specifically authorized by Congress.....	41,316	1,800	9,348	11,192	7,823	4,300	2,200	5,723	8,953
b) Projects not specifically authorized by Congress.....			1,014	2,000	2,000			2,000	
Flood control projects:									
a) Local protection:									
(I) Projects specifically authorized by Congress.....	3,507,397	520,612	175,161	204,020	212,732	91,684	352,000	473,048	2,042,872

S.C.S.

General and special funds—Continued

WATERSHED PLANNING—Continued

Object Classification (in thousands of dollars)—Continued

Identification code 12-1066-0-1-301	1978 actual	1979 est.	1980 est.
22.0 Transportation of things.....	62	84	25
23.1 Standard level user charges.....	514	700	170
23.2 Communications, utilities, and other rent....	335	456	82
24.0 Printing and reproduction.....	197	268	40
25.0 Other services.....	1,453	2,039	1,209
26.0 Supplies and materials.....	144	196	42
31.0 Equipment.....	205	279	50
Total direct obligations.....	11,962	13,237	5,693
Reimbursable obligations:			
Personnel compensation:			
11.1 Permanent positions.....	741	960	960
11.3 Positions other than permanent.....	51	75	75
11.5 Other personnel compensation.....		21	21
Total personnel compensation.....	792	1,056	1,056
12.1 Personnel benefits: Civilian.....	88	116	116
21.0 Travel and transportation of persons.....	30	30	30
23.2 Communications, utilities, and other rent....	15	10	10
24.0 Printing and reproduction.....	3	3	3
25.0 Other services.....	409	170	170
26.0 Supplies and materials.....	5	5	5
32.0 Lands and structures.....	14	10	10
Total reimbursable obligations.....	1,356	1,400	1,400
Total obligations, Soil Conservation Service.....	13,318	14,637	7,093
ALLOCATION ACCOUNTS			
Personnel compensation:			
11.1 Permanent positions.....	390	434	241
11.3 Positions other than permanent.....	35	40	
Total personnel compensation.....	425	474	241
12.1 Personnel benefits: Civilian.....	47	52	27
21.0 Travel and transportation of persons.....	30	28	6
22.0 Transportation of things.....	2	2	3
23.2 Communications, utilities, and other rent....	25	32	24
25.0 Other services.....	6	2	3
26.0 Supplies and materials.....	5	5	
31.0 Equipment.....	3	4	5
41.0 Grants, subsidies, and contributions.....	40	40	21
Total direct obligations, allocation ac- counts.....	583	639	330
99.0 Total obligations.....	13,901	15,276	7,423
Obligations are distributed as follows:			
Soil Conservation Service.....	13,318	14,637	7,093
Forest Service.....	550	608	330
Economics, Statistics, and Cooperatives Service...	33	31	

Personnel Summary

SOIL CONSERVATION SERVICE

Direct:	1978 actual	1979 est.	1980 est.
Total number of permanent positions.....	360	345	161
Full-time equivalent of other positions.....	44	37	27
Total compensable work-years.....	397	375	180
Average GS grade.....	8.60	8.52	8.50
Average GS salary.....	\$17,706	\$18,105	\$17,972
Average salary of ungraded positions.....	\$17,900	\$18,900	\$18,900
Reimbursable:			
Total number of permanent positions.....	40	49	49
Full-time equivalent of other positions.....	6	9	9
Total compensable work-years.....	45	57	57
Average GS grade.....	8.60	8.52	8.50
Average GS salary.....	\$17,706	\$18,105	\$17,972

Personnel Summary—Continued

	1978 actual	1979 est.	1980 est.
Average salary of ungraded positions.....	\$17,900	\$18,900	\$18,900
ALLOCATION ACCOUNTS			
Total number of permanent positions.....	26	26	
Full-time equivalent of other positions.....	2	2	
Total compensable work-years.....	15	15	
Average GS grade.....	9.04	9.04	9.04
Average GS salary.....	\$18,862	\$19,902	\$19,902
Average salary of ungraded positions.....	\$12,930	\$13,641	\$13,641

No enforcement language!

WATERSHED AND FLOOD PREVENTION OPERATIONS

For necessary expenses to carry out preventive measures, including but not limited to research, engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land, in accordance with the Watershed Protection and Flood Prevention Act approved August 4, 1954, as amended (16 U.S.C. 1001-1005, 1006-1009), the provisions of the Act of April 27, 1935 (16 U.S.C. 590a-f) and in accordance with the provisions of laws relating to the activities of the Department, **[\$169,607,000] \$184,908,000** (of which **[\$23,500,000] \$20,884,000** shall be available for the watersheds authorized under the Flood Control Act, approved June 22, 1936 (16 U.S.C. 701, 16 U.S.C. 1006a), as amended and supplemented: *Provided*, That this appropriation shall be available for field employment pursuant to the second sentence of section 706(a) of the Organic Act of 1944 (7 U.S.C. 2225), and not to exceed \$10,000,000 shall be available for emergency measures as provided by [section 216 of the Flood Control Act of 1950 (33 U.S.C. 701b-1)] sections 403-405 of the Agricultural Credit Act of 1978 (16 U.S.C. 2203-2205) and not to exceed \$200,000 shall be available for employment under 5 U.S.C. 3109: *Provided further*, That \$26,000,000 in loans may be insured, or made to be sold and insured, under the Agricultural Credit Insurance Fund of the Farmers Home Administration (86 Stat. 663): *Provided further*, That not to exceed \$1,000,000 of this appropriation is available to carry out the purposes of the Endangered Species Act of 1973 (Public Law 93-205), as amended, including cooperative efforts as contemplated by that Act to relocate endangered or threatened species to other suitable habitats as may be necessary to expedite project construction. (7 U.S.C. 2201-2202; 33 U.S.C. 701b-1, 701b-11; Public Law 93-448, making appropriations for Agriculture, Rural Development, and Related Agencies, 1979.)

Program and Financing (in thousands of dollars)

Identification code 12-1072-0-1-301	1978 actual	1979 est.	1980 est.
Program by activities:			
Direct program:			
Watershed operations authorized by Public Law 534.....	21,500	36,869	18,800
Loan services.....	202	202	
Emergency watershed protection operations.....	40,000	99,854	9,100
Small watershed operations authorized by Public Law 566.....	106,496	148,453	149,000
Loan services.....	383	383	
Total direct program.....	168,581	285,761	176,900
Reimbursable program:			
Watershed operations authorized by Public Law 534.....	5	5	
Small watershed operations authorized by Public Law 566.....	1,298	1,297	1,297
Total reimbursable program.....	1,303	1,302	1,297
Total operating costs.....	169,884	287,063	178,197
Unfunded adjustments to total operating costs:			
Depreciation on property.....	-666	-300	-300
Accrued annual leave.....	818	1,110	1,110
Total operating costs, funded.....	170,036	287,873	180,607

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES)
)
 v.) Criminal No. M-8042-84
)
 TYRONE A. DAVIS)

MEMORANDUM OPINION AND ORDER

I

The questions presented in this case are whether the Supreme Court's invalidation of the legislative veto in INS v. Chadha, ___ U.S. ___, 103 S.Ct. 2654 (1984) nullifies a similar mechanism in the District of Columbia Self-Government and Governmental Reorganization Act of 1973 (the Home Rule Act) and, if so, whether the veto is severable from other provisions of the Act. These issues are important because, if Chadha were held applicable and the veto non-severable, then the authority of the elected representatives of the District of Columbia to enact criminal legislation, and arguably any legislation, would have no valid legal basis, and important elements of home rule would simply cease to exist.

After carefully considering the contentions of the parties and the opinions of three of its colleagues who have written on the subject, */ the Court concludes that the decision in Chadha has in fact invalidated the legislative veto over changes by the City Council in the criminal laws. The statutory language and legislative history, are, however, barren of proof that the Home Rule Act, which returned to the citizens of the District of Columbia fundamental rights that had been taken from them a century earlier largely for racially discriminatory reasons, would not have been enacted without the legislative veto. Home rule for the District of

*/ United States v. Cole, 112 D.W.L.R. 1117 (Super.Ct.D.C. 1984) (Smith, J.); United States v. Langley, 112 D.W.L.R. 801 (Super.Ct.D.C. 1984) (Moultrie, C.J.); United States v. McIntosh, 112 D.W.L.R. 789 (Super.Ct.D.C. 1984) (Shuker, J.).

Columbia, as Senator Mathias stated in urging its adoption, was an idea whose time had come. The Act explicitly authorizes Congress to repeal^{*/} legislation enacted by the District of Columbia government, and the additional inclusion of the veto provision was not critical to the passage of home rule. Accordingly, the Court concludes that the veto is severable from the other provisions of the Act.

II

On July 5, 1984, the defendant Tyrone Davis was charged by information with a number of misdemeanors arising out of the alleged misappropriation of one Eric Blanton's moped. Count E of the information alleges that Davis committed theft in the second degree (Theft II) in violation of D.C. Code 1981 §§3811 and 3812(b). The cited code sections are a part of the District of Columbia Theft and White Collar Crime Act of 1982 (hereinafter the Theft Act), which Act was passed by the City Council, signed by the Mayor, and transmitted to both Houses of Congress for review pursuant to Section 602(c)(2) of the Home Rule Act, D.C. Code 1981 §1-233(c)(2). Under that provision, a proposed change by the City Council in the criminal code becomes effective at the end of a thirty day period following transmission to the Congress unless during that time either House of Congress adopts a resolution disapproving it. Neither House adopted such a resolution, and the Theft Act became law. According to the government's brief in this case, there have been approximately 1700 convictions under the Theft Act, and about 1500 such prosecutions are pending.

Davis has now filed a motion to dismiss the Theft II charge, contending that the Theft Act is unconstitutional. Relying heavily on Judge Smith's recent decision in United States v. Cole, supra, Davis claims that the provision in Section 602(c)(2) authorizing disapproval of changes in

^{*/} The repeal may be accomplished preemptively, during a lay-over period before such legislation becomes effective.

the criminal code by either House of Congress without participation therein by the other House and without presentment to the President was invalidated by Chadha, and that if the veto falls, the Council's authority to enact criminal statutes must also fall, because

Congress would not have given the D.C. City Council authority over criminal statutes without an associated veto.

Davis further argues that since only the Theft Act, which purportedly became effective on December 1, 1982, applies to offenses committed on or after that date, and since the Theft Act is unconstitutional, he cannot be prosecuted at all for the alleged misappropriation of the moped. */

The government concedes that the Chadha decision invalidates the Congressional veto mechanism in the Home Rule Act, **/ but contends that this provision is fully severable from the remainder of the Act. The Court agrees.

III

Before addressing the substantive Chadha questions raised by the defendant, the Court must satisfy itself that they are justiciable. The present case is unlike those decided recently by other judges of this Court, ***/ in that the legislative veto has not been exercised with respect to the statute claimed to be invalid. The City Council passed the Theft Act, the Mayor signed it, and

*/ The defendant apparently contends that offenses committed before December 1, 1982 are governed by the old larceny statute, D.C. Code 1981 §22-2201 et seq., but that the old statute cannot reach conduct on or after December 1, 1982.

**/ This, at least, is the position taken by the United States in cases now pending in our Court of Appeals. In the present case, the government contends that the Court need not reach the issue whether Chadha is applicable because the veto is severable in any event.

***/ See p. 1, note *, supra. Those cases all arose as a result of the veto by the House of Representatives of the District of Columbia Sexual Assault Reform Act of 1981, D.C. Act 4-69.

neither House of Congress passed a disapproving resolution. Evidently, the governments of the United States and of the District of Columbia are in full agreement as to what the law pertaining to theft in this jurisdiction is or should be. The question therefore arises whether the validity of an unexercised legislative veto is ripe for judicial resolution. In Clark v. Valeo, 182 U.S.App.D.C. 21, 559 F.2d 642 (1977), aff'd 431 U.S. 950 (1977), a pre-Chadha decision in which a similar challenge to a statute was held not to be justiciable because the veto there in question had not yet been exercised, the Court observed that the

contention that there are no real considerations of ripeness here can only rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of the court.

182 U.S.App.D.C. at 28, n. 8, 559 F.2d at 649. See also Ehlke, The Legislative Veto Provisions of the District of Columbia Home Rule Act in the Wake of INS v. Chadha (Congressional Research Service July 5, 1983) (hereinafter referred to as Legislative Veto Provisions), p. 15.

Nevertheless, the Court thinks that the issues in the present case */ are justiciable and ripe for decision. If the defendant's legal analysis is correct, and if the legislative veto cannot be severed from the City Council's authority to legislate in the criminal area, then the Theft Act was never validly enacted and the statute under which Davis is being prosecuted is a nullity. It is axiomatic

*/ The Court in Clark relied in part on Justice White's view, expressed in Buckley v. Valeo, 424 U.S. 1, 284-286 (1976), that the one-house veto is valid. 182 U.S.App.D.C. at 28, n. 8, 559 F.2d at 649. As Justice White was the main dissenter in Chadha, the continued viability of this portion of the Clark analysis is questionable.

that a defendant may not be tried and convicted under a statute that was never effectively enacted. Federal crimes must be statutory and the authority to declare actions in the District of Columbia criminal, which is confided to Congress by Article I section 8, cl. 17 of the Constitution, cannot be exercised by any other body unless it has been properly delegated. Cf. United States v. Grimaud, 220 U.S. 506 (1911). In his decision in Cole, on which Davis places heavy reliance, Judge Smith explicitly ruled that

the invalidation of §602(c)(2) also serves to invalidate the delegation of authority over the criminal code to the City Council.

112 D.W.L.R. at 1124.

If the statute delegating authority to the City Council is unconstitutional because of the presence of an invalid provision for a legislative veto, then the Council had no authority to pass the Theft Act, regardless of whether or not the legislative veto was subsequently exercised. If the Council could not enact such a law, Davis cannot be tried for violating it. Accordingly, the Court must reach the substantive Chadha issues. */

*/ Arguably, the Court should rule on the issue of severability first, because if the veto provision is severable, then the Theft Act is valid, and Davis can be prosecuted under it whether or not Chadha applies. Given such a holding, Davis would not have standing to contend that Chadha applies, since the result of that controversy would not affect him. Conversely, however, if the Court were to hold Chadha inapplicable, then it would not have to reach the issue of severability. In light of this not so ingenious paradox, the Court has elected to take up the contentions in the order that the defendant has made them. Cf. Chadha, supra, 103 S.Ct. at 2774, n. 7; Buckley v. Valeo, 424 U.S. 1, 108-109 (1976); Note, Severability of Legislative Veto Provisions: A Policy Analysis, 97 Harv. L.Rev. 1182, 1189-1192 (1984) (hereinafter referred to as Severability of Veto Provisions).

IV

The Court agrees with the defendant that the provision in the Home Rule Act for a legislative veto cannot survive Chadha. Because the arguments on both sides of this question have been effectively marshalled by Judge Smith in Cole (Holding that Chadha applies) and by Chief Judge Moultrie in Langley and Judge Shuker in McIntosh (both holding that Chadha does not apply), the Court will address the subject with as much admittedly uncharacteristic brevity as it can muster for the occasion.

The basic teaching of Chadha is that when Congress acts in a legislative capacity, Article I of the Constitution requires that it act through both Houses (bicameralism) and that the President be given the opportunity to sign or veto its action (presentment). Legislative veto provisions which do not meet the requirements of bicameralism and presentment to the President fail. The legislative veto in the Home Rule Act does not meet these requirements.

In assessing the validity of the veto in Chadha the Court was able to find "but four */ provisions in the Constitution . . . by which one House may act alone with the unreviewable face of law, not subject to the President's veto." 103 S.Ct. at 2786. The opinion of the Court, at

*/ These four provisions allow one House or the other

- (1) to initiate impeachments (House),
- (2) to conduct impeachment trials (Senate),
- (3) to approve presidential appointments (Senate);
- and (4) to ratify treaties (Senate).

the very least, strongly implies that these four provisions are exclusive. Expressio unius est exclusio alterius. */
Indeed, the Court observed that when the framers of the Constitution wished to carve out an exception to Article I procedures for enacting legislation, they did so with unmistakable clarity. 103 S.Ct. at 2786.

The requirements of bicameralism and presentment are, of course, applicable only to legislative action by the Congress. In Chadha, the Court held that the veto under consideration was legislative in character, and thus subject to these requirements, because it had

the purpose and effect of altering
the legal rights, duties and relations
of persons . . . outside the legisla-
tive branch.

103 S.Ct. at 2784. Mr. Chadha, an alien, had challenged a resolution of the House of Representatives which purported to veto an administrative decision of the Immigration and Naturalization Service (INS) suspending his deportation. The Court ruled that by vetoing the suspension, Congress had altered Mr. Chadha's status, and that its action in doing so was legislation in all but name, and thus subject to the provisions of Article I. 103 S.Ct. at 2784-85. The Court further observed that the legislative character of the veto was reflected by the action the veto supplanted, namely, legislation requiring deportation. Ibid. at 2785.

The legislative veto in Chadha directly affected only one alien. No legislation could be more private, let alone local, than a bill permitting a single individual to remain in the country. By contrast, the actual or prospective veto of a criminal law enacted by the City Council

*/ The expression of one thing implies the exclusion of the other.

is of general applicability and alters the legal rights, duties and relations of numerous persons. Accordingly, if the Congressional veto in Chadha is sufficiently legislative in character to implicate the bicameralism and presentment requirements of Article I, then this is true, a fortiori, of the veto provisions of the Home Rule Act.

Article I, 8, cl. 17 of the Constitution invests Congress with the authority to "exercise exclusive Legislation in all cases whatsoever over [the District of Columbia]" (emphasis added). Disapproval of proposed legislation by the City Council is, in this Court's view, a classic exercise of that authority. Absent the veto in the Home Rule Act, Congress could overrule the City Council only by exercising its reserved legislative authority over the District. See D.C. Code 1981 §1-20(a). The action which the veto supplants being legislative, the veto itself is of the same character.

The gravamen of the decisions in Langley and McIntosh is that the Constitution accords Congress plenary authority over the District of Columbia and that this authority is not subject to the Chadha restriction. See, e.g. Palmore v. United States, 411 U.S. 389, 397 (1973); District of Columbia v. Thompson, 346 U.S. 100, 108-109 (1953). It is suggested that Chadha deals with issues of separation of powers between the legislative and executive branches on a national scale, and that these questions do not arise in the context of purely "local" legislation affecting the District of Columbia. The authors of these opinions conclude that the reasons for the Chadha ruling therefore have no application to the legislative veto contained in the Home Rule Act, and that the veto therefore survives a constitutional challenge.

Although reasonable persons may (and do) differ on this very complex issue, the Court respectfully declines to follow Langley and McIntosh. While it is true that Congress has broad powers over the District of Columbia, Congressional authority over immigration matters is just as "plenary." */ Congress was nevertheless required to comply with the bicameralism and presentment requirements of Article I when it dealt with the question whether Mr. Chadha should be permitted to remain in this country. The uncontested fact that Congress has extensive authority to legislate for the District of Columbia does not support a conclusion that it may do so in a fashion which is impermissible in the exercise of its equally broad power to deal with immigration matters. Even if one assumes, arguendo, that the provision authorizing a one-House veto of criminal legislation passed by the City Council can be characterized as addressing "local" rather than national concerns, **/ there is nothing in the Chadha opinion that suggests that this distinction is of controlling consequence. The power of Congress to legislate broadly with respect to the District has never included freedom to ignore constitutional restraints on the manner in which such authority is exercised. Indeed, as the Supreme Court put it in Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899):

*/ "Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977).

**/ The District of Columbia is the seat of government. Hundreds of thousands of federal officials and employees, including the President, members of Congress, and civil servants of high and low status live or work there. Foreign embassies are located in the District. The federal government's stake in the criminal and civil laws of the District of Columbia is thus substantial. See generally letter of November 15, 1983 from Assistant Attorney General Robert A. McConnell to Senator William V. Roth, Jr., Chairman of the Senate Committee on Governmental Affairs, detailing the views of the Department of Justice on Chadha issues.

Congress . . . may exercise within the District all legislative powers that the legislature of a state might exercise within the state . . . so long as it does not contravene any provision of the Constitution of the United States.

(Emphasis added.)

The Supreme Court cases relied on in Langley and McIntosh address the question whether Congress may exercise certain authority over the District of Columbia, not how Congress must proceed when it does so. As the representative of the Congressional Research Service of the Library of Congress stated, in expressing the view that Chadha invalidates the legislative veto in the Home Rule Act,

the unique reach of congressional power over the District of Columbia thus relates to the subjects of legislation, the substantive reach of congressional acts respecting the District.

Legislative Veto Provisions, supra, at pp. 4-5. (Emphasis partially in original, partially added). Although Congressional authority over the District of Columbia "involves a constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue," Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 (1982), it does not permit exclusion of one political branch from the legislative process in the face of a precise constitutional command to the contrary.

The legislative veto in the Home Rule Act is to some degree distinguishable from that in Chadha in relation to its impact on the separation of powers between the legislative and executive branches. In Chadha, the action purportedly subject to veto by one House of Congress, acting alone, was performed by the INS, which is a part

of the executive branch. In the Home Rule Act, the action which a single House may purportedly veto is that of the government of the District of Columbia. The Court's reading of the majority opinion in Chadha, however, persuades it that there must be compliance with the bicameralism and presentment requirements whenever Congress undertakes any legislative action, and not just action which purports to overrule a decision by the executive branch. */ Moreover, the President, as the elected representative of the entire nation, surely has at least as great an interest in participating in a decision whether a statute passed by the elected representatives of the citizens of the District should be overridden by members of Congress (who are elected elsewhere and answerable only to voters with an attenuated stake in the outcome) as he has in the far more parochial question whether a single alien should be deported. Accordingly, the Court finds Chadha controlling and the legislative veto in the Home Rule Act invalid for non-compliance with the bicameralism and presentment requirements of Article I. **/

*/ It is worth noting that the legislative veto in the Home Rule Act was expressly included by Justice White in the Appendix to his dissenting opinion in Chadha, in which he enumerated the various such provisions apparently doomed by what he believed to be an overbroad majority decision. 103 S.Ct. at 2815.

**/ That the First Congress, which included many members who had helped to draft the Constitution, inserted legislative vetoes into the ordinances governing certain territories, see McIntosh, *supra*, 112 D.W.L.R. at 795; Chadha, *supra*, 103 S.Ct. at 2800-2801, n. 18 (White, J. dissenting), suggests that Chadha may perhaps have been decided contrary to the views of some members of that Congress. Given the majority decision in Chadha, however, and the lack of anything in that decision on which this Court can predicate a controlling distinction between the legislative veto there invalidated and the provision here at issue, the Court cannot agree with Judge Shuker that the presence of such a veto in the early territorial ordinances can save the challenged provision of the Home Rule Act.

V

Having concluded that the decision in Chadha invalidates the Home Rule Act's legislative veto, the Court must now determine whether the City Council's authority to enact legislation, or at least criminal legislation, */ must fall with the doomed mechanism. The Court holds that home rule survives the Chadha challenge intact, because the veto is fully severable from the remainder of the Act. The Court respectfully declines to follow the Cole decision, supra, in which another judge of this Court reached a contrary conclusion.

The principal reasons for this Court's holding that the legislative veto is severable are the following:

(a) In Chadha, the Supreme Court reiterated that unconstitutional provisions are severable "unless it is evident that Congress intended otherwise." 103 S.Ct. at 2774. (Emphasis added.) In the absence of a compelling showing that Congress would not have delegated authority over criminal laws to the local authorities, the Council's legislative power must be sustained.

(b) In the present case, the two sovereigns affected by the issue before the Court, the United States and the District of Columbia, agree that the legislative veto is severable from the remainder of the Act.

(c) The Home Rule Act was enacted to return to citizens of the District basic rights which were taken from them

*/ The Home Rule Act vested the City Council with general legislative authority, which is not sub-divided into criminal and civil. It included a one-House veto for criminal legislation, and a two-House veto for other legislation. D.C. Code 1981 §1-233(c)(2). If the authority to enact criminal legislation fails, then the Council's other legislative authority is at least imperiled, although the somewhat artificial division of that authority in the Cole opinion for the purpose of insuring that only the power to pass criminal laws must fall might be justified as "promoting the goal of minimizing interference with Congress." See Note, Severability of Veto Provisions: A Policy Analysis, 97 Harv.L.Rev. 1182, 1195 (1984) (hereinafter referred to as Severability of Veto Provisions).

a century earlier, in large part for racial reasons. It is therefore a remedial civil rights law which must be generously construed to achieve its salutary goals.

(d) The basic purposes of the legislative veto -- to protect the federal interest in the nation's capital and to secure the ultimate authority of Congress -- are substantially achieved by other provisions of the Home Rule Act.

(e) Both Houses of Congress have passed home rule legislation not including a legislative veto by substantial margins. It is therefore improbable that home rule would have been defeated but for the inclusion of the veto.

(f) After examining the legislative history of the Home Rule Act, and in the light of the foregoing considerations, the Court is satisfied that the Act would have passed without the veto, and that the contrary is not "evident."

The Court addresses each of these considerations in turn.

A. Burdens and Presumptions.

"The cardinal principle of statutory construction is to save and not to destroy." N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Tilton v. Richardson, 403 U.S. 672, 684 (1971) (plurality opinion). Accordingly, the Supreme Court has insisted that courts exercise caution on the issue of severability, lest they in effect throw out the baby with the bath water. An invalid provision is "presumed severable if what remains after severance is fully operative as a law." Chadha, supra, 103 S.Ct. at 2775, citing Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). Otherwise valid portions of the law will be sustained "unless it is evident that the Legislature would not have enacted those provisions which are

within its power, independent of that which is not."

Chadha, supra, 103 S.Ct. at 2774, citing Buckley v. Valeo, supra, 424 U.S. at 108 and Champlin, supra, 286 U.S. at 234. Severability is presumed because, as stated in Regan v. Time, Inc., ___ U.S. ___, 104 S.Ct. 3262, 3269 (1984)

(plurality opinion):

in exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this Court has observed, 'whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid. El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87, 96 (1909).

The statute in question in Chadha -- 244(c) of the Immigration Act -- contains a severability clause, whereas the Home Rule Act contains none. The Supreme Court has not been entirely consistent in its teachings as to the significance, if any, of this distinction. Sixty years ago, the Court characterized the presence of a severability clause as an aid in determining Congressional intent, but not as an "inexorable command." Dorchy v. Kansas, 264 U.S. 286, 290 (1924). Subsequently, the Court indicated that "in the absence of a severability clause, the presumption is that the legislature intends an act to be effective as an entirety." Williams v. Standard Oil Co., 278 U.S. 235, 241-42 (1929); see also Utah Power & Light Co. v. Pfof, 286 U.S. 165, 184 (1932). The more recent cases, however, attach far less significance to whether or not Congress included in a statute what may often be a recitation of severability by rote. "The ultimate determination of severability will rarely turn on the presence or absence

of such a clause." United States v. Jackson, 390 U.S. 570, 585, n. 27 (1968); Tilton v. Richardson, supra, 403 U.S. at 684 (plurality opinion); Regan v. Time, Inc., 104 S.Ct. at 3269. In Chadha, the Court indicated that the severability clause "gives rise to a presumption" of severability, 103 S.Ct. at 2774, but went on to suggest that severability may also be presumed where the legislation remains operative after excision of the veto, irrespective of the inclusion vel non of a severability clause.

There can be no question that the Home Rule Act remains "fully operative as a law" if the legislative veto is excised. The City Council has enacted numerous laws since Home Rule, including a number of criminal measures. See, e.g. the Sexual Assault Reform Act of 1981, D.C. Act 4-69. Bail Amendment Act, D.C. Law 4-152; the Theft Act, D.C. Law 4-164; the Sentencing Improvements Act, D.C. Law 4-202. Only the Sexual Assault Reform Act has been the subject of a legislative veto. Regardless of the final disposition of the litigation over that veto, see United States v. Boyd, supra, it is incontestable that the Home Rule Act can function and that the legislative veto has had a comparatively minor effect on its operation. The presumption of severability therefore applies.

The ultimate issue in determining severability is the intent of Congress. See Consumer Energy Council of America v. F.E.R.C., 218 U.S.App.D.C. 34, 49, 673 F.2d 425, 440 (1982), aff'd 103 S.Ct. 3556 (1983). Legislative intent with respect to an issue which Congress never addressed is not always easy to discern. It has been described as "at best a reified, ex post facto approximation of statutory purpose." Severability of Veto Provisions, supra, 97 Harv.L.Rev. at 1195. The intrinsic difficulties in

assessing intent are compounded in the case of governmental action, which is frequently the product of compromise, of collective decision making, and of mixed motivation.

Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J. concurring). Given the impediments encountered in probing the collective state of mind of a group of legislators on a hypothetical set of facts, the Court is inclined to agree with the writer of a recent Harvard Law Review Note that

a court should invalidate an entire act only if removing the offending provision would defeat the statute's essential purpose. In determining the purpose of the statute as a whole, courts should ignore the veto provision. The veto provision is designed only to reserve congressional control; attributing that purpose to the entire statute yields an absolute rule against severability that cannot stand because it conflicts with the result in Chadha. Thus, the courts should sever veto provisions when doing so frustrates only the subsidiary policy of congressional control. If Congress decides that the statute should not survive without its veto provision, Congress is free to repeal the statute. */

Severability of Veto Provisions, supra, 97 Harv.L.Rev. at 1182. Even short of that position, however, the burden imposed by the case law on a party seeking to show non-severability is a formidable one. Mere uncertainty about the legislature's intent is insufficient to rebut the presumption of severability; a convincing showing is required. E.E.O.C. v. Hernando Bank, 724 F.2d 1188, 1192 (5th Cir. 1984).

B. The positions of the governments concerned.

The issue of severability here presented implicates the interests of the governments of the United States and of the District of Columbia. Each of these governments has taken the unambiguous position before our Court of

*/ The Court thinks it at least improbable that Congress would repeal the Home Rule Act or any major provision thereof if the legislative veto were excised from it.

Appeals that the legislative veto is severable from the remainder of the Home Rule Act and that the authority of the City Council to pass criminal and other legislation therefore survives Chadha. See the brief for the United States in Gary v. United States, Nos. 83-796, et al. filed August 17, 1984, at pp. 15-20; */ and the brief for the District of Columbia, Intervenor in the same case at pp. 23-41. The failure of either government, or of any branch of either government, to contend that home rule must fall as a result of Chadha bolsters the Court's view that it should not invalidate the Council's legislative authority without a very strong showing indeed.

It is worth noting that in Chadha, Congress, in its capacity as intervenor, contended that the veto provision in the Immigration and Naturalization Act was not severable from the rest of the statute. 103 S.Ct. at 2774. In spite of this, and notwithstanding Justice Rehnquist's insistence in dissent that "Congress was unwilling to give the Executive Branch permission to suspend deportation on its own," 103 S.Ct. at 2817, the Supreme Court held that the invalid veto was severable. In the light of the position of the United States **/ with respect to the Home Rule Act, the argument for severability is stronger here in this respect than in Chadha.

*/ This brief bears the names of the United States Attorney, of a Justice Department attorney, and of several Assistant United States Attorneys.

**/ Although the positions of the executive and legislative branches could reasonably be expected to differ on the applicability of Chadha to the Home Rule Act, there is no reason to suppose that the position of the Department of Justice should be at odds with the position of Congress with respect to severability. The interests of the two branches do not conflict in any way with respect to the latter issue.

C. The Home Rule Act as a remedial civil rights law.

(1) History.

Local government was already established within the boundaries of the District of Columbia at the time of cession by Maryland (1778) and Virginia (1779). Home Rule History, */ at p. 1487. After the city was incorporated by Act of Congress in 1802, its government consisted of a Mayor appointed by the President and a City Council elected by the free white male residents of the City of Washington. **/ Ibid. In 1820, the City's Charter was amended to provide for the popular election of the Mayor. Act of May 15, 1820, 3 Stat. 583; Bringing Democracy, supra, at 543. An elected municipal government remained in existence until 1870.

The circumstances under which the citizens of the District lost the franchise are worth recounting. Following the Emancipation Proclamation, the Radical Republicans proposed that Congress enfranchise the black population of the nation's capital. Bringing Democracy, supra 543-44, citing J. Keeley, Democracy or Despotism in the American Capital, pp. 108-116 (1939). These proposals did not generate an enthusiastic response from the white citizens of the District. In 1865, a committee of the Common Council drafted the following statement of the City's official view:

*/ Committee Print, Home Rule for the District of Columbia 1973-74, Background and Legislative History of H.R. 9056, H.R. 9682 and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act (House Committee on the District of Columbia 1974), hereinafter cited as Home Rule History.

**/ See Act of May 3, 1802, ch. 53, 2 Stat. 195, discussed in Newman and Depuy, Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act, 24 American U.L.Rev. 537, 542 (1975) (hereinafter cited as Bringing Democracy).

The white man, being the superior race */ must rule the black. Why he is black and we white, or why we the superior and he the inferior race are matters past our comprehension . . . If it took the ancient Briton a thousand years to emerge from his only half-civilized condition . . . to reach the point to qualify him for the exercise of the right [to vote], how long would it reasonably take the black man, who but about two hundred years ago was brought from Africa.

Constance McLaughlin Green, Washington: A History of the Capital, 1800-1950 (Princeton University Press 1962) (hereinafter referred to as Washington, a History), p. 297.

An 1865 referendum in Washington and Georgetown on the question whether blacks should be allowed to vote had the following results:

	<u>For</u>	<u>Against</u>
Washington	35	6991
Georgetown	1	712

Bringing Democracy, supra at 544. **/ Nevertheless, in 1866, a Radical Republican Congress overrode white opposition and, for a short period, made democracy color-blind.

Although white citizens were in the majority in Washington after the Civil War, blacks represented about

*/The "superiority" of the white race apparently did not avoid the implication, in incorrect English, that the white man is a race.

**/ The results are reported slightly differently in Washington, a History, p. 298:

	<u>For</u>	<u>Against</u>
Washington	35	6591
Georgetown	0	465

According to the Star of December 23, 1865,

the ballot box at the special election doubtless received many ballots from fingers that pulled rebel triggers.

Ibid. at 299.

30% of the population. Washington, A History, supra, p. 306, citing the Special Census of 1867. In the 1868 election, Sayles J. Bowen was elected Mayor with the support of blacks and Radical Republicans. Under Bowen's administration, the word "white" was stricken from every passage where it appeared in the laws of the District of Columbia. Henderson, Why Home Rule Was Taken from D.C., Washington Star News, Nov. 11, 1973, G, p. 2 col. 1; */ Washington, A History, supra, p. 321; Bringing Democracy, supra, p. 544, n. 48. Other taboos also foundered, and some black and white children began to attend public school together with the blessing of elected public officials.

Understandably, Bowen's policies triggered opposition on the part of many white residents. An anti-Negro coalition defeated Bowen in his bid for re-election. Congress promptly replaced the elective office of mayor with the office of a governor to be appointed by the President. A bicameral local legislature was created, with a presidentially appointed Council and a House of Delegates to be elected by the male residents of the District. In 1872 and again in 1873, the new partly elective local government enacted criminal legislation which made it a misdemeanor to discriminate on the basis of race with respect to access to most places of public accommodation. See District of Columbia v. Thompson, 346 U.S. 100 (1953), rev'g 92 U.S. App.D.C. 34, 203 F.2d 579 (1953). In 1874, Congress abolished government by an appointed governor and a partially elected legislature and created a new system of government by three

*/ John B. Henderson, Jr. is the pen name of a historian and speechwriter working for the federal government. His article is hereinafter referred to as Why Home Rule Was Taken.

presidentially appointed Commissioners and no legislature at all. Act of June 20, 1874, 18 Stat. 116 et seq.; Why Home Rule Was Taken, supra. Elected local government, which had continued undisturbed for seventy years when only whites voted, lasted barely a tenth of that time when blacks were admitted to the franchise.

For almost exactly a century after 1874, persons appointed by the President -- initially three Commissioners, and from 1967 to 1973, one Commissioner and nine appointed members of the Council -- were in charge of the local government of the District of Columbia. The citizens of the District -- both black and white -- were disfranchised. Schools were once again racially segregated, and remained so for more than eighty years, see, Bolling v. Sharpe, 347 U.S. 497 (1954). The District's public accommodations laws were never enforced for a like period. District of Columbia v. Thompson, supra. Although there were doubtless many reasons for the loss of the right to vote, there can be no question, considering the tenor of the times, that race played an important part. In the words of historian Henderson:

When Home Rule was withdrawn in 1874 a large minority of the District residents were black. Those who choose to think that this was not a major factor in the act of disfranchisement are of course free to do so, but history will laugh them out of court.

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Officially, the act of disfranchisement was in direct response to the overspending and corruption of the Shepherd administration. */ But at the time the act was publicly recognized as a move to smother growing black political power, represented by the outcome of the 1868 election and the Radical reforms of Mayor Sayles J. Bowen. Conservative newspapers made that clear, coming out frankly in favor of disfranchisement, applauding destruction of the 'curse' of black suffrage.

*/Alexander Shepherd was the District's second appointed governor.

Why Home Rule Was Taken, supra. */ Constance McLaughlin Green, in perhaps the leading history of the District of Columbia, quotes Washington's Common Council in 1871 to the effect that the plan of disfranchisement originated

in the selfish, aristocratical spirit of those who either sympathized with the rebellion, or who can see nothing good . . . in the liberty of all men.

Washington, A History, p. 334. Further, in her view,

citizens who had carped about Washington's 'negro government' expected the curtailed power of the electorate to ensure white rule in the future.

Ibid., p. 337. As Representative Diggs, a black Congressman from Michigan who was then Chairman of the House Committee on the District of Columbia, had occasion to remark, in urging his colleagues to reestablish home rule a century after it was taken away:

Rights of self-government have time and time again been proved to apply to all citizens; all, that is, except the people of the District of Columbia. To put the debate today in perspective, it should be noted that the people of the District of Columbia are the only American citizens who have had the right of self-government taken away from them by Congress.

*/ Henderson's analysis may appear to be in some measure over-simplified. The Court notes that the elective post of mayor was abolished after Bowen had been defeated, so that no such change was needed to remove a particular pro-Negro incumbent. Moreover, at the time District residents were disfranchised, a majority of them were white. As a leading historian has observed, however, some Washingtonians were "willing to surrender their own rights rather than to respect the rights of others, and had welcomed any substitute for a local government in which Negroes would have a voice." Washington, A History, supra, p. 333. After an elected Mayor helped black citizens, the elective mayoralty was abolished. After a partially elected legislature gave blacks equal rights, it too was replaced, and equal opportunity became a dead letter.

Home Rule History at 2105. Denied their right to vote but fortunately not their freedom of speech, citizens of the District affixed bumper stickers to their cars describing their city as the nation's "last colony." */

By 1973, most members of Congress found this state of affairs unacceptable for reasons both of pragmatism and of principle. In the words of Senator Mathias of Maryland, the existing form of government was

an obsolete and cumbersome and arbitrary system of arrangements that have been made at various times through which authority is diffused and power is fragmented and decisionmaking is delayed. The Mayor does not have the power, Congress does not have the time, and the people of the District do not have the vote.

Home Rule History, at 3116. From the pragmatic perspective, Senator Eagleton pointedly observed that Congress had been

*/ This, presumably, is the explanation for the title of the Newman and Dupuy article cited at p. 18, n. **.

called upon to pass on such issues as the membership requirements of the Metropolitan Police Department's band, the permissibility of flying kites at the base of the Washington Monument, and the addition of seats to the football stadium. Home Rule History, p. 2755; see Bringing Democracy, supra, at 538. Turning to considerations of principle, the House Report on H.R. 9682 reads in pertinent part as follows:

In a democracy, the people should have the right to speak and act in their own interest. Self-determination is tied to self-government. For the citizens of the District of Columbia, self-government comes through home rule. To continue to deny the citizens of Washington, D.C. home rule is, in fact, to deprive them of full human dignity.

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The overwhelming evidence, testimony and representations filed with the Committee have urged the Congress that the residents of the District of Columbia should have the basic right to local self-government through the elective process.

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In a country such as ours where the tenets of democracy have reached full flower, it is an anomaly that the people of our Nation's Capital have virtually no voice in their own government. Taxes are levied without their consent; officials are appointed without their approval; budget funds are allocated without reference to their needs and desires; and major governmental decisions concerning all aspects of their lives are made by officials elected from substantially different constituencies.

The Supreme Court of the United States has described the right to vote as a 'fundamental political right' because it is 'preservative of all rights.' (Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). For almost 100 years now, since 1874, the citizens of the District of Columbia have been denied this fundamental right to the detriment of all. Restoration of an elected local government with powers of legislation and finance is, in the judgment of the committee, perhaps the most important step which this or any Congress can take for the Nation's Capital. Self-government is necessary to responsive and responsible government.

Home Rule History, p. 1490.

In the years after the Supreme Court's landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), holding racial segregation in public education to be unconstitutional, Congress enacted the Civil Rights Acts of 1957 and 1960 (protecting voting rights), */ the Civil Rights Act of 1964 (barring discrimination in public accommodations and facilities, employment, and federally assisted programs, and strengthening enforcement of school desegregation), **/ the Voting Rights Act of 1965 (providing more comprehensive protection of voting rights), ***/ and the Fair Housing Act of 1968 (securing equal housing opportunity). ****/ Over the same general period, there had been corresponding progress in restoring some limited voting rights to citizens of the District:

Since ratification of the 23d amendment to the Constitution on Mar. 29, 1961, qualified voters in the District of Columbia have had the right to vote for electors for President and Vice President; for the Board of Education since Apr. 22, 1968, the date of approval of Public Law 90-292; and for non-voting Delegate in the House since Sept. 22, 1970, the date of approval of Public Law 91-405.

Home Rule History, p. 1484.

Although the Home Rule Act was not, by its terms, a law barring discrimination based on race, national origin, sex, or other invidious grounds, there can be no doubt that its effect *****/ was to end the denial of the */ 42 U.S.C. §1971 et seq.

**/ 42 U.S.C. §2000a through §2000h.

***/ 42 U.S.C. §1973 et seq.

****/ 42 U.S.C. §3601 et seq.

*****/ It was suggested by representatives of Common Cause, who lobbied for the Home Rule Act, that

"the unspoken argument against home rule is based on distrust of a largely black electorate."

(footnote continued next page)

right of self-government to the citizens of the District, a substantial majority of whom, by then, were black. The Act also corrected a century-old disfranchisement which was based, at least in part, on race. For all practical purposes, the Home Rule Act is a remedial civil rights law providing basic liberties to the citizens of the District of Columbia. It should be read in the same spirit as civil rights statutes are read, and its generous agenda ought not to be defeated by niggardly or strained construction.

(footnote continued from previous page)

Home Rule History, p. 2127. By 1973, "most persons [would] not admit publicly that they entertain any bias or prejudice against members of the Negro race," Dailey v. City of Lawton, 296 F.Supp. 266, 268 (W.D. Okla. 1969); aff'd 425 F.2d 1037 (10th Cir. 1976), so that one would ordinarily expect such arguments to be unspoken and disguised. It has also been noted that while the Senate had passed a number of home rule bills prior to 1973, the House had failed to do so until Congressman John MacMillan of South Carolina, an intransigent opponent of home rule, was defeated for re-election and replaced as Chairman of the House Committee on the District of Columbia by Representative Diggs. Home Rule History, p. 2127. Moreover, one is ordinarily presumed to intend the natural and foreseeable consequences of one's conduct. Railway Officers v. Labor Board, 347 U.S. 17, 45 (1954).

Arguments based on constitutional history and pragmatic considerations having no relation to race have also been made against home rule, see, e.g. Home Rule History, pp. 1605 et seq., and the Court is of the opinion that, as with most controversial issues, the motives of the opponents (and the proponents) of home rule vary and defy easy categorization. Be that as it may, "effect, and not motivation, is the touchstone," United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), cert. denied 422 U.S. 1042 (1975) and, in the Home Rule Act as in other civil rights legislation, "Congress directed the thrust of the Act at the consequences of [the challenged] practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

(2) Construction.

In general, remedial legislation should be construed broadly to effectuate its purposes. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). In construing a remedial statute, a court should give a liberal interpretation to its protective provisions while narrowly interpreting any exemptions from such provisions. Hutchison Bros. Excav. Co. v. District of Columbia, 278 A.2d 318, 321 (D.C. 1971), citing United States v. Dotterweich, 320 U.S. 277 (1943). */ "Where the nature of an Act is remedial, as here, it should be construed liberally in an attempt to provide the remedy, not avoid it." Starks v. Orleans Motors, Inc., 372 F. Supp. 928, 932 (E.D. La. 1974), aff'd 500 F.2d 1182 (5th Cir. 1974). The "remedy" in the Home Rule Act was basic self-government for the District of Columbia.

Civil rights legislation is, of course, remedial, and the nation's commitment to individual rights and equal opportunity ranks high in its constellation of constitutional and legislative values. Laws prohibiting racial and other invidious discrimination carry out policies to which Congress has accorded the "highest priority," and are accorded a "generous" construction. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-212 (1972). Accord: Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969); Daniel v. Paul, 395 U.S. 298, 306-307 (1969). Just as the Civil Rights Act of 1964 is to be liberally construed, and to be read

*/ Exemptions from coverage of civil rights statutes especially are narrowly construed and closely scrutinized. Singleton v. Gendason, 545 F.2d 1224 (9th Cir. 1976); United States v. Hughes Memorial Home, 396 F.Supp. 544, 550 (W.D. Va. 1975).

[not] with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely to secure for all citizens the full enjoyment of facilities described in the Act,

Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968) (en banc), so too the Home Rule Act must be read with a view to its basic purpose of returning to the citizens of the District of Columbia the right to participate in their own elected local government.

As the majority of the House District of Columbia Committee explicitly recognized, the right to vote, which is at stake in the Home Rule Act^{*/}, is fundamental, for it "preservative of all rights," Yick Wo v. Hopkins, supra, 118 U.S. at 370, Reynolds v. Sims, 377 U.S. 533, 562 (1972). Constitutional provisions and statutes which protect the right to vote have traditionally been generously construed in a manner which comports with the precious character of their subject matter. See, e.g. Gaston County v. United States, 395 U.S. 285 (1969) (Voting Rights Act construed as invalidating state literacy test absent proof of intentional discrimination in its adoption or administration, because it disproportionately burdened blacks in light of past denials of equal educational opportunity); Lane v. Wilson, 307 U.S. 268, 275 (1939) (Constitution nullifies "sophisticated as well as simple-minded modes of discrimination"). Where self-government is at stake, courts should view generously measures that protect it and look with a jaundiced eye at provisions that would restrict it.

To be sure, questions of Congressional intent and statutory interpretation cannot be avoided simply by characterizing the Home Rule Act as remedial civil rights

^{*/} If the elected representatives of the citizens of the District are stripped of authority to pass legislation, then a major goal of granting citizens the right to vote is substantially undermined.

legislation. No such label can be a sacred talisman. In deciding the question of severability, however, the Court must recognize that a holding in the defendant's favor would nullify or substantially impair the effectiveness of a statute designed to protect the basic rights of citizens of the District.

D. Protection of the federal interest by means other than the legislative veto.

The history of the Home Rule Act reveals that the legislators were attempting to accommodate two competing interests, namely, self-determination for citizens of the District and the protection of the federal interest in and ultimate sovereignty over the nation's capital. United States v. Cole, supra, 112 D.W.L.R. at 1122. While the legislative veto was one of the devices employed by Congress to preserve the federal interest, it was by no means the only one, and its significance ought not to be overestimated.

Although Congress granted legislative authority to the newly formed elected local government, it explicitly did so

subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I §8 of the Constitution.

Section 102(a) of the Act, D.C. Code 1981 §1-201(a).

Congress further reserved

the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

Section 601 of the Act, D.C. Code 1981 §1-206. (Emphasis added.) Moreover, under the provisions of Section 602(c)(1) of the Act, D.C. Code 1981 §1-233(c)(1), legislation passed

by the local government does not go into effect for a period of 30 days, during which period Congress and the President could prevent the legislation from becoming law without resort to the veto. Even if the legislative veto created by Section 602(c)(2), D.C. Code 1981 §1-233(c)(2) were eliminated, federal control over legislation for the District could be readily preserved, provided that Congress complied with the Article I requirements of bicameralism and presentment to the President. */

In determining whether it is "evident" that Congress would not have authorized the City Council to pass criminal legislation without the legislative veto, the Court must consider whether the veto itself provides so great a measure of protection for the federal interest from improvident action by local officials that its omission would have doomed legislation which passed both Houses overwhelmingly. In this regard, it is noteworthy that those members of Congress who wished to exclude authority over criminal legislation from the Act viewed the veto as a superfluous and therefore useless device. Congressman Broyhill, an opponent of home rule, complained during the floor debate that

this thirty day so-called veto power . . . is somewhat [sic] of a farce, because we know that we can legislate an act of Congress to repeal any act of this Council.

Home Rule History, p. 2382. Congressman Landgrebe, another opponent, expressed the view that

this type of [veto] provision is of little value in limiting the authority of the local government, inasmuch as it is not of significant difference with a provision that would call for the Congress through its entire legislative process to reverse or nullify an enactment of the local council.

Home Rule History, p. 3025. The Court has found nothing

*/ Even with the veto excised, the layover period would remain.

in the legislative history to suggest that proponents of home rule attempted to contest these remarks.

The Court is of the opinion that Congressmen Broyhill and Landgrebe were probably correct in their evaluation of the effectiveness and importance of the veto provision in protecting the federal interest. Although veto by one House of criminal legislation or by both Houses of other legislation might be more expeditious than the formal enactment of repealing measures, there is little if any evidence that such marginally greater convenience was a controlling consideration in the passage of the Home Rule Act.

E. Overwhelming passage of home rule measures by both Houses without a legislative veto.

After the House and Senate versions of the Home Rule Act had been reconciled in conference, the final version was passed in both Houses by overwhelming majorities. The vote in the Senate was 77-13. The vote in the House was 272-74. Home Rule History, pp. 3107-3109, 3124-3125.

There was no legislative veto in the original House version. */ Indeed, the House defeated amendments proposed by Congressman Broyhill and Congressman Nelson, which would have included a legislative veto, by votes of 273-138 and 273-144 respectively. Home Rule History, pp. 2381-2385, 2443-2452. There was obviously no overwhelming sentiment for the veto in the House.

*/ That version did not confer legislative authority on the City Council in the criminal field, so that a legislative veto was arguably unnecessary. The reason for this omission of such authority, however, was not reluctance on the part of the House to trust the Council on criminal matters but rather a disposition to await action on the Code by a law revision commission. See pp. 34 et seq., infra.

Although the Senate version did include the veto mechanism, there is no indication that it was an indispensable ingredient without which the Act would not have passed. Indeed, between 1951 and 1971, the Senate had overwhelmingly passed several home rule bills, none of which would have restricted the District's legislative authority by a congressional veto device. Home Rule History, p. 2723. As explained by the representative of the Congressional Research Service,

the 1951 Senate Report specifically noted that the 'present bill omits any congressional veto provision. The sponsors believe there is ample legal authority to support the constitutionality of a direct grant of legislative power to a mayor and a District Council.' S.Rept. No. 630, 82d Cong., 1st Sess., 11 (1951). The overriding power to legislate, delays in effective dates of District legislation, presidential veto power and enumeration of substantive limits on the District's legislative authority were various means employed to reserve congressional authority and protect the federal interest in the bills that passed the Senate in this twenty-year period. See, e.g. S. Rept. No. 17115, 85th Cong. 2d Sess. 29 (1958), 105 Cong. Rec. 13423 (1959).

The Legislative Veto Provisions, supra, p. 10.

Under these circumstances, and even allowing for the changing composition of the Senate, it appears that the federal interest was substantially protected by devices other than the veto, that Congress recognized this, and that the veto was added as an additional protection, rather than as an indispensable prerequisite for granting legislative authority. The substantial margins by which the legislation passed bolster this conclusion.

F. The inconclusiveness of the legislative history.

In assessing Congressional intent, the Court must not become so preoccupied with the trees that it is unable to see the forest. The enactment of the Home Rule Act was an important historical event for the District of Columbia, and the issues here presented must be placed in an appropriate context.

In confidently urging enactment of the conference committee compromise, Senator Mathias stated that

Today, we find that this body, this U.S. Senate, which has gone on record eight times in eight separate Congresses as favoring home rule, will have the privilege of taking the final congressional step to restore to the citizens of the District of Columbia some measure of self-government.

Home Rule History, p. 3115. He added that

Home rule for the District of Columbia is simply an idea whose time has come.

Ibid., p. 3116. (Emphasis added.) As previously noted, overwhelming majorities of both Houses agreed with him.

The Court finds it most unlikely that the course of history would have been derailed if Congress had known that the legislative veto was unconstitutional, considering that the layover and repeal remained available. In the words of the representative of the Congressional Research Service,

the confluence of political forces at the time, the emergence of the veto as a compromise provision, the history of use of the veto device in home rule proposals, the fact that the veto was only one of many congressional control devices in the Act, and the fact that the Act is workable without the provision arguably militate against holding that Congress would not have enacted home rule legislation or delegated the legislative powers it did to a District legislature without the legislative veto mechanism.

The Legislative Veto Provisions, supra, at pp. 14-15.

If this Court correctly understands the decision in Cole, the Court there essentially held that

1. the House eliminated the Council's authority over the criminal code from its version of the bill because of fears that the Council would be too soft on crime;
2. the Senate included a legislative veto in order to guard against the same tendency;
3. the House, and Congressman Diggs in particular, acceded to the legislative veto in recognition of the reality that without the veto, authority over the Criminal Code could not pass the Senate; and
4. the foregoing compromise secured final passage of the Act.

This Court must respectfully disagree.*/

It should be noted at the outset that, before the Council's authority to amend the criminal code was eliminated from the House bill, the House District Committee, by a vote of 20-4, had reported out an earlier version which included that very authority. Home Rule History, pp. 1376-1377. The Committee did so over the objection of dissenting members who were primarily concerned that the United States Attorney's prosecutive authority might be ceded to the Corporation Counsel. Ibid. at 1567-1568. Although the House did subsequently excise the Council's authority over the criminal code, it did not do so because of any supposed reluctance to trust the Council to be firm enough with

*/ As previously noted, however, the Court agrees with that part of the Cole opinion which holds that Chadha invalidates the legislative veto in the Home Rule Act. See pp. 6-11, supra.

criminals. As Congressman Brock Adams explained:

We have said also that there should not be a change in the criminal statutes. The reason for that is that there is proposed before the Committee on the District of Columbia at the present time a commission to review the criminal code. There will be hearings on that, so that for the present time we know where we are with it and can move on that subject without bringing it into this bill, which basically provides a structure of locally elected government.

Home Rule History, p. 2117. (Emphasis added.) It should be noted that the word "reason" in the italicized language is in the singular, not the plural. This was evidently the only reason, or at least the principal reason.

Subsequently, Congressman Diggs advised his colleagues that under the Conference Committee compromise the Council was prohibited from making changes in the criminal code for two years because

Congress will then have a chance to make the much needed revision of the criminal code. This should take no longer than two years. Subsequent to that action, it seems appropriate and consistent with the concept of self-determination, that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary.

Ibid. at 3042. */ The initial exclusion of Council authority to amend the criminal code was thus tied to an anticipated study and revision of the code, and not to concern on the part of a majority of the House that the Council would be too soft on crime. While fear of excessive leniency

*/ But see Section 602(a)(9) of the Act, D.C. Code 1981 §1-233(a)(9), which prohibits action by the Council for 48 full calendar months after the members take office. Our Court of Appeals has recognized that the purpose of this section was to declare a moratorium on the Council's new legislative authority while the District of Columbia Law Revision Commission proposed and Congress considered a complete revision of the District of Columbia Criminal Code. McIntosh v. Washington, 395 A.2d 744, 751 (D.C. 1978).

undoubtedly existed in the House, there is no indication that it played a significant part in the revision of the House version.

The second assumption on which the Cole decision rests -- that the Senate insisted on the legislative veto to forestall passage of lenient criminal laws by the local government, and would not otherwise have allowed the Council to dabble in criminal matters -- is likewise unsound. As previously noted, p. 32, supra, the Senate had readily and repeatedly passed by substantial margins home rule bills which did not contain such a veto mechanism.

Congressman Diggs did state on the floor of the House that

the real reason the Senate has been able to pass home rule in the past so expeditiously is because it was just felt in the other body that as long as there is a veto apparatus, as long as there is a congressional process to correct what they might consider to be a misaction on the part of the local legislative body, then they were inclined to be generous about it.

Home Rule History, p. 3050. (Emphasis added.) Although Congressman Diggs may have mistakenly believed that the legislative veto, as such, had been responsible for securing the passage of prior home rule bills in the Senate, the underlined phrase in the quoted passage is more revealing than his allusion to the veto. If the Congressman's reference to the veto as if it were the same thing as a corrective process was imprecise, this was because the distinction between veto and repeal was seldom precisely articulated (except by opponents who thought neither adequate). See pp. 30-31, supra. What the Senators were concerned about was the availability of a corrective process, with which the veto was associated in a rather vague and

general way. The Court agrees with the United States Attorney's contention that

while Congress also included legislative veto provisions in the Act, there are indications in the legislative history that it did not differentiate seriously between the two forms of control -- repeal and veto -- and that it was most insistent on having a sufficient reporting or lay-over period in which to express its disapproval of objectionable Council legislation. */

An examination of the 4000-page Home Rule History **/ discloses that there was comparatively little discussion in Congress of the issues here presented. Far more attention was devoted to the issues of fiscal autonomy, the federal payment, and whether there should be partisan elections in the nation's capital. The flavor of a number of the allusions to the legislative veto suggests that the mechanism was a subsidiary issue, a third or fourth reason, seldom clearly distinguished from Congressional authority to repeal Council action. There is no evidence in the legislative history that any member of Congress ever said anything like

now that the bill contains a legislative veto, and not just Congressional power to repeal, I can vote for it.

Congressman Diggs' allusion to the Senate position, see p. 36, supra, was, in the Court's view, at best ambiguous.

*/ Brief for the United States in Gary v. United States, D.C. App. No. 83-796, at p. 18, citing Home Rule History pp. 1601, 1799, 3031.

**/ This trial judge obviously did not have the time to read all 4,000 pages. The four volumes of history are, however, remarkably well indexed, and most of the relevant material in the legislative history has probably been identified in Judge Smith's opinion in Cole, in the briefs of the United States, the Corporation Counsel, and the Public Defender Service in Gary and Cole, and as a result of this Court's own review.

In light of the foregoing discussion, it is certainly not "evident" to the Court that Congress would not have given the local government authority to enact criminal legislation without this particular mechanism. Accordingly, the Court concludes that the veto is severable from the remainder of the Home Rule Act, and that the Act survives Chadha.

VI

The Court recognizes that, if its ruling herein is correct, and if it is applied to cases implicating the Sexual Assault Reform Act, as to which the legislative veto was in fact exercised, difficult questions will arise as to prospective or retroactive application. In the present case, however, the Court's ruling sustains the authority of the Council to pass the Theft Act, and the Court need not address the issue of retroactivity at all. The defendant's motion to dismiss the Theft II charge against him is therefore DENIED; and

IT IS SO ORDERED this 2nd day of October, 1984. */

Frank E. Schwelb

FRANK E. SCHWELB
Judge

*/ As this Opinion was being completed, the Reagan administration apparently agreed to legislation which would address the Chadha problem by providing for a 60-day layover period for proposed changes in the criminal code by the District Government, during which period such proposed changes could be disapproved by both Houses of Congress and the President. Washington Post, September 27, 1984, p. A-1; September 29, 1984, p. B-3. If this Court's decision in the present case is correct, then the proposed legislation would largely clarify current law and would not drastically alter it insofar as the issues here addressed are concerned.

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DISTRICT OF COLUMBIA

HOME RULE ACT

Legislative veto provision of D.C. Home Rule Act is severable from other provisions of the Act.

UNITED STATES v. DAVIS, Sup.Ct., D.C., Crim. No. M-8042-84, October 2, 1984. *Opinion per Schwelb, J. Scott Fulton for Plaintiff. Judith Sinkin for Defendant.*

SCHWELB, J.: The questions presented in this case are whether the Supreme Court's invalidation of the legislative veto in *INS v. Chadha*, ___ U.S. ___, 103 S.Ct. 2654 (1984) nullifies a similar mechanism in the District of Columbia Self-Government and Governmental Reorganization Act of 1973 (the Home Rule Act) and, if so, whether the veto is severable from other provisions of the Act. These issues are important because, if *Chadha* were held applicable and the veto non-severable, then the authority of the elected representatives of the District of Columbia to enact criminal legislation, and arguably any legislation, would have no valid legal basis, and important elements of home rule would simply cease to exist.

After carefully considering the contentions of the parties and the opinions of three of its colleagues who have written on the subject,¹ the Court concludes that the decision in *Chadha* has in fact invalidated the legislative veto over changes by the City Council in the criminal laws. The statutory language and legislative history, are, however, barren of proof that the Home Rule Act, which returned to the citizens of the District of Columbia fundamental rights that had been taken from them a century earlier largely for racially discriminatory reasons, would not have been enacted without the legislative veto. Home rule for the District of Columbia, as Senator Mathias stated in urging its adoption, was an idea whose time had come. The Act explicitly authorizes Congress to repeal² legislation enacted by the District of Columbia government, and the additional inclusion of the veto provision was not critical to the passage of home rule. Accordingly, the Court concludes that the veto is severable from the other provisions of the Act.

II

On July 5, 1984, the defendant Tyrone Davis was charged by information with a number of misdemeanors arising out of the alleged misappropriation of one Eric Blanton's moped. Count E of the information alleges that Davis committed theft in the second degree (Theft II) in violation of D.C. Code 1981 §§3811 and 3812(b). The cited code sections are a part of the District of Columbia Theft and White Collar Crime Act of 1982 (hereinafter the Theft Act), which Act was

United States v. Cole, 112 D.W.L.R. 1117 (Super.Ct.D.C. 1984) (Smith, J.); *United States v. Langley*, 112 D.W.L.R. 801 (Super.Ct.D.C. 1984) (Moutrie, C.J.); *United States v. McIntosh*, 112 D.W.L.R. 789 (Super.Ct.D.C. 1984) (Shuker, J.).

2. The repeal may be accomplished preemptively, during a layover period before such legislation becomes effective.

passed by the City Council, signed by the Mayor, and transmitted to both Houses of Congress for review pursuant to Section 602(c)(2) of the Home Rule Act, D.C. Code 1981 §1-233(c)(2). Under that provision, a proposed change by the City Council in the criminal code becomes effective at the end of a thirty day period following transmission to the Congress unless during that time either House of Congress adopts a resolution disapproving it. Neither House adopted such a resolution, and the Theft Act became law. According to the government's brief in this case, there have been approximately 1700 convictions under the Theft Act, and about 1500 such prosecutions are pending.

Davis has now filed a motion to dismiss the Theft II charge, contending that the Theft Act is unconstitutional. Relying heavily on Judge Smith's recent decision in *United States v. Cole*, *supra*, Davis claims that the provision in Section 602(c)(2) authorizing disapproval of changes in the criminal code by either House of Congress without participation therein by the other House and without presentment to the President was invalidated by *Chadha*, and that if the veto falls, the Council's authority to enact criminal statutes must also fall, because

Congress would not have given the D.C. City Council authority over criminal statutes without an associated veto.

Davis further argues that since only the Theft Act, which purportedly became effective on December 1, 1982, applies to offenses committed on or after that date, and since the Theft Act is unconstitutional, he cannot be prosecuted at all for the alleged misappropriation of the moped.³

The government concedes that the *Chadha* decision invalidates the Congressional veto mechanism in the Home Rule Act,⁴ but contends that this provision is fully severable from the remainder of the Act. The Court agrees.

III

Before addressing the substantive *Chadha* questions raised by the defendant, the Court must satisfy itself that they are justiciable. The present case is unlike those decided recently by other judges of this Court,⁵ in that the legislative veto has not been exercised with respect to the statute claimed to be invalid. The City Council passed the Theft Act, the Mayor signed it, and neither House of Congress passed a disapproving resolution. Evidently, the governments of the United States and of the District of Columbia are in full agreement as to what the law pertaining to theft in this jurisdiction is or should be. The question therefore arises whether the validity of an unexercised legislative veto is ripe for

3. The defendant apparently contends that offenses committed before December 1, 1982 are governed by the old larceny statute, D.C. Code 1981 §§22-2201 *et seq.*, but that the old statute cannot reach conduct on or after December 1, 1982.

4. This, at least, is the position taken by the United States in cases now pending in our Court of Appeals. In the present case, the government contends that the Court need not reach the issue whether *Chadha* is applicable because the veto is severable in any event.

5. See p. 1, note 1, *supra*. Those cases all arose as a result of the veto by the House of Representatives of the District of Columbia Sexual Assault Reform Act of 1981. D.C. Act 4-69.

judicial resolution. In *Clark v. Valeo*, 182 U.S.App.D.C. 21, 559 F.2d 642 (1977), *aff'd* 431 U.S. 950 (1977), a pre-*Chadha* decision in which a similar challenge to a statute was held not to be justiciable because the veto there in question had not yet been exercised, the Court observed that the

contention that there are no real considerations of ripeness here can only rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of the court.

182 U.S.App.D.C. at 28, n.8, 559 F.2d at 649. See also Ehlike, *The Legislative Veto Provisions of the District of Columbia Home Rule Act in the Wake of INS v. Chadha* (Congressional Research Service July 5, 1983) (hereinafter referred to as *Legislative Veto Provisions*), p. 15.

Nevertheless, the Court thinks that the issues in the present case⁶ are justiciable and ripe for decision. If the defendant's legal analysis is correct, and if the legislative veto cannot be severed from the City Council's authority to legislate in the criminal area, then the Theft Act was never validly enacted and the statute under which Davis is being prosecuted is a nullity. It is axiomatic that a defendant may not be tried and convicted under a statute that was never effectively enacted. Federal crimes must be statutory and the authority to declare actions in the District of Columbia criminal, which is confided to Congress by Article I section 8, cl. 17 of the Constitution, cannot be exercised by any other body unless it has been properly delegated. Cf. *United States v. Grimaud*, 220 U.S. 506 (1911). In his decision in *Cole*, on which Davis places heavy reliance, Judge Smith explicitly ruled that

the invalidation of §602(c)(2) also serves to invalidate the delegation of authority over the criminal code to the City Council.

112 D.W.L.R. at 1124.

If the statute delegating authority to the City Council is unconstitutional because of the presence of an invalid provision for a legislative veto, then the Council had no authority to pass the Theft Act, regardless of whether or not the legislative veto was subsequently exercised. If the Council could not enact such a law, Davis cannot be tried for violating it. Accordingly, the Court must reach the substantive *Chadha* issues.⁷

(Cont'd. on p. 2253 - Act)

6. The Court in *Clark* relied in part on Justice White's view, expressed in *Buckley v. Valeo*, 424 U.S. 1, 284-286 (1976), that the one-house veto is valid. 182 U.S.App.D.C. at 28, n.8, 559 F.2d at 649. As Justice White was the main dissenter in *Chadha*, the continued viability of this portion of the *Clark* analysis is questionable.

7. Arguably, the Court should rule on the issue of severability first, because if the veto provision is severable, then the Theft Act is valid, and Davis can be prosecuted under it whether or not *Chadha* applies. Given such a holding, Davis would not have standing to contend that *Chadha* applies, since the result of that

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ACT

(Cont'd. from p. 2249)

IV

The Court agrees with the defendant that the provision in the Home Rule Act for a legislative veto cannot survive *Chadha*. Because the arguments on both sides of this question have been effectively marshalled by Judge Smith in *Cole* (Holding that *Chadha* applies) and by Chief Justice Moultrie in *Langley* and Judge Shuker in *McIntosh* (both holding that *Chadha* does not apply), the Court will address the subject with as much admittedly uncharacteristic brevity as it can muster for the occasion.

The basic teaching of *Chadha* is that when Congress acts in a legislative capacity, Article I of the Constitution requires that it act through both Houses (bicameralism) and that the President be given the opportunity to sign or veto its action (presentment). Legislative veto provisions which do not meet the requirements of bicameralism and presentment to the President fail. The legislative veto in the Home Rule Act does not meet these requirements.

In assessing the validity of the veto in *Chadha* the Court was able to find "but four⁸ provisions in the Constitution . . . by which one House may act alone with the unreviewable face of law, not subject to the President's veto." 103 S.Ct. at 2786. The opinion of the Court, at the very least, strongly implies that these four provisions are exclusive. *Expressio unius est exclusio alterius*.⁹ Indeed, the Court observed that when the framers of the Constitution wished to carve out an exception to Article I procedures for enacting legislation, they did so with unmistakable clarity.

controversy would not affect him. Conversely, however, if the Court were to hold *Chadha* inapplicable, then it would not have to reach the issue of severability. In light of this not so ingenious paradox, the Court has elected to take up the contentions in the order that the defendant has made them. Cf. *Chadha, supra*, 103 S.Ct. at 2774, n.7; *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 Harv.L.Rev. 1182, 1189-1192 (1984) (hereinafter referred to as *Severability of Veto Provisions*).

8. These four provisions allow one House or the other

- (1) to initiate impeachments (House),
 - (2) to conduct impeachment trials (Senate),
 - (3) to approve presidential appointments (Senate);
- and
- (4) to ratify treaties (Senate).

9. The expression of one thing implies the exclusion of the other.

103 S.Ct. at 2786.

The requirements of bicameralism and presentment are, of course, applicable only to legislative action by the Congress. In *Chadha*, the Court held that the veto under consideration was legislative in character, and thus subject to these requirements, because it had

the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.

103 S.Ct. at 2784. Mr. Chadha, an alien, had challenged a resolution of the House of Representatives which purported to veto an administrative decision of the Immigration and Naturalization Service (INS) suspending his deportation. The Court ruled that by vetoing the suspension, Congress had altered Mr. Chadha's status, and that its action in doing so was legislation in all but name, and thus subject to the provisions of Article I, 103 S.Ct. at 2784-85. The Court further observed that the legislative character of the veto was reflected by the action the veto supplanted, namely, legislation requiring deportation. *Ibid.* at 2785.

The legislative veto in *Chadha* directly affected only one alien. No legislation could be more private, let alone local, than a bill permitting a single individual to remain in the country. By contrast, the actual or prospective veto of a criminal law enacted by the City Council is of general applicability and alters the legal rights, duties and relations of numerous persons. Accordingly, if the Congressional veto in *Chadha* is sufficiently legislative in character to implicate the bicameralism and presentment requirements of Article I, then this is true, *a fortiori*, of the veto provisions of the Home Rule Act.

Article I, 8, cl. 17 of the Constitution invests Congress with the authority to "exercise exclusive Legislation in all cases whatsoever over [the District of Columbia]" (emphasis added). Disapproval of proposed legislation by the City Council is, in this Court's view, a classic exercise

of that authority. Absent the veto in the Home Rule Act, Congress could overrule the City Council only by exercising its reserved legislative authority over the District. See D.C. Code 1981 §1-20(a). The action which the veto supplants being legislative, the veto itself is of the same character.

The gravamen of the decisions in *Langley* and *McIntosh* is that the Constitution accords Congress plenary authority over the District of Columbia and that this authority is not subject to the *Chadha* restriction. See, e.g. *Palmore v. United States*, 411 U.S. 389, 397 (1973); *District of Columbia v. Thompson*, 346 U.S. 100, 108-109 (1953). It is suggested that *Chadha* deals with issues of separation of powers between the legislative and executive branches on a national scale, and that these questions do not arise in the context of purely "local" legislation affecting the District of Columbia. The authors of these opinions conclude that the reasons for the *Chadha* ruling therefore have no application to the legislative veto contained in the Home Rule Act, and that the veto therefore survives a constitutional challenge.

Although reasonable persons may (and do) differ on this very complex issue, the Court respectfully declines to follow *Langley* and *McIntosh*. While it is true that Congress has broad powers over the District of Columbia, Congressional authority over immigration matters is just as "plenary."¹⁰ Congress was nevertheless required to comply with the bicameralism and presentment requirements of Article I when it dealt with the question whether Mr. Chadha should be permitted to remain in this country. The uncontested fact that Congress has extensive authority to legislate for the District of Columbia does not support a conclusion that it may do so in a fashion which is impermissible in the exercise of its equally broad power to deal with immigration matters. Even if one assumes, *arguendo*, that the provision authorizing a one-House veto of criminal legislation passed by the City Council can be characterized as addressing "local" rather than national concerns,¹¹ there is nothing in the *Chadha* opinion that suggests that this distinction is of controlling consequence. The power of Congress to legislate broadly with respect to the District has never included freedom to ignore constitutional restraints on the manner in which such authority is exercised. Indeed, as the Supreme Court put it in *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899):

Congress . . . may exercise within the District all legislative powers that the legislature of a state might exercise within the state . . . so long as it does not contravene any provision of the Constitution of the United States.

(Emphasis added.)

The Supreme Court cases relied on in *Langley* and *McIntosh* address the question *whether* Congress may exercise certain authority over the District of Columbia, not *how* Congress must proceed when it does so. As the representative of the Congressional Research Service of the Library of Congress stated, in expressing the view that *Chadha* invalidates the legislative veto in the Home Rule Act,

the unique reach of congressional power over

10. "Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

11. The District of Columbia is the seat of government. Hundreds of thousands of federal officials and employees, including the President, members of Congress, and civil servants of high and low status live or work there. Foreign embassies are located in the District. The federal government's stake in the criminal and civil laws of the District of Columbia is thus substantial. See generally letter of November 15, 1983 from Assistant Attorney General Robert A. McConnell to Senator William V. Roth, Jr., Chairman of the Senate Committee on Governmental Affairs, detailing the views of the Department of Justice on *Chadha* issues.

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the District of Columbia thus relates to the subjects of legislation, the substantive reach of congressional acts respecting the District.

Legislative Veto Provisions, supra. (Emphasis partially in original, partially added). Although Congressional authority over the District of Columbia "involves a constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982), it does not permit exclusion of one political branch from the legislative process in the face of a precise constitutional command to the contrary.

The legislative veto in the Home Rule Act is to some degree distinguishable from that in *Chadha* in relation to its impact on the separation of powers between the legislative and executive branches. In *Chadha*, the action purportedly subject to veto by one House of Congress, acting alone, was performed by the INS, which is a part of the executive branch. In the Home Rule Act, the action which a single House may purportedly veto is that of the government of the District of Columbia. The Court's reading of the majority opinion in *Chadha*, however, persuades it that there must be compliance with the bicameralism and presentment requirements whenever Congress undertakes any legislative action, and not just action which purports to overrule a decision by the executive branch.¹² Moreover, the President, as the elected representative of the entire nation, surely has at least as great an interest in participating in a decision whether a statute passed by the elected representatives of the citizens of the District should be overridden by members of Congress (who are elected elsewhere and answerable only to voters with an attenuated stake in the outcome) as he has in the far more parochial question whether a single alien should be deported. Accordingly, the Court finds *Chadha* controlling and the legislative veto in the Home Rule Act invalid for non-compliance with the bicameralism and presentment requirements of Article I.¹³

V

Having concluded that the decision in *Chadha* invalidates the Home Rule Act's legislative veto, the Court must now determine whether the City Council's authority to enact legislation, or at least criminal legislation,¹⁴ must fall with the doomed mechanism. The Court holds that home rule survives the *Chadha* challenge intact,

12. It is worth noting that the legislative veto in the Home Rule Act was expressly included by Justice White in the Appendix to his dissenting opinion in *Chadha*, in which he enumerated the various such provisions apparently doomed by what he believed to be an overbroad majority decision. 103 S.Ct. at 2815.

13. That the First Congress, which included many members who had helped to draft the Constitution, inserted legislative vetoes into the ordinances governing certain territories, see *McIntosh, supra*, 112 D.W.L.R. at 795; *Chadha, supra*, 103 S.Ct. at 2800-2801, n.18 (White, J. dissenting), suggests that *Chadha* may perhaps have been decided contrary to the views of some members of that Congress. Given the majority decision in *Chadha*, however, and the lack of anything in that decision on which this Court can predicate a controlling distinction between the legislative veto there invalidated and the provision here at issue, the Court cannot agree with Judge Shuker that the presence of such a veto in the early territorial ordinances can save the challenged provision of the Home Rule Act.

14. The Home Rule Act vested the City Council with general legislative authority, which is not sub-divided into criminal and civil. It included a one-House veto for criminal legislation, and a two-House veto for other legislation. D.C. Code 1981 §1-233(c)(2). If the authority to enact criminal legislation fails, then the Council's other legislative authority is at least imperiled, although the somewhat artificial division of that authority in the *Cole* opinion for the purpose of insuring that only the power to pass criminal laws must fall might be justified as "promoting the goal of minimizing interference with Congress." See Note, *Severability of Veto Provisions: A Policy Analysis*, 97 Harv.L.Rev. 1182, 1195 (1984) (hereinafter referred to as *Severability of Veto Provisions*).

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because the veto is fully severable from the remainder of the Act. The Court respectfully declines to follow the *Cole* decision, *supra*, in which another judge of this Court reached a contrary conclusion.

The principal reasons for this Court's holding that the legislative veto is severable are the following:

(a) In *Chadha*, the Supreme Court reiterated that unconstitutional provisions are severable "unless it is evident that Congress intended otherwise." 103 S.Ct. at 2774. (Emphasis added.) In the absence of a compelling showing that Congress would not have delegated authority over criminal laws to the local authorities, the Council's legislative power must be sustained.

(b) In the present case, the two sovereigns affected by the issue before the Court, the United States and the District of Columbia, agree that the legislative veto is severable from the remainder of the Act.

(c) The Home Rule Act was enacted to return to citizens of the District basic rights which were taken from them a century earlier, in large part for racial reasons. It is therefore a remedial civil rights law which must be generously construed to achieve its salutary goals.

(d) The basic purposes of the legislative veto—to protect the federal interest in the nation's capital and to secure the ultimate authority of Congress—are substantially achieved by other provisions of the Home Rule Act.

(e) Both Houses of Congress have passed home rule legislation not including a legislative veto by substantial margins. It is therefore improbable that home rule would have been defeated but for the inclusion of the veto.

(f) After examining the legislative history of the Home Rule Act, and in the light of the foregoing considerations, the Court is satisfied that the Act would have passed without the veto, and that the contrary is not "evident."

The Court addresses each of these considerations in turn.

A. Burdens and Presumptions.

"The cardinal principle of statutory construction is to save and not to destroy." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion). Accordingly, the Supreme Court has insisted that courts exercise caution on the issue of severability, lest they in effect throw out the baby with the bath water. An invalid provision is "presumed severable if what remains after severance is fully operative as a law." *Chadha, supra*, 103 S.Ct. at 2775, citing *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). Otherwise valid portions of the law will be sustained "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not." *Chadha, supra*, 103 S.Ct. at 2774, citing *Buckley v. Valeo, supra*, 424 U.S. at 108 and *Champlin, supra*, 286 U.S. at 234. Severability is presumed because, as stated in *Regan v. Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 3269 (1984) (plurality opinion):

in exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this Court has observed, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid. *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909).

The statute in question in *Chadha*—244(c) of the Immigration Act—contains a severability clause, whereas the Home Rule Act contains none. The Supreme Court has not been entirely consistent in its teachings as to the significance, if any, of this distinction. Sixty years ago, the Court characterized the presence of a severability clause as an aid in determining Congressional intent, but not as an "inexorable command." *Dorcy v. Kansas*, 264 U.S. 286, 290 (1924). Subsequently, the Court indicated that "in the absence of a severability clause, the presumption is that the legislature intends to act to be effective as an entirety." *Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42 (1929); see also *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184 (1932). The more recent cases, however, attach far less significance to whether or not Congress included in a statute what may often be a recitation of severability by rote. "The ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585, n.27 (1968); *Tilton v. Richardson, supra*, 403 U.S. at 684 (plurality opinion); *Regan v. Time, Inc.*, 104 S.Ct. at 3269. In *Chadha*, the Court indicated that the severability clause "gives rise to a presumption" of severability, 103 S.Ct. at 2774, but went on to suggest that severability may also be presumed where the legislation remains operative after excision of the veto, irrespective of the inclusion *vel non* of a severability clause.

There can be no question that the Home Rule Act remains "fully operative as a law" if the legislative veto is excised. The City Council has enacted numerous laws since Home Rule, including a number of criminal measures. See, e.g. the Sexual Assault Reform Act of 1981, D.C. Act 4-69. Bail Amendment Act, D.C. Law 4-152; the Theft Act, D.C. Law 4-164; the Sentencing Improvements Act, D.C. Law 4-202. Only the Sexual Assault Reform Act has been the subject of a

legislative veto. Regardless of the final disposition of the litigation over that veto, see *United States v. Boyd*, *supra*, it is incontestable that the Home Rule Act can function and that the legislative veto has had a comparatively minor effect on its operation. The presumption of severability therefore applies.

The ultimate issue in determining severability is the intent of Congress. See *Consumer Energy Council of America v. F.E.R.C.*, 218 U.S.App.D.C. 34, 49, 673 F.2d 425, 440 (1982), *aff'd* 103 S.Ct. 3556 (1983). Legislative intent with respect to an issue which Congress never addressed is not always easy to discern. It has been described as "at best a reified, *ex post facto* approximation of statutory purpose." *Severability of Veto Provisions*, *supra*, 97 Harv.L.Rev. at 1195. The intrinsic difficulties in assessing intent are compounded in the case of governmental action, which is frequently the product of compromise, of collective decision making, and of mixed motivation. *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J. concurring). Given the impediments encountered in probing the collective state of mind of a group of legislators on a hypothetical set of facts, the Court is inclined to agree with the writer of a recent Harvard Law Review Note that

a court should invalidate an entire act only if removing the offending provision would defeat the statute's essential purpose. In determining the purpose of the statute as a whole, courts should ignore the veto provision. The veto provision is designed only to reserve congressional control; attributing that purpose to the entire statute yields an absolute rule against severability that cannot stand because it conflicts with the result in *Chadha*. Thus, the courts should sever veto provisions when doing so frustrates only the subsidiary policy of congressional control. If Congress decides that the statute should not survive without its veto provision, Congress is free to repeal the statute.¹⁵

Severability of Veto Provisions, *supra*, 97 Harv.L.Rev. at 1182. Even short of that position, however, the burden imposed by the case law on a party seeking to show non-severability is a formidable one. Mere uncertainty about the legislature's intent is insufficient to rebut the presumption of severability; a convincing showing is required. *E.E.O.C. v. Hernandez Bank*, 724 F.2d 1188, 1192 (5th Cir. 1984).

B. The positions of the governments concerned.

The issue of severability here presented implicates the interests of the governments of the United States and of the District of Columbia. Each of these governments has taken the unambiguous position before our Court of Appeals that the legislative veto is severable from the remainder of the Home Rule Act and that the authority of the City Council to pass criminal and other legislation therefore survives *Chadha*. See the brief for the United States in *Gary v. United States*, Nos. 83-796, *et al.* filed August 17, 1984, at pp. 15-20;¹⁶ and the brief for the District of Columbia, Intervenor in the same case at pp. 23-41. The failure of either government, or of any branch of either government, to contend that home rule must fall as a result of *Chadha* bolsters the Court's view that it should not invalidate the Council's legislative authority without a very strong showing indeed.

It is worth noting that in *Chadha*, Congress, in its capacity as intervenor, contended that the veto provision in the Immigration and

Naturalization Act was not severable from the rest of the statute. 103 S.Ct. at 2774. In spite of this, and notwithstanding Justice Rehnquist's insistence in dissent that "Congress was unwilling to give the Executive Branch permission to suspend deportation on its own," 103 S.Ct. at 2817, the Supreme Court held that the invalid veto was severable. In the light of the position of the United States¹⁷ with respect to the Home Rule Act, the argument for severability is stronger here in this respect than in *Chadha*.

C. The Home Rule Act as a remedial civil rights law.

(1) History.

Local government was already established within the boundaries of the District of Columbia at the time of cession by Maryland (1778) and Virginia (1779). *Home Rule History*,¹⁸ at p. 1487. After the city was incorporated by Act of Congress in 1802, its government consisted of a Mayor appointed by the President and a City Council elected by the free white male residents of the City of Washington.¹⁹ *Ibid.* In 1820, the

17. Although the positions of the executive and legislative branches could reasonably be expected to differ on the applicability of *Chadha* to the Home Rule Act, there is no reason to suppose that the position of the Department of Justice should be at odds with the position of Congress with respect to severability. The interests of the two branches do not conflict in any way with respect to the latter issue.

18. Committee Print, *Home Rule for the District of Columbia 1973-74, Background and Legislative History of H.R. 9056, H.R. 9482 and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act (House Committee on the District of Columbia 1974)*, hereinafter cited as *Home Rule History*.

19. See Act of May 3, 1802, ch. 53, 2 Stat. 195, discussed in Newman and Deput, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act, 24 American U.L.Rev. 537, 542* (1975) (hereinafter cited as *Bringing Democracy*).

City's Charter was amended to provide for the popular election of the Mayor. Act of May 15, 1820, 3 Stat. 583; *Bringing Democracy*, *supra*, at 543. An elected municipal government remained in existence until 1870.

The circumstances under which the citizens of the District lost the franchise are worth recounting. Following the Emancipation Proclamation, the Radical Republicans proposed that Congress enfranchise the black population of the nation's capital. *Bringing Democracy*, *supra* 543-44, citing J. Keeley, *Democracy or Despotism in the American Capital*, pp. 108-116 (1939). These proposals did not generate an enthusiastic response from the white citizens of the District. In 1865, a committee of the Common Council drafted the following statement of the City's official view:

The white man, being the superior race²⁰ must rule the black. Why he is black and we white, or why we the superior and he the inferior race are matters past our comprehension . . . If it took the ancient Briton a thousand years to emerge from his only half-civilized condition . . . to reach the point to qualify him for the exercise of the right [to vote], how long would it reasonably take the black man, who but about two hundred years ago was brought from Africa.

Constance McLaughlin Green, *Washington: A History of the Capital, 1800-1950* (Princeton University Press 1962) (hereinafter referred to as *Washington, a History*), p. 297. An 1865 referendum in Washington and Georgetown on the question whether blacks should be allowed to vote had the following results:

	For	Against
Washington	35	6991
Georgetown	1	712

Bringing Democracy, *supra* at 544.²¹ Nevertheless, in 1866, a Radical Republican Congress overrode white opposition and, for a short period, made democracy color-blind.

Although white citizens were in the majority in Washington after the Civil War, blacks represented about 30% of the population. *Washington, a History*, *supra*, p. 306, citing the Special Census of 1867. In the 1868 election, Sayles J. Bowen was elected Mayor with the support of blacks and Radical Republicans. Under Bowen's administration, the word "white" was stricken from every passage where it appeared in the laws of the District of Columbia. Hendersson, *Why Home Rule Was Taken from D.C.*, *Washington Star News*, Nov. 11, 1973, G, p. 2 col. 1;²² *Washington, a History*, *supra*, p. 321; *Bringing Democracy*, *supra*, p. 544, n.48. Other taboos also foundered, and some black and white children began to attend public school together with the blessing of elected public officials.

Understandably, Bowen's policies triggered opposition on the part of many white residents. An anti-Negro coalition defeated Bowen in his bid for re-election. Congress promptly replaced

20. The "superiority" of the white race apparently did not avoid the implication, in incorrect English, that the white man is a race.

21. The results are reported slightly differently in *Washington, a History*, p. 298:

	For	Against
Washington	35	6591
Georgetown	0	465

According to the Star of December 23, 1865

the ballot box at the special election doubtless received many ballots from fingers that pulled rebel triggers.

Ibid. at 299.

22. John B. Hendersson, Jr. is the pen name of a historian and speechwriter working for the federal government. His article is hereinafter referred to as *Why Home Rule Was Taken*.

15. The Court thinks it at least improbable that Congress would repeal the Home Rule Act or any major provision thereof if the legislative veto were excised from it.

16. This brief bears the names of the United States Attorney, of a Justice Department attorney, and of several Assistant United States Attorneys.

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the elective office of mayor with the office of a governor to be appointed by the President. A bicameral local legislature was created, with a presidentially appointed Council and a House of Delegates to be elected by the male residents of the District. In 1872 and again in 1873, the new partly elective local government enacted criminal legislation which made it a misdemeanor to discriminate on the basis of race with respect to access to most places of public accommodation. See *District of Columbia v. Thompson*, 346 U.S. 100 (1953), *rev'g*, 92 U.S.App.D.C. 34, 203 F.2d 579 (1953). In 1874, Congress abolished government by an appointed governor and a partially elected legislature and created a new system of government by three presidentially appointed Commissioners and no legislature at all. Act of June 20, 1874, 18 Stat. 116 *et seq.*; *Why Home Rule Was Taken*, *supra*. Elected local government, which had continued undisturbed for seventy years when only whites voted, lasted barely a tenth of that time when blacks were admitted to the franchise.

For almost exactly a century after 1874, persons appointed by the President—initially three Commissioners, and from 1967 to 1973, one Commissioner and nine appointed members of the Council—were in charge of the local government of the District of Columbia. The citizens of the District—both black and white—were disfranchised. Schools were once again racially segregated, and remained so for more than eighty years, see, *Bolling v. Sharpe*, 347 U.S. 497 (1954). The District's public accommodations laws were never enforced for a like period. *District of Columbia v. Thompson*, *supra*. Although there were doubtless many reasons for the loss of the right to vote, there can be no question, considering the tenor of the times, that race played an important part. In the words of historian Henderson:

When Home Rule was withdrawn in 1874 a large minority of the District residents were black. Those who choose to think that this was not a major factor in the act of disfranchisement are of course free to do so, but history will laugh them out of court.

Officially, the act of disfranchisement was in direct response to the overspending and corruption of the Shepherd administration.²³ But at the time the act was publicly recognized as a move to smother growing black political power, represented by the outcome of the 1868 election and the Radical reforms of Mayor Sayles J. Bowen. Conservative newspapers made that clear, coming out frankly in favor of disfranchisement, applauding destruction of the 'curse' of black suffrage.

Why Home Rule Was Taken, *supra*.²⁴ Constance McLaughlin Green, in perhaps the leading history of the District of Columbia, quotes Washington's Common Council in 1971 to the effect that the plan of disfranchisement originated

in the selfish, aristocratical spirit of those who either sympathized with the rebellion, or who can see nothing good . . . in the liberty of all men.

23. Alexander Shepherd was the District's second appointed governor.

24. Henderson's analysis may appear to be in some measure over-simplified. The Court notes that the elective post of mayor was abolished after Bowen had been defeated, so that no such change was needed to remove a particular pro-Negro incumbent. Moreover, at the time District residents were disfranchised, a majority of them were white. As a leading historian has observed, however, some Washingtonians were "willing to surrender their own rights rather than to respect the rights of others, and had welcomed any substitute for a local government in which Negroes would have a voice." *Washington, A History*, *supra*, p. 333. After an elected Mayor helped black citizens, the elective mayorality was abolished. After a partially elected legislature gave blacks equal rights, it too was replaced, and equal opportunity became a dead letter.

Washington, a History, p. 334. Further, in her view,

citizens who had carped about Washington's 'negro government' expected the curtailed power of the electorate to ensure white rule in the future.

Ibid., p. 337. As Representative Diggs, a black Congressman from Michigan who was then Chairman of the House Committee on the District of Columbia, had occasion to remark, in urging his colleagues to reestablish home rule a century after it was taken away:

Rights of self-government have time and time again been proved to apply to all citizens; all, that is, except the people of the District of Columbia. To put the debate today in perspective, it should be noted that the people of the District of Columbia are the only American citizens who have had the right of self-government taken away from them by Congress.

Home Rule History at 2105. Denied their right to vote but fortunately not their freedom of speech, citizens of the District affixed bumper stickers to their cars describing their city as the nation's "last colony."²⁵

By 1973, most members of Congress found this state of affairs unacceptable for reasons both of pragmatism and of principle. In the words of Senator Mathias of Maryland, the existing form of government was

an obsolete and cumbersome and arbitrary system of arrangements that have been made at various times through which authority is diffused and power is fragmented and decision-making is delayed. The Mayor does not have the power, Congress does not have the time, and the people of the District do not have the vote.

Home Rule History, at 3116. From the pragmatic perspective, Senator Eagleton pointedly observed that Congress had been called upon to pass on such issues as the membership requirements of the Metropolitan Police Department's band, the permissibility of flying kites at the base of the Washington Monument, and the addition of seats to the football stadium. *Home Rule History*, p. 2755; see *Bringing Democracy*, *supra*, at 538. Turning to considerations of principle, the House Report on H.R. 9682 reads in pertinent part as follows:

In a democracy, the people should have the right to speak and act in their own interest. Self-determination is tied to self-government. For the citizens of the District of Columbia, self-government comes through home rule. To continue to deny the citizens of Washington, D.C. home rule is, in fact, to deprive them of full human dignity.

The overwhelming evidence, testimony and representations filed with the Committee have urged the Congress that the residents of the District of Columbia should have the basic right to local self-government through the elective process.

In a country such as ours where the tenets of democracy have reached full flower, it is an anomaly that the people of our Nation's Capital have virtually no voice in their own government. Taxes are levied without their consent; officials are appointed without their approval; budget funds are allocated without reference to their needs and desires; and major governmental decisions concerning all aspects of their lives are made by officials elected from substantially different constituencies.

25. This, presumably, is the explanation for the title of the Newman and Dupuy article cited at p. 18, n.**.

The Supreme Court of the United States has described the right to vote as a 'fundamental political right' because it is 'preservative of all rights.' (*Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). For almost 100 years now, since 1874, the citizens of the District of Columbia have been denied this fundamental right to the detriment of all. Restoration of an elected local government with powers of legislation and finance is, in the judgment of the committee, perhaps the most important step which this or any Congress can take for the Nation's Capital. Self-government is necessary to responsive and responsible government.

Home Rule History, p. 1490.

In the years after the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), holding racial segregation in public education to be unconstitutional, Congress enacted the Civil Rights Acts of 1957 and 1960 (protecting voting rights),²⁶ the Civil Rights Act of 1964 (barring discrimination in public accommodations and facilities, employment, and federally assisted programs, and strengthening enforcement of school desegregation),²⁷ the Voting Rights Act of 1965 (providing more comprehensive protection of voting rights),²⁸ and the Fair Housing Act of 1968 (securing equal housing opportunity).²⁹ Over the same general period, there had been corresponding progress in restoring some limited voting rights to citizens of the District:

Since ratification of the 23d amendment to the Constitution on Mar. 29, 1961, qualified voters in the District of Columbia have had the right to vote for electors for President and Vice President; for the Board of Education since Apr. 22, 1968, the date of approval of Public Law 90-292; and for non-voting Delegate in the House since Sept. 22, 1970, the date of approval of Public Law 91-405.

Home Rule History, p. 1484.

Although the Home Rule Act was not, by its terms, a law barring discrimination based on race, national origin, sex, or other invidious grounds, there can be no doubt that its effect³⁰ was to end the denial of the right of self-government to the citizens of the District, a substantial majority of whom, by then, were black. The Act also corrected a century-old

26. 42 U.S.C. §1971 *et seq.*

27. 42 U.S.C. §2000a through §2000h.

28. 42 U.S.C. §1973 *et seq.*

29. 42 U.S.C. §3601 *et seq.*

30. It was suggested by representatives of Common Cause, who lobbied for the Home Rule Act, that

"the unspoken argument against home rule is based on distrust of a largely black electorate."

Home Rule History, p. 2127. By 1973, "most persons [would] not admit publicly that they entertain any bias or prejudice against members of the Negro race," *Dailey v. City of Lawton*, 296 F.Supp. 266, 268 (W.D.Okla. 1969); *aff'd* 425 F.2d 1037 (10th Cir. 1976), so that one would ordinarily expect such arguments to be unspoken and disguised. It has also been noted that while the Senate had passed a number of home rule bills prior to 1973, the House had failed to do so until Congressman John MacMillan of South Carolina, an intransigent opponent of home rule, was defeated for re-election and replaced as Chairman of the House Committee on the District of Columbia by Representative Diggs. *Home Rule History*, p. 2127. Moreover, one is ordinarily presumed to intend the natural and foreseeable consequences of one's conduct. *Railway Officers v. Labor Board*, 347 U.S. 17, 45 (1954).

Arguments based on constitutional history and pragmatic considerations having no relation to race have also been made against home rule, see, e.g., *Home Rule History*, pp. 1605 *et seq.*, and the Court is of the opinion that, as with most controversial issues, the motives of the opponents (and the proponents) of home rule vary and defy easy categorization. Be that as it may, "effect, and not motivation, is the touchstone." *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) and, in the Home Rule Act as in other civil rights legislation, "Congress directed the thrust of the Act at the consequences of [the challenged] practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

disfranchisement which was based, at least in part, on race. For all practical purposes, the Home Rule Act is a remedial civil rights law providing basic liberties to the citizens of the District of Columbia. It should be read in the same spirit as civil rights statutes are read, and its generous agenda ought not to be defeated by niggardly or strained construction.

(2) Construction.

In general, remedial legislation should be construed broadly to effectuate its purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). In construing a remedial statute, a court should give a liberal interpretation to its protective provisions while narrowly interpreting any exemptions from such provisions. *Hutchison Bros. Excav. Co. v. District of Columbia*, 278 A.2d 318, 321 (D.C. 1971), citing *United States v. Dotterweich*, 320 U.S. 277 (1943)³¹ "Where the nature of an Act is remedial, as here, it should be construed liberally in an attempt to provide the remedy, not avoid it." *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928, 932 (E.D.La. 1974), *aff'd* 500 F.2d 1182 (5th Cir. 1974). The "remedy" in the Home Rule Act was basic self-government for the District of Columbia.

Civil rights legislation is, of course, remedial, and the nation's commitment to individual rights and equal opportunity ranks high in its constellation of constitutional and legislative values. Laws prohibiting racial and other invidious discrimination carry out policies to which Congress has accorded the "highest priority," and are accorded a "generous" construction. *Traficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211-212 (1972). *Accord: Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969); *Daniel v. Paul*, 395 U.S. 298, 306-307 (1969). Just as the Civil Rights Act of 1964 is to be liberally construed, and to be read

[not] with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely to secure for all citizens the full enjoyment of facilities described in the Act,

Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968) (*en banc*), so too the Home Rule Act must be read with a view to its basic purpose of returning to the citizens of the District of Columbia the right to participate in their own elected local government.

As the majority of the House District of Columbia Committee explicitly recognized, the right to vote, which is at stake in the Home Rule Act,³² is fundamental, for it is "preservative of all rights," *Yick Wo v. Hopkins*, *supra*, 118 U.S. at 370, *Reynolds v. Sims*, 377 U.S. 533, 562 (1972). Constitutional provisions and statutes which protect the right to vote have traditionally been generously construed in a manner which comports with the precious character of their subject matter. See, e.g. *Gaston County v. United States*, 395 U.S. 285 (1969) (Voting Rights Act construed as invalidating state literacy test absent proof of intentional discrimination in its adoption or administration, because it disproportionately burdened blacks in light of past denials of equal educational opportunity); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Constitution nullifies "sophisticated as well as simple-minded modes of discrimination"). Where self-government is at stake, courts should view generously measures that protect it and look with a jaundiced eye at provisions that would restrict it.

To be sure, questions of Congressional intent

31. Exemptions from coverage of civil rights statutes especially are narrowly construed and closely scrutinized. *Singleton v. Gendason*, 545 F.2d 1224 (9th Cir. 1976); *United States v. Hughes Memorial Home*, 396 F.Supp. 544, 550 (W.D.Va. 1975).

32. If the elected representatives of the citizens of the District are stripped of authority to pass legislation, then a major goal of granting citizens the right to vote is substantially undermined.

and statutory interpretation cannot be avoided simply by characterizing the Home Rule Act as remedial civil rights legislation. No such label can be a sacred talisman. In deciding the question of severability, however, the Court must recognize that a holding in the defendant's favor would nullify or substantially impair the effectiveness of a statute designed to protect the basic rights of citizens of the District.

D. Protection of the federal interest by means other than the legislative veto.

The history of the Home Rule Act reveals that the legislators were attempting to accommodate two competing interests, namely, self-determination for citizens of the District and the protection of the federal interest in and ultimate sovereignty over the nation's capital. *United States v. Cole*, *supra*, 112 D.W.L.R. at 1122. While the legislative veto was one of the devices employed by Congress to preserve the federal interest, it was by no means the only one, and its significance ought not to be overestimated.

Although Congress granted legislative authority to the newly formed elected local government, it explicitly did so

subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I §8 of the Constitution.

Section 102(a) of the Act, D.C. Code 1981 §1-201(a). Congress further reserved

the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

Section 601 of the Act, D.C. Code 1981 §1-206. (Emphasis added.) Moreover, under the provisions of Section 602(c)(1) of the Act, D.C. Code 1981 §1-233(c)(1), legislation passed by the local government does not go into effect for a period of 30 days, during which period Congress and the President could prevent the legislation from becoming law without resort to the veto. Even if the legislative veto created by Section 602(c)(2), D.C. Code 1981 §1-233(c)(2) were eliminated, federal control over legislation for the District could be readily preserved, provided that Congress complied with the Article I requirements of bicameralism and presentment to the President.³³

In determining whether it is "evident" that Congress would not have authorized the City Council to pass criminal legislation without the legislative veto, the Court must consider whether the veto itself provides so great a measure of protection for the federal interest from improvident action by local officials that its omission would have doomed legislation which passed both Houses overwhelmingly. In this regard, it is noteworthy that those members of Congress who wished to exclude authority over criminal legislation from the Act viewed the veto as a superfluous and therefore useless device. Congressman Broyhill, an opponent of home rule, complained during the floor debate that

this thirty day so-called veto power . . . is somewhat [sic] of a farce, because we know that we can legislate an act of Congress to repeal any act of this Council.

Home Rule History, p. 2382. Congressman Landgrebe, another opponent, expressed the view that

33. Even with the veto excised, the layover period would remain.

this type of [veto] provision is of little value in limiting the authority of the local government, inasmuch as it is not of significant difference with a provision that would call for the Congress through its entire legislative process to reverse or nullify an enactment of the local council.

Home Rule History, p. 3025. The Court has found nothing in the legislative history to suggest that proponents of home rule attempted to contest these remarks.

The Court is of the opinion that Congressman Broyhill and Landgrebe were probably correct in their evaluation of the effectiveness and importance of the veto provision in protecting the federal interest. Although veto by one House of criminal legislation or by both Houses of other legislation might be more expeditious than the formal enactment of repealing measures, there is little if any evidence that such marginally greater convenience was a controlling consideration in the passage of the Home Rule Act.

E. Overwhelming passage of home rule measures by both Houses without a legislative veto.

After the House and Senate versions of the Home Rule Act had been reconciled in conference, the final version was passed in both Houses by overwhelming majorities. The vote in the Senate was 77-13. The vote in the House was 272-74. *Home Rule History*, p. 3107-3109, 3124-3125.

There was no legislative veto in the original House version.³⁴ Indeed, the House defeated amendments proposed by Congressman Broyhill and Congressman Nelson, which would have included a legislative veto, by votes of 273-138 and 273-144 respectively. *Home Rule History*, pp. 2381-2385, 2443-2452. There was obviously no overwhelming sentiment for the veto in the House.

Although the Senate version did include the veto mechanism, there is no indication that it was an indispensable ingredient without which the Act would not have passed. Indeed, between 1951 and 1971, the Senate had overwhelmingly passed several home rule bills, none of which would have restricted the District's legislative authority by a congressional veto device. *Home Rule History*, p. 2723. As explained by the representative of the Congressional Research Service,

the 1951 Senate Report specifically noted that the 'present bill omits any congressional veto provision. The sponsors believe there is ample legal authority to support the constitutionality of a direct grant of legislative power to a mayor and a District Council.' S. Rept. No. 630, 82d Cong., 1st Sess., 11 (1951). The overriding power to legislate, delays in effective dates of District legislation, presidential veto power and enumeration of substantive limits on the District's legislative authority were various means employed to reserve congressional authority and protect the federal interest in the bills that passed the Senate in this twenty-year period. See, e.g. S. Rept. No. 17115, 85th Cong. 2d Sess. 29 (1958), 105 Cong. Rec. 13423 (1959).

The Legislative Veto Provisions, *supra*, p. 10.

Under these circumstances, and even allowing for the changing composition of the Senate, it appears that the federal interest was substantially

34. That version did not confer legislative authority on the City Council in the criminal field, so that a legislative veto was arguably unnecessary. The reason for this omission of such authority, however, was not reluctance on the part of the House to trust the Council on criminal matters but rather a disposition to await action on the Code by a law revision commission. See pp. 34 et seq., *infra*.

protected by devices other than the veto, that Congress recognized this, and that the veto was added as an additional protection, rather than as an indispensable prerequisite for granting legislative authority. The substantial margins by which the legislation passed bolster this conclusion.

F. *The inconclusiveness of the legislative history.*

In assessing Congressional intent, the Court must not become so preoccupied with the trees that it is unable to see the forest. The enactment of the Home Rule Act was an important historical event for the District of Columbia, and the issues here presented must be placed in an appropriate context.

In confidently urging enactment of the conference committee compromise, Senator Mathias stated that

Today, we find that this body, this U.S. Senate, which has gone on record eight times in eight separate Congresses as favoring home rule, will have the privilege of taking the final congressional step to restore to the citizens of the District of Columbia some measure of self-government.

Home Rule History, p. 3115. He added that

Home rule for the District of Columbia is simply an idea whose time had come.

Ibid., p. 3116. (Emphasis added.) As previously noted, overwhelming majorities of both Houses agreed with him.

The Court finds it most unlikely that the course of history would have been derailed if Congress had known that the legislative veto was unconstitutional, considering that the layover and repeal remained available. In the words of the representative of the Congressional Research Service,

the confluence of political forces at the time, the emergence of the veto as a compromise provision, the history of use of the veto device in home rule proposals, the fact that the veto was only one of many congressional control devices in the Act, and the fact that the Act is workable without the provision arguably militate against holding that Congress would not have enacted home rule legislation or delegated the legislative powers it did to a District legislature without the legislative veto mechanism.

The Legislative Veto Provisions, *supra*, at pp. 14-15.

If this Court correctly understands the decision in *Cole*, the Court there essentially held that

1. the House eliminated the Council's authority over the criminal code from its version of the bill because of fears that the Council would be too soft on crime;

2. the Senate included a legislative veto in order to guard against the same tendency;

3. the House, and Congressman Diggs in particular, acceded to the legislative veto in recognition of the reality that without the veto, authority over the Criminal Code could not pass the Senate; and

4. the foregoing compromise secured final passage of the Act.

This court must respectfully disagree.³⁵

It should be noted at the outset that, before the Council's authority to amend the criminal code was eliminated from the House bill, the House District Committee, by a vote of 20-4, had reported out an earlier version which included that very authority. *Home Rule History*, pp.

1376-1377. The Committee did so over the objection of dissenting members who were primarily concerned that the United States Attorney's prosecutive authority might be ceded to the Corporation Counsel. *Ibid.* at 1567-1568. Although the House did subsequently excise the Council's authority over the criminal code, it did not do so because of any supposed reluctance to trust the Council to be firm enough with criminals. As Congressman Brock Adams explained:

We have said also that there should not be a change in the criminal statutes. *The reason for that is that there is proposed before the Committee on the District of Columbia at the present time a commission to review the criminal code.* There will be hearings on that, so that for the present time we know where we are with it and can move on that subject without bringing it into this bill, which basically provides a structure of locally elected government.

Home Rule History, p. 2117. (Emphasis added.) It should be noted that the word "reason" in the italicized language is in the singular, not the plural. This was evidently the only reason, or at least the principal reason.

Subsequently, Congressman Diggs advised his colleagues that under the Conference Committee compromise the Council was prohibited from making changes in the criminal code for two years because

Congress will then have a chance to make the much needed revision of the criminal code. This should take no longer than two years. Subsequent to that action, it seems appropriate and consistent with the concept of self-determination, that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary.

Ibid. at 3042.³⁶ The initial exclusion of Council authority to amend the criminal code was thus tied to an anticipated study and revision of the code, and not to concern on the part of a majority of the House that the Council would be too soft on crime. While fear of excessive leniency undoubtedly existed in the House, there is no indication that it played a significant part in the revision of the House version.

The second assumption on which the *Cole* decision rests—that the Senate insisted on the legislative veto to forestall passage of lenient criminal laws by the local government, and would not otherwise have allowed the Council to dabble in criminal matters—is likewise unsound. As previously noted, the Senate had readily and repeatedly passed by substantial margins home rule bills which did not contain such a veto mechanism.

Congressman Diggs did state on the floor of the House that

the real reason the Senate has been able to pass home rule in the past so expeditiously is because it was just felt in the other body that as long as there is a *veto apparatus*, as long as there is a *congressional process to correct* what they might consider to be a misaction on the part of the local legislative body, then they were inclined to be generous about it.

Home Rule History, p. 3050. (Emphasis added.) Although Congressman Diggs may have mistakenly believed that the legislative veto, as such, had been responsible for securing the passage of prior home rule bills in the Senate,

36. But see Section 602(a)(9) of the Act, D.C. Code 1981 §1-233(a)(9), which prohibits actions by the Council for 48 full calendar months after the members take office. Our Court of Appeals has recognized that the purpose of this section was to declare a moratorium on the Council's new legislative authority while the District of Columbia Law Revision Commission proposed and Congress considered a complete revision of the District of Columbia Code. *McIntosh v. Washington*, 395 A.2d 744, 751 (D.C. 1978).

the underlined phrase in the quoted passage is more revealing than his allusion to the veto. If the Congressman's reference to the veto as if it were the same thing as a corrective process was imprecise, this was because the distinction between veto and repeal was seldom precisely articulated (except by opponents who thought neither adequate). See *supra*. What the Senators were concerned about was the availability of a corrective process, with which the veto was associated in a rather vague and general way. The Court agrees with the United States Attorney's contention that

while Congress also included legislative veto provisions in the Act, there are indications in the legislative history that it did not differentiate seriously between the two forms of control—repeal and veto—and that it was most insistent on having a sufficient reporting or layover period in which to express its disapproval of objectionable Council legislation.³⁷

An examination of the 4000-page *Home Rule History*³⁸ discloses that there was comparatively little discussion in Congress of the issues here presented. Far more attention was devoted to the issues of fiscal autonomy, the federal payment, and whether there should be partisan elections in the nation's capital. The flavor of a number of the allusions to the legislative veto suggests that the mechanism was a subsidiary issue, a third or fourth reason, seldom clearly distinguished from Congressional authority to repeal Council action. There is no evidence in the legislative history that any member of Congress ever said anything like

now that the bill contains a legislative veto, and not just Congressional power to repeal, I can vote for it.

Congressman Diggs' allusion to the Senate position, see *supra*, was, in the Court's view, at best ambiguous.

In light of the foregoing discussion, it is certainly not "evident" to the Court that Congress would not have given the local government authority to enact criminal legislation without this particular mechanism. Accordingly, the Court concludes that the veto is severable from the remainder of the Home Rule Act, and that the Act survives *Chadha*.

VI

The Court recognizes that, if its ruling herein is correct, and if it is applied to cases implicating the Sexual Assault Reform Act, as to which the legislative veto was in fact exercised, difficult questions will arise as to prospective or retroactive application. In the present case, however, the Court's ruling sustains the authority of the Council to pass the Theft Act, and the Court need not address the issue of retroactivity at all. The defendant's motion to dismiss the Theft II charge against him is therefore DENIED; and

IT IS SO ORDERED this 2nd day of October, 1984.³⁹

37. Brief for the *United States* in *Gary v. United States*, D.C.App. No. 83-796, at p. 18, citing *Home Rule History* pp. 1601, 1799, 3031.

38. This trial judge obviously did not have the time to read all 4,000 pages. The four volumes of history are, however, remarkably well indexed, and most of the relevant material in the legislative history has probably been identified in Judge Smith's opinion in *Cole*, in the briefs of the United States, the Corporation Counsel, and the Public Defender Service in *Gary* and *Cole*, and as a result of this Court's own review.

39. As this Opinion was being completed, the Reagan administration apparently agreed to legislation which would address the *Chadha* problem by providing for a 60-day layover period for proposed changes in the criminal code by the District Government, during which period such proposed changes could be disapproved by both Houses of Congress and the President. *Washington Post*, September 27, 1984, p. A-1; September 29, 1984, p. B-3. If this Court's decision in the present case is correct, then the proposed legislation would largely clarify current law and would not drastically alter it insofar as the issues here addressed are concerned.

35. As previously noted, however, the Court agrees with that part of the *Cole* opinion which holds that *Chadha* invalidates the legislative veto in the Home Rule Act. See *supra*.

THE WHITE HOUSE

WASHINGTON

September 26, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS 

SUBJECT: D.C. Chadha

The D.C. Chadha rider added to the Continuing Resolution was simply the text of H.R. 3932 in its entirety, as passed by the House on October 4, 1983. H.R. 3932, you will recall, was the original D.C. Chadha bill that started everything rolling. It would require a joint resolution of disapproval to block any D.C. Council action. The pertinent passage from the Congressional Record of yesterday is attached for your information.

Attachment

Senate Committee Schedules Action On Problems of D.C. Home Rule

By Sandra Evans
Washington Post Staff Writer

A Senate committee has scheduled action next week on a bill to resolve serious home rule problems in the District of Columbia, despite strong Reagan administration objections to the approach Congress has taken.

Legal questions arising from a Supreme Court ruling last year barring legislative vetoes resulted in challenges to a number of criminal convictions under District laws and have prevented the city from entering the bond market to get money for capital projects and for day-to-day operations.

The Senate Governmental Affairs Committee has held off since last fall on approving legislation to correct the problems, in hopes that city and federal officials could reach a compromise on how much authority the federal government should have over D.C. criminal laws.

The two governments have not reached a compromise, however, and it is getting close to the end of the 98th Congress. The legislation that Hill aides say would most likely get out of committee is a revised proposal that D.C. offered earlier this year as a compromise but which the Justice Department rejected.

"We wanted to at least indicate to the bond markets that we are serious about doing something," said one Governmental Affairs Committee source. "We didn't buy the administration argument on the criminal [law] section."

Sen. William V. Roth (R-Del.), chairman of the committee, has been

supportive of home rule for the District and has indicated he believes the administration went too far in trying to get more control over the criminal code, the source said.

"You've got to get somewhere," said another Senate aide of the decision to go ahead. "This way, you'll know who your friends are and who your enemies are."

Markup on the bill is scheduled for Thursday.

Senate aides and city officials said yesterday it is unclear whether Congress will be able to give final approval to a home rule bill before it adjourns for electioneering in October, particularly since some Republicans might be expected to try to hold up the bill on the Senate floor. If it passes, there is a possibility of a presidential veto.

Aides said there have been no specific veto threats from the White House but they noted that the administration took a strong stand against the city's position during negotiations. Administration officials said they could not say whether President Reagan would veto the plan being considered in committee.

One city official expressed concerns about the strategy of scheduling a public markup of the bill, rather than quietly polling the committee, because it "gives [the city's] adversaries notice that this is an opportunity to bottle it up."

The Supreme Court ruled in June 1983 that legislative vetoes are unconstitutional. The legislative veto is the mechanism in the decade-old home rule act by which Congress retained oversight of D.C. laws.

The court ruling brought into question the city's authority to legislate for itself.

The District and its congressional supporters wanted the problem resolved by having any veto of D.C.-passed legislation accomplished with a joint resolution passed by both houses. The House last year passed legislation approving that method before the administration raised its objections.

The Reagan administration accepts that approach for noncriminal laws but wants criminal legislation enacted only if both houses take affirmative action, which is a more difficult proposition than merely failing to disapprove them within a certain time.

The compromise being studied by the committee would take the House approach but lengthen the time Congress has to disapprove D.C. legislation from 30 legislative days to 60.

Sen. Charles McC. Mathias (R-Md.), chairman of the D.C. subcommittee, and Sen. Thomas Eagleton (D-Mo.), ranking minority member, have pushed the approach preferred by the city for some time.

In June, Congress approved a provision in its tax bill to enable the city to issue \$30 million in housing bonds, but some officials said they felt this took pressure off Congress to act on the larger home rule questions.

"I have consistently resisted going forward on a piecemeal basis," Mathias said at the time. The court ruling "raises extremely serious concerns, and addressing them in other than a comprehensive manner is very risky."

30

Chadha

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 80-1832. Argued February 22, 1982—Reargued October 7, 1982—
Decided June 23, 1983*

Section 244(c)(2) of the Immigration and Nationality Act (Act) authorizes either House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the United States. Appellee-respondent Chadha, an alien who had been lawfully admitted to the United States on a nonimmigrant student visa, remained in the United States after his visa had expired and was ordered by the Immigration and Naturalization Service (INS) to show cause why he should not be deported. He then applied for suspension of the deportation, and, after a hearing, an Immigration Judge, acting pursuant to § 244(a)(1) of the Act, which authorizes the Attorney General, in his discretion, to suspend deportation, ordered the suspension, and reported the suspension to Congress as required by § 244(c)(1). Thereafter, the House of Representatives passed a Resolution pursuant to § 244(c)(2) vetoing the suspension, and the Immigration Judge reopened the deportation proceedings. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional, but the judge held that he had no authority to rule on its constitutionality and ordered Chadha deported pursuant to the House Resolution. Chadha's appeal to the Board of Immigration Appeals was dismissed, the Board also holding that it had no power to declare § 244(c)(2) unconstitutional. Chadha then filed a peti-

*Together with No. 80-2170, *United States House of Representatives v. Immigration and Naturalization Service et al.*, and No. 80-2171, *United States Senate v. Immigration and Naturalization Service et al.*, on certiorari to the same court.

Syllabus

tion for review of the deportation order in the Court of Appeals, and the INS joined him in arguing that § 244(c)(2) is unconstitutional. The Court of Appeals held that § 244(c)(2) violates the constitutional doctrine of separation of powers, and accordingly directed the Attorney General to cease taking any steps to deport Chadha based upon the House Resolution.

Held:

1. This Court has jurisdiction to entertain the INS's appeal in No. 80-1832 under 28 U. S. C. § 1252, which provides that "[a]ny party" may appeal to the Supreme Court from a judgment of "any court of the United States" holding an Act of Congress unconstitutional in "any civil action, suit or proceeding" to which the United States or any of its agencies is a party. A court of appeals is "a court of the United States" for purposes of § 1252, the proceeding below was a "civil action, suit or proceeding," the INS is an agency of the United States and was a party to the proceeding below, and the judgment below held an Act of Congress unconstitutional. Moreover, for purposes of deciding whether the INS was "any party" within the grant of appellate jurisdiction in § 1252, the INS was sufficiently aggrieved by the Court of Appeals' decision prohibiting it from taking action it would otherwise take. An agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional. Pp. 8-10.

2. Section 244(c)(2) is severable from the remainder of § 244. Section 406 of the Act provides that if any particular provision of the Act is held invalid, the remainder of the Act shall not be affected. This gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part thereof, to depend upon whether the veto clause of § 244(c)(2) was invalid. This presumption is supported by § 244's legislative history. Moreover, a provision is further presumed severable if what remains after severance is fully operative as a law. Here, § 244 can survive as a "fully operative" and workable administrative mechanism without the one-house veto. Pp. 10-14.

3. Chadha has standing to challenge the constitutionality of § 244(c)(2) since he has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U. S. 59, 79. Pp. 14-15.

4. The fact that Chadha may have other statutory relief available to him does not preclude him from challenging the constitutionality of § 244(c)(2), especially where the other avenues of relief are at most speculative. Pp. 15-16.

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5. The Court of Appeals had jurisdiction under § 106(a) of the Act, which provides that a petition for review in a court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings" under § 242(b) of the Act. Section 106(a) includes all matters on which the final deportation order is contingent, rather than only those determinations made at the deportation hearing. Here, Chadha's deportation stands or falls on the validity of the challenged veto, the final deportation order having been entered only to implement that veto. Pp. 16-18.

6. A case or controversy is presented by these cases. From the time of the House's formal intervention, there was concrete adverseness, and prior to such intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha. The INS's agreement with Chadha's position does not alter the fact that the INS would have deported him absent the Court of Appeals' judgment. Moreover, Congress is the proper party to defend the validity of a statute when a Government agency, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is unconstitutional. Pp. 18-19.

7. These cases do not present a nonjusticiable political question on the asserted ground that Chadha is merely challenging Congress' authority under the Naturalization and Necessary and Proper Clauses of the Constitution. The presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts simply because the issues have political implications. Pp. 19-23.

8. The congressional veto provision in § 244(c)(2) is unconstitutional. Pp. 23-37.

(a) The prescription for legislative action in Art. I, § 1—requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives—and § 7—requiring every bill passed by the House and Senate, before becoming law, to be presented to the President, and, if he disapproves, to be repassed by two-thirds of the Senate and House—represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers. Pp. 23-30.

(b) Here, the action taken by the House pursuant to § 244(c)(2) was essentially legislative in purpose and effect and thus was subject to the

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procedural requirements of Art. I, § 7, for *legislative* action: passage by a majority of both Houses and presentation to the President. The one-House veto operated to overrule the Attorney General and mandate Chadha's deportation. The veto's legislative character is confirmed by the character of the congressional action it supplants; *i.e.*, absent the veto provision of § 244(c)(2), neither the House nor the Senate, or both acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined that the alien should remain in the United States. Without the veto provision, this could have been achieved only by legislation requiring deportation. A veto by one House under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of § 244 as applied to Chadha. The nature of the decision implemented by the one-House veto further manifests its legislative character. Congress must abide by its delegation of authority to the Attorney General until that delegation is legislatively altered or revoked. Finally, the veto's legislative character is confirmed by the fact that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action in the Constitution. Pp. 30-37.

634 F. 2d 408, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment. WHITE, J., filed a dissenting opinion. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 80-1832, 80-2170 AND 80-2171

IMMIGRATION AND NATURALIZATION SERVICE,
APPELLANT

80-1832

v.

JAGDISH RAI CHADHA ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES,
PETITIONER

80-2170

v.

IMMIGRATION AND NATURALIZATION SERVICE
ET AL.

UNITED STATES SENATE, PETITIONER

80-2171

v.

IMMIGRATION AND NATURALIZATION SERVICE
ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 23, 1983]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in Nos. 80-2170 and 80-2171, and postponed consideration of the question of jurisdiction in No. 80-1832. Each presents a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act, 8 U. S. C. § 1254(c)(2), authorizing one House of

Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States.

I

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having "remained in the United States for a longer time than permitted." App. 6. Pursuant to § 242(b) of the Immigration and Nationality Act (Act), 8 U. S. C. § 1254(b), a deportation hearing was held before an immigration judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under § 244(a)(1) of the Act, 8 U. S. C. § 1254(a)(1). Section 244(a)(1) provides:

"(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney

General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”¹

After Chadha submitted his application for suspension of deportation, the deportation hearing was resumed on February 7, 1974. On the basis of evidence adduced at the hearing, affidavits submitted with the application, and the results of a character investigation conducted by the INS, the immigration judge, on June 25, 1974, ordered that Chadha's deportation be suspended. The immigration judge found that Chadha met the requirements of § 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer “extreme hardship” if deported.

Pursuant to § 244(c)(1) of the Act, 8 U. S. C. § 1254(c)(1), the immigration judge suspended Chadha's deportation and a report of the suspension was transmitted to Congress. Section 244(c)(1) provides:

“Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.”

¹ Congress delegated the major responsibilities for enforcement of the Immigration and Nationality Act to the Attorney General. 8 U. S. C. § 1103(a). The Attorney General discharges his responsibilities through the Immigration and Naturalization Service, a division of the Department of Justice. *Ibid.*

Once the Attorney General's recommendation for suspension of Chadha's deportation was conveyed to Congress, Congress had the power under § 244(c)(2) of the Act, 8 U. S. C. § 1254(c)(2), to veto² the Attorney General's determination that Chadha should not be deported. Section 244(c)(2) provides:

"(2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—
if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings."

The June 25, 1974 order of the immigration judge suspending Chadha's deportation remained outstanding as a valid order for a year and a half. For reasons not disclosed by the record, Congress did not exercise the veto authority re-

²In constitutional terms, "veto" is used to describe the President's power under Art. I, § 7 of the Constitution. See Black's Law Dictionary 1403 (5th ed. 1979). It appears, however, that Congressional devices of the type authorized by § 244(c)(2) have come to be commonly referred to as a "veto." See, e. g., Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 Va. L. Rev. 253 (1982); Miller and Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 Ind. L.J. 367 (1977). We refer to the Congressional "resolution" authorized by § 244(c)(2) as a "one-House veto" of the Attorney General's decision to allow a particular deportable alien to remain in the United States.

served to it under § 244(c)(2) until the first session of the 94th Congress. This was the final session in which Congress, pursuant to § 244(c)(2), could act to veto the Attorney General's determination that Chadha should not be deported. The session ended on December 19, 1975. 121 Cong. Rec. 42014, 42277 (1975). Absent Congressional action, Chadha's deportation proceedings would have been cancelled after this date and his status adjusted to that of a permanent resident alien. See 8 U. S. C. § 1254(d).

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing "the granting of permanent residence in the United States to [six] aliens", including Chadha. H. R. Res. 926, 94th Cong., 1st Sess.; 121 Cong. Rec. 40247 (1975). The resolution was referred to the House Committee on the Judiciary. On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote. 121 Cong. Rec. 40800. The resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. *Ibid.* So far as the record before us shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that

"[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Ibid.*

The resolution was passed without debate or recorded vote.³

³It is not at all clear whether the House generally, or Subcommittee Chairman Eilberg in particular, correctly understood the relationship be-

Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Article I legislative act; it was not submitted to the Senate or presented to the President for his action.

After the House veto of the Attorney General's decision to allow Chadha to remain in the United States, the immigra-

tween H. R. Res. 926 and the Attorney General's decision to suspend Chadha's deportation. Exactly one year previous to the House veto of the Attorney General's decision in this case, Representative Eilberg introduced a similar resolution disapproving the Attorney General's suspension of deportation in the case of six other aliens. H. R. Res. 1518, 93d Cong., 2d Sess. The following colloquy occurred on the floor of the House:

"Mr. WYLIE. Mr. Speaker, further reserving the right to object, is this procedure to expedite the ongoing operations of the Department of Justice, as far as these people are concerned. Is it in any way contrary to whatever action the Attorney General has taken on the question of deportation; does the gentleman know?

Mr. EILBERG. Mr. Speaker, the answer is no to the gentleman's final question. These aliens have been found to be deportable and the Special Inquiry Officer's decision denying suspension of deportation has been reversed by the Board of Immigration Appeals. We are complying with the law since all of these decisions have been referred to us for approval or disapproval, and there are hundreds of cases in this category. In these six cases however, we believe it would be grossly improper to allow these people to acquire the status of permanent resident aliens.

Mr. WYLIE. In other words, the gentleman has been working with the Attorney General's office?

Mr. EILBERG. Yes.

Mr. WYLIE. This bill then is in fact a confirmation of what the Attorney General intends to do?

Mr. EILBERG. The gentleman is correct insofar as it relates to the determination of deportability which has been made by the Department of Justice in these cases.

Mr. WYLIE. Mr. Speaker, I withdraw my reservation of objection."
120 Cong. Rec. 41412 (1974).

Clearly, this was an obfuscation of the effect of a veto under § 244(c)(2). Such a veto in no way constitutes "a confirmation of what the Attorney General intends to do." To the contrary, such a resolution was meant to overrule and set aside, or "veto," the Attorney General's determination that, in a particular case, cancellation of deportation would be appropriate under the standards set forth in § 244(a)(1).

tion judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional. The immigration judge held that he had no authority to rule on the constitutional validity of § 244(c)(2). On November 8, 1976, Chadha was ordered deported pursuant to the House action.

Chadha appealed the deportation order to the Board of Immigration Appeals again contending that § 244(c)(2) is unconstitutional. The Board held that it had "no power to declare unconstitutional an act of Congress" and Chadha's appeal was dismissed. App. 55-56.

Pursuant to § 106(a) of the Act, 8 U. S. C. § 1105a(a), Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service agreed with Chadha's position before the Court of Appeals and joined him in arguing that § 244(c)(2) is unconstitutional. In light of the importance of the question, the Court of Appeals invited both the Senate and the House of Representatives to file briefs *amici curiae*.

After full briefing and oral argument, the Court of Appeals held that the House was without constitutional authority to order Chadha's deportation; accordingly it directed the Attorney General "to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives." *Chadha v. INS*, 634 F. 2d 408, 436 (CA9 1980). The essence of its holding was that § 244(c)(2) violates the constitutional doctrine of separation of powers.

We granted certiorari in Nos. 80-2170 and 80-2171, and postponed consideration of our jurisdiction over the appeal in No. 80-1832, 454 U. S. 812 (1981), and we now affirm.

II

Before we address the important question of the constitutionality of the one-House veto provision of § 244(c)(2), we

first consider several challenges to the authority of this Court to resolve the issue raised.

A

Appellate Jurisdiction

Both Houses of Congress⁴ contend that we are without jurisdiction under 28 U. S. C. § 1252 to entertain the INS appeal in No. 80-1832. Section 1252 provides:

“Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.”

Parker v. Levy, 417 U. S. 733, 742 n. 10 (1974), makes clear that a court of appeals is a “court of the United States” for purposes of § 1252. It is likewise clear that the proceeding below was a “civil action, suit or proceeding,” that the INS is an agency of the United States and was a party to the proceeding below, and that that proceeding held an Act of Congress—namely, the one-House veto provision in § 244(c)(2)—unconstitutional. The express requisites for an appeal under § 1252, therefore, have been met.

In motions to dismiss the INS appeal, the Congressional parties⁵ direct attention, however, to our statement that “[a]

⁴ Nine Members of the House of Representatives disagree with the position taken in the briefs filed by the Senate and the House of Representatives and have filed a brief *amicus curiae* urging that the decision of the Court of Appeals be affirmed in this case.

⁵ The Senate and House authorized intervention in this case, S. Res. 40 and H. R. Res. 49, 97th Cong., 1st Sess. (1981), and, on February 3, 1981,

party who receives all that he has sought generally is not aggrieved by the judgment affording relief and cannot appeal from it." *Deposit Guaranty National Bank v. Roper*, 445 U. S. 326, 333 (1980). Here, the INS sought the invalidation of § 244(c)(2) and the Court of Appeals granted that relief. Both Houses contend that the INS has already received what it sought from the Court of Appeals, is not an aggrieved party, and therefore cannot appeal from the decision of the Court of Appeals. We cannot agree.

The INS was ordered by one House of Congress to deport Chadha. As we have set out more fully, *ante* at 7, the INS concluded that it had no power to rule on the constitutionality of that order and accordingly proceeded to implement it. Chadha's appeal challenged that decision and the INS presented the Executive's views on the constitutionality of the House action to the Court of Appeals. But the INS brief to the Court of Appeals did not alter the agency's decision to comply with the House action ordering deportation of Chadha. The Court of Appeals set aside the deportation proceedings and ordered the Attorney General to cease and desist from taking any steps to deport Chadha; steps that the Attorney General would have taken were it not for that decision.

At least for purposes of deciding whether the INS is "any party" within the grant of appellate jurisdiction in § 1252, we hold that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take. It is apparent that Congress intended that this Court take notice of cases that meet the technical prerequisites of § 1252; in other cases where an Act of Congress is held unconstitutional by a federal court, review in this Court

filed motions to intervene and petitioned for rehearing. The Court of Appeals granted the motions to intervene. Both Houses are therefore proper "parties" within the meaning of that term in 28 U. S. C. § 1254(1). See *Batterton v. Francis*, 432 U. S. 416, 424, n. 7 (1977).

is available only by writ of certiorari. When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal under § 1252. The agency's status as an aggrieved party under § 1252 is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional. The appeal in No. 80-1832 is therefore properly before us.⁶

B

Severability

Congress also contends that the provision for the one-House veto in § 244(c)(2) cannot be severed from § 244. Congress argues that if the provision for the one-House veto is held unconstitutional, all of § 244 must fall. If § 244 in its entirety is violative of the Constitution, it follows that the Attorney General has no authority to suspend Chadha's deportation under § 244(a)(1) and Chadha would be deported. From this, Congress argues that Chadha lacks standing to challenge the constitutionality of the one-House veto provision because he could receive no relief even if his constitutional challenge proves successful.⁷

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "[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." *Buckley v. Valeo*, 424 U. S. 1, 108 (1976), quoting

⁶ In addition to meeting the statutory requisites of § 1252, of course, an appeal must present a justiciable case or controversy under Art. III. Such a controversy clearly exists in No. 80-1832, as in the other two cases, because of the presence of the two Houses of Congress as adverse parties. See *infra*, at 18; see also *Director, OWCP v. Perini North River Associates*, — U. S. —, — (1982).

⁷ In this case we deem it appropriate to address questions of severability first. But see *Buckley v. Valeo*, 424 U. S. 1, 108-109 (1976); *United States v. Jackson*, 390 U. S. 570, 585 (1968).

Champlin Refining Co. v. Corporation Comm'n, 286 U. S. 210, 234 (1932). Here, however, we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in § 406 of the Immigration and Nationality Act, 8 U. S. C. § 1101, which provides:

“If *any* particular provision of this Act, or the application thereof to *any* person or circumstance, is held invalid, *the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.*” (Emphasis added.)

This language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid. The one-House veto provision in § 244(c)(2) is clearly a “particular provision” of the Act as that language is used in the severability clause. Congress clearly intended “the remainder of the Act” to stand if “any particular provision” were held invalid. Congress could not have more plainly authorized the presumption that the provision for a one-House veto in § 244(c)(2) is severable from the remainder of § 244 and the Act of which it is a part. See *Electric Bond & Share Co. v. SEC*, 303 U. S. 419, 434 (1938).

The presumption as to the severability of the one-House veto provision in § 244(c)(2) is supported by the legislative history of § 244. That section and its precursors supplanted the long established pattern of dealing with deportations like Chadha's on a case-by-case basis through private bills. Although 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.

The Immigration Act of 1924, Pub. L. No. 139, § 14, 43 Stat. 153, 162, required the Secretary of Labor to deport any alien who entered or remained in the United States unlaw-

fully. The only means by which a deportable alien could lawfully remain in the United States was to have his status altered by a private bill enacted by both Houses and presented to the President pursuant to the procedures set out in Art. I, § 7 of the Constitution. These private bills were found intolerable by Congress. In the debate on a 1937 bill introduced by Representative Dies to authorize the Secretary to grant permanent residence in "meritorious" cases, Dies stated:

"It was my original thought that the way to handle all these meritorious cases was through special bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with the situation through special bills. We had a demonstration of that fact not long ago when 15 special bills were before the House. The House consumed 5½ hours considering four bills and made no disposition of any of these bills." 81 Cong. Rec. 5542 (1937).

Representative Dies' bill passed the House, *id.*, at 5574, but did not come to a vote in the Senate. 83 Cong. Rec. 8992-8996 (1938).

Congress first authorized the Attorney General to suspend the deportation of certain aliens in the Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 671. That Act provided that an alien was to be deported, despite the Attorney General's decision to the contrary, if both Houses, by concurrent resolution, disapproved the suspension.

In 1948, Congress amended the Act to broaden the category of aliens eligible for suspension of deportation. In addition, however, Congress limited the authority of the Attorney General to suspend deportations by providing that the Attorney General could not cancel a deportation unless both Houses affirmatively voted by concurrent resolution to *approve* the Attorney General's action. Act of July 1, 1948, ch. 783, 62 Stat. 1206. The provision for approval by concurrent resolution in the 1948 Act proved almost as burdensome as

private bills. Just four years later, the House Judiciary Committee, in support of the predecessor to §244(c)(2), stated in a report:

“In the light of experience of the last several months, the committee came to the conclusion that the requirements of affirmative action by both Houses of the Congress in many thousands of individual cases which are submitted by the Attorney General every year, is not workable and places upon the Congress and particularly on the Committee on the Judiciary responsibilities which it cannot assume. The new responsibilities placed upon the Committee on the Judiciary [by the concurrent resolution mechanism] are of purely administrative nature and they seriously interfere with the legislative work of the Committee on the Judiciary and would, in time, interfere with the legislative work of the House.” H. R. Rep. No. 362, 81st Cong., 1st Sess. 2 (1949).

The proposal to permit one House of Congress to veto the Attorney General's suspension of an alien's deportation was incorporated in the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 214. Plainly, Congress' desire to retain a veto in this area cannot be considered in isolation but must be viewed in the context of Congress' irritation with the burden of private immigration bills. This legislative history is not sufficient to rebut the presumption of severability raised by §406 because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that §244(c)(2) would be held unconstitutional.

A provision is further presumed severable if what remains after severance “is fully operative as a law.” *Champlin Refining Co. v. Corporation Comm'n*, *supra*, 286 U. S., at 234. There can be no doubt that §244 is “fully operative” and workable administrative machinery without the veto provision in §244(c)(2). Entirely independent of the one-House

veto, the administrative process enacted by Congress authorizes the Attorney General to suspend an alien's deportation under § 244(a). Congress' oversight of the exercise of this delegated authority is preserved since all such suspensions will continue to be reported to it under § 244(c)(1). Absent the passage of a bill to the contrary,⁸ deportation proceedings will be cancelled when the period specified in § 244(c)(2) has expired.⁹ Clearly, § 244 survives as a workable administrative mechanism without the one-House veto.

C

Standing

We must also reject the contention that Chadha lacks

⁸ Without the provision for one-House veto, Congress would presumably retain the power, during the time allotted in § 244(c)(2), to enact a law, in accordance with the requirements of Article I of the Constitution, mandating a particular alien's deportation, unless, of course, other constitutional principles place substantive limitations on such action. Cf. Attorney General Jackson's attack on H. R. 9766, 76th Cong., 3d Sess. (1940), a bill to require the Attorney General to deport an individual alien. The Attorney General called the bill "an historical departure from an unbroken American practice and tradition. It would be the first time that an act of Congress singled out a named individual for deportation." S. Rep. No. 2031, 76th Cong., 3d Sess. 9 (1940) (reprinting Jackson's letter of June 18, 1940). See n. 17, *infra*.

⁹ Without the one-House veto, § 244 resembles the "report and wait" provision approved by the Court in *Sibbach v. Wilson*, 312 U. S. 1 (1941). The statute examined in *Sibbach* provided that the newly promulgated Federal Rules of Civil Procedure "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064. This statute did *not* provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable. This technique was used by Congress when it acted in 1973 to stay, and ultimately to revise, the proposed Rules of Evidence. Compare Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, with Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926.

REPORT
AND
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standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress, rather than simply Chadha's private interests. Chadha has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. . . ." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U. S. 59, 79 (1978). If the veto provision violates the Constitution, and is severable, the deportation order against Chadha will be cancelled. Chadha therefore has standing to challenge the order of the Executive mandated by the House veto.

D

Alternative Relief

It is contended that the Court should decline to decide the constitutional question presented by this case because Chadha may have other statutory relief available to him. It is argued that since Chadha married a United States citizen on August 10, 1980, it is possible that other avenues of relief may be open under §§ 201(b), 204, and 245 of the Act, 8 U. S. C. §§ 1151(b), 1154, 1255. It is true that Chadha may be eligible for classification as an "immediate relative" and, as such, could lawfully be accorded permanent residence. Moreover, in March 1980, just prior to the decision of the Court of Appeals in this case, Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, under which the Attorney General is authorized to grant asylum, and then permanent residence, to any alien who is unable to return to his country of nationality because of "a well-founded fear of persecution on account of race."

It is urged that these two intervening factors constitute a prudential bar to our consideration of the constitutional question presented in this case. See *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346 (1936) (Brandeis, J.,

concurring). If we could perceive merit in this contention we might well seek to avoid deciding the constitutional claim advanced. But at most these other avenues of relief are speculative. It is by no means certain, for example, that Chadha's classification as an immediate relative would result in the adjustment of Chadha's status from nonimmigrant to permanent resident. See *Menezes v. INS*, 601 F. 2d 1028 (CA9 1979). If Chadha is successful in his present challenge he will not be deported and will automatically become eligible to apply for citizenship.¹⁰ A person threatened with deportation cannot be denied the right to challenge the constitutional validity of the process which led to his status merely on the basis of speculation over the availability of other forms of relief.

E

Jurisdiction

It is contended that the Court of Appeals lacked jurisdiction under § 106(a) of the Act, 8 U. S. C. § 1105a(a). That section provides that a petition for review in the Court of Appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act." Congress argues that the one-House veto authorized by § 244(c)(2) takes place outside the administrative proceedings conducted under § 242(b), and that the jurisdictional grant contained in § 106(a) does not encompass Chadha's constitutional

¹⁰Depending on how the INS interprets its statutory duty under § 244 apart from the challenged portion of § 244(c)(2), Chadha's status may be retroactively adjusted to that of a permanent resident as of December 19, 1975—the last session in which Congress could have attempted to stop the suspension of Chadha's deportation from ripening into cancellation of deportation. See 8 U. S. C. § 1254(d). In that event, Chadha's five-year waiting period to become a citizen under § 316(a) of the Act, 8 U. S. C. § 1427(a), would have elapsed.

challenge.

In *Cheng Fan Kwok v. INS*, 392 U. S. 206, 216 (1968), this Court held that “§106(a) embrace[s] only those determinations made during a proceeding conducted under §242(b), including those determinations made incident to a motion to reopen such proceedings.” It is true that one court has read *Cheng Fan Kwok* to preclude appeals similar to Chadha’s. See *Dastmalchi v. INS*, 660 F. 2d 880 (CA3 1981).¹¹ However, we agree with the Court of Appeals in this case that the term “final orders” in §106(a) “includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.” 634 F. 2d, at 412. Here, Chadha’s deportation stands or falls on the validity of the challenged veto; the final order of deportation was entered against Chadha only to implement the action of the House of Representatives. Although the Attorney General was satisfied that the House action was invalid and that it should not have any effect on his decision to suspend deportation, he appropriately let the controversy take its course through the courts.

This Court’s decision in *Cheng Fan Kwok*, *supra*, does not bar Chadha’s appeal. There, after an order of deportation had been entered, the affected alien requested the INS to stay the execution of that order. When that request was de-

¹¹Under the Third Circuit’s reasoning, judicial review under §106(a) would not extend to the constitutionality of §244(c)(2) because that issue could not have been tested during the administrative deportation proceedings conducted under §242(b). *Dastmalchi v. INS*, 660 F. 2d 880 (CA3 1981). The facts in *Dastmalchi* are distinguishable, however. In *Dastmalchi*, Iranian aliens who had entered the United States on nonimmigrant student visas challenged a regulation that required them to report to the District Director of the INS during the Iranian hostage crisis. The aliens reported and were ordered deported after a §242(b) proceeding. The aliens in *Dastmalchi* could have been deported irrespective of the challenged regulation. Here, in contrast, Chadha’s deportation would have been cancelled but for §242(c)(2).

nied, the alien sought review in the Court of Appeals under § 106(a). This Court's holding that the Court of Appeals lacked jurisdiction was based on the fact that the alien "did not 'attack the deportation order itself but instead [sought] relief not inconsistent with it.'" 392 U. S., at 213, quoting *Mui v. Esperdy*, 371 F. 2d 772, 777 (CA2 1966). Here, in contrast, Chadha directly attacks the deportation order itself and the relief he seeks—cancellation of deportation—is plainly inconsistent with the deportation order. Accordingly, the Court of Appeals had jurisdiction under § 106(a) to decide this case.

F

Case or Controversy

It is also contended that this is not a genuine controversy but "a friendly, non-adversary, proceeding," *Ashwander v. Tennessee Valley Authority*, *supra*, 297 U. S., at 346 (Brandeis, J., concurring), upon which the Court should not pass. This argument rests on the fact that Chadha and the INS take the same position on the constitutionality of the one-House veto. But it would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual.

A case or controversy is presented by this case. First, from the time of Congress' formal intervention, see note 5, *supra*, the concrete adverseness is beyond doubt. Congress is both a proper party to defend the constitutionality of § 244(c)(2) and a proper petitioner under § 1254(1). Second, prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the INS and Chadha. We have already held that the INS's agreement with the Court of Appeals' decision that § 244(c)(2) is unconstitutional does not affect that agency's "aggrieved" status for purposes of appealing that decision under 28 U. S. C. § 1252, see *ante*, at 8-10. For similar reasons, the INS's

agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment. We agree with the Court of Appeals that "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him." 634 F. 2d, at 419.¹²

Of course, there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of this case in the absence of any participant supporting the validity of § 244(c)(2). The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress. We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional. See *Cheng Fan Kwok v. INS*, *supra*, 392 U. S., at 210 n. 9; *United States v. Lovett*, 328 U. S. 303 (1946).

G

Political Question

It is also argued that this case presents a nonjusticiable political question because Chadha is merely challenging Congress' authority under the Naturalization Clause, U. S. Const. art. I, § 8, cl. 4, and the Necessary and Proper Clause,

¹² A relevant parallel can be found in our recent decision in *Bob Jones University v. United States*, — U. S. — (1983). There, the United States agreed with Bob Jones University and Goldsboro Christian Schools that certain Revenue Rulings denying tax exempt status to schools that discriminated on the basis of race were invalid. Despite its agreement with the schools, however, the United States was complying with a court order enjoining it from granting tax-exempt status to any school that discriminated on the basis of race. Even though the government largely agreed with the opposing party on the merits of the controversy, we found an adequate basis for jurisdiction in the fact that the government intended to enforce the challenged law against that party. See *id.*, at — n. 9.

U. S. Const. art. I, §8, cl. 18. It is argued that Congress' Article I power "To establish a uniform Rule of Naturalization", combined with the Necessary and Proper Clause, grants it unreviewable authority over the regulation of aliens. The plenary authority of Congress over aliens under Art. I, §8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo*, 424 U. S. 1 (1976); "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Id.*, at 132.

A brief review of those factors which may indicate the presence of a nonjusticiable political question satisfies us that our assertion of jurisdiction over this case does no violence to the political question doctrine. As identified in *Baker v. Carr*, 369 U. S. 186, 217 (1962), a political question may arise when any one of the following circumstances is present:

"a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Congress apparently directs its assertion of nonjusticiability to the first of the *Baker* factors by asserting that Chadha's claim is "an assault on the legislative authority to enact Section 244(c)(2)." Brief for the United States House of Repre-

sentatives 48. But if this turns the question into a political question virtually every challenge to the constitutionality of a statute would be a political question. Chadha indeed argues that one House of Congress cannot constitutionally veto the Attorney General's decision to allow him to remain in this country. No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts.¹³

Other *Baker* factors are likewise inapplicable to this case. As we discuss more fully below, Art. I provides the "judicially discoverable and manageable standards" of *Baker* for resolving the question presented by this case. Those standards forestall reliance by this Court on nonjudicial "policy

¹³The suggestion is made that § 244(c)(2) is somehow immunized from constitutional scrutiny because the Act containing § 244(c)(2) was passed by Congress and approved by the President. *Marbury v. Madison*, 1 Cranch 137 (1803), resolved that question. The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review. See *Smith v. Maryland*, 442 U. S. 735, 740 n. 5 (1979); *National League of Cities v. Usery*, 426 U. S. 833, 841 n. 12 (1976); *Buckley v. Valeo*, 424 U. S. 1 (1976); *Myers v. United States*, 272 U. S. 52 (1926). See also n. 22, *infra*. In any event, eleven Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge Congressional vetoes as unconstitutional. See Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 Harv. J. Legis. 735, 737-738 n. 7 (1979) (collecting citations to presidential statements). Perhaps the earliest Executive expression on the constitutionality of the Congressional veto is found in Attorney General William D. Mitchell's opinion of January 24, 1933 to President Hoover. 37 Op. Atty. Gen. 56. (1933). Furthermore, it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds. For example, after President Roosevelt signed the Lend-Lease Act of 1941, Attorney General Jackson released a memorandum explaining the President's view that the provision allowing the Act's authorization to be terminated by concurrent resolution was unconstitutional. Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353 (1953).

determinations” or any showing of disrespect for a coordinate branch. Similarly, if Chadha’s arguments are accepted, § 244(c)(2) cannot stand, and, since the constitutionality of that statute is for this Court to resolve, there is no possibility of “multifarious pronouncements” on this question.

It is correct that this controversy may, in a sense, be termed “political.” But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress. *Marbury v. Madison*, 1 Cranch 137 (1803), was also a “political” case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But “courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.” *Baker v. Carr*, *supra*, 369 U. S. at 217.

In *Field v. Clark*, 143 U. S. 649 (1892), this Court addressed and resolved the question whether

“a bill signed by the Speaker of the House of Representatives and by the President of the Senate, presented to and approved by the President of the United States, and delivered by the latter to the Secretary of State, as an act passed by Congress, does not become a law of the United States if it had not in fact been passed by Congress.

We recognize, on one hand, the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the conse-

quences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been . . . deposited in the public archives, as an act of Congress, . . . did not become law." *Id.*, at 669, 670 (emphasis in original).

H

The contentions on standing and justiciability have been fully examined and we are satisfied the parties are properly before us. The important issues have been fully briefed and twice argued, — U. S. — (1982). The Court's duty in this case, as Chief Justice Marshall declared in *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821), is clear:

"Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

III

A

We turn now to the question whether action of one House of Congress under §244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained:

"Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." *Tennessee Valley Authority v. Hill*, 437 U. S. 153, 194-195 (1978).

By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of

government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies:

“Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940–49, nineteen statutes; between 1950–59, thirty-four statutes; and from 1960–69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.” Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 *Ind. L. Rev.* 323, 324 (1977). See also Appendix 1 to JUSTICE WHITE’s dissent, *post*, at —.

JUSTICE WHITE undertakes to make a case for the proposition that the one-House veto is a useful “political invention,” *post*, at —, and we need not challenge that assertion. We can even concede this utilitarian argument although the long range political wisdom of this “invention” is arguable. It has been vigorously debated and it is instructive to compare the views of the protagonists. See, e. g., Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 *N.Y.U. L. Rev.* 455 (1977), and Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 *Va. L. Rev.* 253 (1982). But policy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution

prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of this case, we set them out verbatim. Art. I provides:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* a House of Representatives.” Art. I, § 1. (Emphasis added).

“Every Bill which shall have passed the House of Representatives *and* the Senate, *shall*, before it become a Law, be presented to the President of the United States; . . .” Art. I, § 7, cl. 2. (Emphasis added).

“*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) *shall be* presented to the President of the United States; and before the Same shall take Effect, *shall be* approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.” Art. I, § 7, cl. 3. (Emphasis added).

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. We have recently noted that “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.” *Buckley v. Valeo*, *supra*, 424 U. S., at 124. Just as we relied on the textual provision of Art. II, § 2, cl. 2, to vindicate the principle of separation of powers in *Buckley*, we find that the purposes underlying the Presentment Clauses, Art. I, § 7, cls. 2, 3, and

the bicameral requirement of Art. I, § 1 and § 7, cl. 2, guide our resolution of the important question presented in this case. The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers and we now turn to Art. I.

B

The Presentment Clauses

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers.¹⁴ Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." 2 M. Farrand, *The Records of the Federal Convention of 1787* 301-302. As a consequence, Art. I, § 7, cl. 3, *ante*, at 25, was added. *Id.*, at 304-305.

The decision to provide the President with a limited and

¹⁴The widespread approval of the delegates was commented on by Joseph Story:

"In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws. The principal points of discussion seem to have been, whether the negative should be absolute, or qualified; and if the latter, by what number of each house the bill should subsequently be passed, in order to become a law; and whether the negative should in either case be exclusively vested in the president alone, or in him jointly with some other department of government." 1 J. Story, *Commentaries on the Constitution of the United States* 611 (1858). See 1 M. Farrand, *The Records of the Federal Convention of 1787* 21, 97-104, 138-140; *id.*, at 73-80, 181, 298, 301-305.

qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. In *The Federalist* No. 73 (H. Lodge ed. 1888), Hamilton focused on the President's role in making laws:

"If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense." *Id.*, at 457-458.

See also *The Federalist* No. 51. In his *Commentaries on the Constitution*, Joseph Story makes the same point. 1 J. Story, *Commentaries on the Constitution of the United States* 614-615 (1858).

The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. The President's veto role in the legislative process was described later during public debate on ratification:

"It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body. . . . The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inad-

vertence, or design.” The Federalist No. 73, *supra*, at 458 (A. Hamilton).

See also *The Pocket Veto Case*, 279 U. S. 655, 678 (1929); *Myers v. United States*, 272 U. S. 52, 123 (1926). The Court also has observed that the Presentment Clauses serve the important purpose of assuring that a “national” perspective is grafted on the legislative process:

✓ “The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide. . . .” *Myers v. United States, supra*, 272 U. S., at 123.

C

Bicameralism

The bicameral requirement of Art. I, §§ 1, 7 was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials. In the Constitutional Convention debates on the need for a bicameral legislature, James Wilson, later to become a Justice of this Court, commented:

“Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stabil-

ity; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it." 1 M. Farrand, *supra*, at 254.

Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution. Were the Nation to adopt a Constitution providing for only one legislative organ, he warned:

"we shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert." The Federalist No. 22, *supra*, at 135.

This view was rooted in a general skepticism regarding the fallibility of human nature later commented on by Joseph Story:

"Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous. . . . If [a legislature] feels no check but its own will, it rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations to society." 1 J. Story, *supra*, at 383-384.

These observations are consistent with what many of the Framers expressed, none more cogently than Hamilton in pointing up the need to divide and disperse power in order to protect liberty:

"In republican government, the legislative authority

necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." The Federalist No. 51, *supra*, at 324.

See also The Federalist No. 62.

However familiar, it is useful to recall that apart from their fear that special interests could be favored at the expense of public needs, the Framers were also concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. See 1 M. Farrand, *supra*, 176-177, 484-491. It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states.¹⁵

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby

¹⁵ The Great Compromise was considered so important by the Framers that they inserted a special provision to ensure that it could not be altered, even by constitutional amendment, except with the consent of the states affected. See U. S. Const. Art V.

precluding final arbitrary action of one person. See 1 M. Farrand, *supra*, at 99-104. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

IV

The Constitution sought to divide the delegated powers of the new federal 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. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Although not "hermetically" sealed from one another, *Buckley v. Valeo, supra*, 424 U. S., at 121, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. See *Hampton & Co. v. United States*, 276 U. S. 394, 406 (1928). When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.

Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7 apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. See *post*, at 35. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect." S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897).

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4 to "establish an uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be cancelled under § 244. The one-House veto operated in this case to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status.

The legislative character of the one-House veto in this case is confirmed by the character of the Congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority,¹⁶ had determined the alien should remain in

¹⁶ Congress protests that affirming the Court of Appeals in this case will sanction "lawmaking by the Attorney General. . . . Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?" Brief of the United States House of Representatives 40. To be sure, some administrative agency action—rule making, for example—may resemble "lawmaking." See 5 U. S. C. § 551(4), which defines an agency's "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe *law* or policy. . . ." This Court has referred to agency activity as being "quasi-legislative" in character. *Humphrey's Executor v. United States*, 295 U. S. 602, 628 (1935). Clearly, however, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 587 (1952). See

the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation.¹⁷ Similarly, a veto by one House of Congress under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of § 244 as applied to Chadha. Amendment and repeal of statutes, no less than enactment, must conform with Art. I.¹⁸

Buckley v. Valeo, 424 U. S. 1, 123 (1976). When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. See *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 213-214 (1976). The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by § 244 involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U. S. 414, 425 (1944), and can enforce adherence to statutory standards. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 585 (1952); *Ethyl Corp. v. EPA*, 541 F. 2d 1, 68 (CA DC) (en banc) (separate statement of Leventhal, J.), *cert. denied*, 426 U. S. 941 (1976); L. Jaffe, *Judicial Control of Administrative Action* 320 (1965). It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely. A one-House veto is clearly legislative in both character and effect and is not so checked; the need for the check provided by Art. I, §§ 1, 7 is therefore clear. Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto.

¹⁷ We express no opinion as to whether such legislation would violate any constitutional provision. See note 8, *supra*.

¹⁸ During the Convention of 1787, the application of the President's veto

The nature of the decision implemented by the one-House veto in this case further manifests its legislative character. After long experience with the clumsy, time consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.¹⁹

to repeals of statutes was addressed and the Framers were apparently content with Madison's comment that "[a]s to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws as to require renewal instead of repeal." 2 M. Farland, *supra*, at 587. See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 587-599 (1953). There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.

¹⁹This does not mean that Congress is required to capitulate to "the accretion of policy control by forces outside its chambers." Javits and Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. Rev. 455, 462 (1977). The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power. See *id.*, at 460-461; Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 Ad. L. Rev. 667 (1980). See also note 9, *supra*.

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;

(c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms.²⁰

²⁰ An exception from the Presentment Clauses was ratified in *Hollingsworth v. Virginia*, 3 Dall. 378 (1798). There the Court held presidential approval was unnecessary for a proposed constitutional amendment which had passed both Houses of Congress by the requisite two-thirds majority. See U. S. Const. Art. V.

One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cl. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Although the bicameral check was not provided for in any of these provisions for independent Congressional action, precautionary alternative

These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that Congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I.²¹ The

checks are evident. For example, Art. II., § 2 requires that two-thirds of the Senators present concur in the Senate's consent to a treaty, rather than the simple majority required for passage of legislation. See *The Federalist* No. 64 (J. Jay); *The Federalist* No. 66 (A. Hamilton); *The Federalist* No. 75 (A. Hamilton). Similarly, the Framers adopted an alternative protection, in the stead of Presidential veto and bicameralism, by requiring the concurrence of two-thirds of the Senators present for a conviction of impeachment. Art. I, § 3. We also note that the Court's holding in *Hollingsworth*, *supra*, that a resolution proposing an amendment to the Constitution need not be presented to the President, is subject to two alternative protections. First, a constitutional amendment must command the votes of two-thirds of each House. Second, three-fourths of the states must ratify any amendment.

²¹ JUSTICE POWELL's position is that the one-House veto in this case is a *judicial* act and therefore unconstitutional as beyond the authority vested in Congress by the Constitution. We agree that there is a sense in which one-House action pursuant to § 244(c)(2) has a judicial cast, since it purports to "review" Executive action. In this case, for example, the sponsor of the resolution vetoing the suspension of Chadha's deportation argued that Chadha "did not meet [the] statutory requirements" for suspension of deportation. *Ante*, at 5. To be sure, it is normally up to the courts to decide whether an agency has complied with its statutory mandate. See

bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.²¹

note 16, *supra*. But the attempted analogy between judicial action and the one-House veto is less than perfect. Federal courts do not enjoy a roving mandate to correct alleged excesses of administrative agencies; we are limited by Art. III to hearing cases and controversies and no justiciable case or controversy was presented by the Attorney General's decision to allow Chadha to remain in this country. We are aware of no decision, and JUSTICE POWELL has cited none, where a federal court has reviewed a decision of the Attorney General suspending deportation of an alien pursuant to the standards set out in § 244(a)(1). This is not surprising, given that no party to such action has either the motivation or the right to appeal from it. As JUSTICE WHITE correctly notes, *post*, at —, "the courts have not been given the authority to review whether an alien should be given permanent status; review is limited to whether the Attorney General has properly applied the statutory standards for" *denying* a request for suspension of deportation. *Foti v. INS*, 375 U. S. 217 (1963), relied on by JUSTICE POWELL, addressed only "whether a refusal by the Attorney General to grant a suspension of deportation is one of these 'final orders of deportation' of which direct review by Courts of Appeals is authorized under § 106(a) of the Act." *Id.*, at 221. Thus, JUSTICE POWELL's statement that the one-House veto in this case is "clearly adjudicatory," *post*, at —, simply is not supported by his accompanying assertion that the House has "assumed a function ordinarily entrusted to the federal courts." *Ibid.* We are satisfied that the one-House veto is legislative in purpose and effect and subject to the procedures set out in Art. I.

²¹ Neither can we accept the suggestion that the one-House veto provision in § 244(c)(2) either removes or modifies the bicameralism and presentment requirements for the enactment of future legislation affecting aliens.

The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the “sharing” with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-

See *Atkins v. United States*, 556 F. 2d 1028, 1063–1064 (Ct. Cl. 1977), cert denied, 431 U. S. 1009 (1978); Brief for the United States House of Representatives 40. The explicit prescription for legislative action contained in Art. I cannot be amended by legislation. See n. 13, *supra*.

JUSTICE WHITE suggests that the Attorney General's action under § 244(c)(1) suspending deportation is equivalent to a *proposal* for legislation and that because Congressional approval is indicated “by failure to veto, the one-House veto satisfies the requirement of bicameral approval.” *Post*, at —. However, as the Court of Appeals noted, that approach “would analogize the effect of the one house disapproval to the failure of one house to vote affirmatively on a private bill.” 634 F. 2d, at 435. Even if it were clear that Congress entertained such an arcane theory when it enacted § 244(c)(2), which JUSTICE WHITE does not suggest, this would amount to nothing less than an amending of Art. I. The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority. This does not mean that legislation must always be preceded by debate; on the contrary, we have said that it is not necessary for a legislative body to “articulate its reasons for enacting a statute.” *United States Railroad Retirement Board v. Fritz*, 449 U. S. 166, 179 (1980). But the steps required by Art. I, §§ 1, 7 make certain that there is an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.

step, deliberate and deliberative process.

← The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. ↪ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). With 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.

V

We hold that the Congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional. Accordingly, the judgment of the Court of Appeals is

Affirmed.