

An Escape for the Escape Clause Veto?

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NOTES AND COMMENTS

AN ESCAPE FOR THE ESCAPE CLAUSE VETO?

I. INTRODUCTION

Since the Supreme Court in *Immigration and Naturalization Service v. Chadha*¹ invalidated the unicameral legislative veto provision in the Immigration and Nationality Act² as violative of Article I, section 1 and section 7³ of the Constitution, the Constitutional soundness of nearly two hundred similar provisions in other legislation has become open to question. Appellate and lower courts have resolved the issue of such provisions' constitutionality negatively in the context of six other legislative enactments,⁴ while Congress is returning to other techniques of *post hoc* legislative control.⁵ The breadth of the *Chadha* decision, the small amount of case law

1. 103 S. Ct. 2764 (1983). Chief Justice Burger delivered the opinion, with Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor joining to form the majority. Justice Powell concurred on significantly narrower grounds. Both Justices White and Rehnquist dissented.

2. 8 U.S.C. §1254(c)(2) (1982), which was §244(c)(2) of the Act, provided

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

3. 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.

U.S. CONST. art. I, §1.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. . . .

U.S. CONST. art. I, §7, cl. 2.

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.

U.S. CONST. art. I, §7, cl. 3.

4. See cases listed *infra*, in notes 96-102.

5. See, e.g., Levitas & Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801, 804 (1984) (concerning the introduction in S.1650 of combined report-and-wait disapproval procedures); Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 792-94 (1984). The methods of

addressing legislative vetoes, the fact that those few cases invalidate them across the board, and the perceptible shift in Congress' style of retaining control over administrative decisions, all indicate that the device of the congressional veto has met its end. Several commentators, however, have suggested that the inquiry into constitutionality should be answered differently according to the use the given veto serves.⁶

This Note will consider whether the characteristics peculiar to import trade legislation provide a basis for arguing that section 203(c) of the Trade Act of 1974⁷ should survive the *Chadha* decision, a question not yet addressed by any court. The inquiry which follows immediately upon a finding of constitutional infirmity is whether the offending provision is severable either from the section of which it is part or from the legislation as a whole. This issue is tactically crucial because a finding of inseverability will often have the same effect as simply allowing the exercise of the congressional veto. Therefore, the question of section 203(c)'s severability from sections 201 and 202, the "escape clause" provisions, will also be discussed.⁸

Although the *Chadha* decision has been extensively analyzed,⁹ a brief

congressional oversight of executive action apart from the legislative veto are (1) sunset laws (2) the requirement of Presidential consultation before taking given measures (3) report and wait procedures which delay implementation of the agency decision for a period in which Congress may legislate contrary law (4) the denial of appropriations in retaliation for actions of which Congress disapproves. *Id.* at 792.

6. Breyer, *supra* note 5, at 790; Note, *Immigration and Naturalization Service v. Chadha: The Death Knell for the Legislative Veto?*, 69 IOWA L. REV. 513, 526 (1984) [hereinafter cited as Iowa Note]; Dixon, *The Congressional Veto and Separation of Powers: The Executive on the Leash?*, 56 N.C.L. REV. 423, 481 (1978).

7. Trade Act of 1974, 19 U.S.C. §§2101-2487 (1982); the "escape clause" is section 201 of the Act, 19 U.S.C. §2251, and the legislative veto provision governing it is section 203, 19 U.S.C. §2253(c) (1982). For a general discussion of the operation of the escape clause, see Garfinkel, *Guide to Import Relief and Unfair Trade Actions Available Under U.S. Law*, 15 INT'L LAW. 240 (1981); Berg, *Petitioning and Responding under the Escape Clause: One Practitioner's View*, 6 N.C.J. INT'L L. & COM. REG. 407 (1981); Ball, *Interpretive History of the Escape Clause under the Trade Act of 1974*, 12 J. INT'L L. & ECON. 531 (1978); Ris, "Escape Clause" relief under the Trade Act of 1974: new standards, same results, 16 COLUM. J. TRANSNAT'L L. 297 (1977).

8. 19 U.S.C. §2253(c) (1982).

9. Breyer, *supra* note 5; Levitas & Brand, *supra* note 5; Iowa Note, *supra* note 6; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789; Spann, *Spinning the Legislative Veto*, 72 GEO. L.J. 813 (1984); Note, *The Decline of the One-House Veto After Chadha v. Immigration and Naturalization Service and Consumer Energy Council of America v. FERC*, 18 NEW ENG. L. REV. 943 (1983) [hereinafter cited as New England Note]; Note, *Immigration and Naturalization Service v. Chadha: The Legislative Veto Declared Unconstitutional*, 86 W. VA. L. REV. 461 (1984) [hereinafter cited as West Virginia Note]; Note, *Immigration and Naturalization Service v. Chadha: A Legislative "House of Cards" Tumbles*, 8 NOVA L.J. 451 (1984) [here-

review is necessary in order to apply the decision's reasoning to the escape clause legislation. Congress had delegated to the Immigration and Naturalization Service ("INS") the power to order suspension in the cases of aliens who satisfied statutory criteria,¹⁰ and had empowered the Attorney General to enforce this provision.¹¹ The constitutional dilemma presented in *Chadha* was that section 244(c)(2) of the Immigration and Nationality Act¹² purported to authorize either House of Congress to invalidate by resolution the Attorney General's suspension of deportation of aliens. This device of reserving to one House the power to override the Attorney General's decision with a mere majority, allowed Congress to retain continuing control over specific instances of executive action, and was known as the legislative veto.¹³

inafter cited as Nova Note]; Note, *Immigration and Naturalization Service v. Chadha*, 78 AM. J. INT'L L. 226 (1983).

10. 8 U.S.C. §1254(c)(2) (1982).

11. Section 244(a)(1) provides that a deportable alien who applies to the Attorney General and fits the following criteria may be eligible for suspension if he:

(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.

8 U.S.C. §1254(a)(1) (1982).

12. 9 U.S.C. §1103(a) (1982).

13. Thus, congressional delegation of power was made to a certain degree conditional on Congress' ongoing agreement with administrative decisions. At the same time, Congress bore less political accountability for vetoing a given executive act by such resolution, than it would by drafting a bill, pushing it through committee, reporting it, voting on the record to pass it, all in both houses, and then obtaining Presidential signature. The cost of this lost accountability is particularly addressed in Spann, *supra* note 9.

The legislative veto appears in fifty-six different statutes. Its forms are several: the one-house veto, the two-house veto, the committee veto, the requirement of an affirmative Congressional resolution, the one and one half House veto. See Breyer, *supra* note 5, at 785. According to Judge Breyer, three traits are essential. The legislative veto is identified by (1) a statutory delegation of power to the executive; (2) an exercise of that power by the executive; and (3) a power reserved by Congress to nullify the executive's exercise of power. *Id.* at 786.

Many commentators have attempted to categorize these veto provisions by their context and function. See *supra* note 9. Strauss, for example, makes the distinction between regulatory vetoes and political vetoes. Strauss, *supra* note 9, at 791, 805. See also Dixon, *supra* note 6, at 470-74.

II. LEGISLATIVE ANALYSIS

A. *Legislative Action Defined*

On the merits,¹⁴ the *Chadha* court decided that Congressional exercise of the retained section 244(c)(2) power was an act legislative "in character and effect."¹⁵ Article I, section 1 and section 7 prescribe the bicameral process through which legislation is to pass. Under Article I, section 7, clause 2, legislation is also subject to the requirement of presentment to the President for signature or veto.¹⁶ By effecting a legislative purpose, yet sidestepping these textual requirements for legislative action, section 244(c)(2) expressly violated the Constitution. Thus, the initial characterization of the exercise of the section 244(c)(2) power as legislative is crucial.

The Court identified four traits of legislative action. First, the House resolution revoking Chadha's suspension of deportation 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."¹⁷ The alterations were the change in Chadha's legal status, and Congress' requiring the Attorney General to prevent the suspension he would otherwise have supported.¹⁸ Second, the veto supplanted typical legislative action. Absent the veto, the only manner in which Congress could have obligated the Attorney General to deport a particular alien whose deportation had been lawfully suspended, would have been to pass a specific law to that effect, which would first have required a bicameral majority and Presidential approval.¹⁹ Third, the effect of the veto was to implement a policy decision of the sort embodied in statutes. Accordingly, the Court argued that:

[d]isagreement with the Attorney General's decision on Chadha's deportation . . . 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 revoked.²⁰

14. The Court gave close attention to a number of threshold as well as other substantive issues, including appellate jurisdiction, severability, standing, alternative relief, jurisdiction, case or controversy, and the political question doctrine.

15. *Chadha*, 103 S. Ct. at 2784.

16. See *supra* note 3.

17. *Chadha*, 103 S.Ct. at 2784.

18. *Id.*

19. *Id.* at 2785.

20. *Id.* at 2786.

Fourth, this veto did not fall into any of the four Constitutional provisions giving unicameral congressional action the force of law.²¹ Since the Constitution painstakingly describes these four cases, the Court reasoned, only such explicit exceptions to the lawmaking channels prescribed in Article I may be recognized.²²

Commentators have decried the formalism of this definition of legislative action.²³ The most pointed argument is that many types of governmental action seem to fit the abstract definition, whether originating in the executive, legislative, or judicial branch. Agency rulemaking under the executive aegis is most often cited as legislative action not conforming to Article I, section 1 and section 7.²⁴ In addition, Professor Strauss notes that the House may alter legal rights and duties, without adhering to Article I, section 1 and section 7, in holding witnesses in congressional contempt, and in ordering investigations.²⁵ Moreover, the Attorney General's action and the House action in *Chadha*'s case were indistinguishable: both authorities attempted to decide the case of a particular individual, according to each authority's interpretation of whether that individual's case presented the facts described by statutory criteria. The Court's definition seems to abandon a long-standing, although inadequately sharp, distinction between legislative and adjudicative action. Legislative action is action with future effect, which presents a principle to be applied consistently to a broad range of similar situations. Adjudication focuses on resolving a present conflict between parties.²⁶ This view would have characterized the effect of the veto as adjudicative, rather than legislative.²⁷

In considering whether *Chadha* should invalidate the Trade Act's es-

21. *Id.* The four provisions are:

- i. Art. I, §2, cl. 5—The House of Representatives initiates impeachments.
- ii. Art. I, §3, cl. 6—The Senate conducts trials following impeachment.
- iii. Art. II, §2, cl. 2—The Senate ratifies treaties negotiated by the President.
- iv. Art. II, §2, cl. 2—The Senate approves or disapproves presidential appointments.

22. It is unclear whether each of these four traits must be present before action can be considered legislative. This question serves to emphasize the similarity between the first, second and third characteristics given by the Court.

23. See Strauss, *supra* note 9, at 795-800.

24. Professor Dixon asserts, however, that this analogy is inappropriate because decisions of these agencies are subject to the strictures of the Administrative Procedure Act, requiring a consultative rationalized decisional process; while the Congressional process is, from a jurisprudential standpoint, basically an irrational process. Dixon, *supra* note 6.

25. *Id.* at 795-96.

26. 2 K. DAVIS, ADMINISTRATIVE LAW 416-20 (1983).

27. The Court chose not to base its decision on the impropriety of the legislative branch hearing individual cases and assuming an adjudicative function, without the beneficial check of judicial review. *But see* Justice Powell's concurrence, 103 S. Ct. at 2788.

cape clause, there are therefore several issues. First, under the *Chadha* analysis, is the veto's effect legislative? Second, is the veto provision severable? Third, if academic criticism of *Chadha* eventually leads to a narrowing of the decision, it is necessary to inquire whether there is a reasonable basis for differentiating the section 203(c) veto from the Immigration and Nationality Act veto struck down in *Chadha*.²⁸ This issue focuses on whether suggested distinctions in the commentary are persuasive as applied to the Trade Act of 1974's veto provision, 19 U.S.C. §2253(c).

B. *Is the Escape Clause Veto Legislative?*

The *Chadha* Courts's definition of legislative action appears on its face to embrace the Trade Act's section 203(c). Title 19, section 2253(c)(1) provides in relevant part:

If the President reports under subsection (b) of this section . . . that he will not provide import relief, the action recommended by the Commission shall take effect . . . upon the adoption by both Houses of Congress (within the 90-day period following the date on which the document referred to in subsection (b) of this section is transmitted to the Congress), by an affirmative vote of a majority of the Members of each House present and voting . . . of a concurrent resolution disapproving the action taken by the President or his determination not to provide import relief under Section 2252(a)(1)(A) of this title.²⁹

The course of implementing the escape clause and its potential veto by Congress³⁰ is as follows. An entity representative of a domestic industry may petition the International Trade Commission ("ITC") under section 201 for import relief "for the purpose of facilitating orderly adjustment to import competition."³¹ The ITC then undertakes an investigation to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the

28. Judge Breyer analogizes *Chadha* to *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), for its responsiveness to an extreme situation which the Court has never identified again. Breyer, *supra* note 5, at 788. Other commentators have suggested that the Court may be forced to retreat from the sweeping breadth of the *Chadha* decision, just as it did when it narrowed the broad separation of powers decision in *Myers v. United States*, 295 U.S. 602 (1935). Note, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 192 & n.46 (1983); See also Strauss, *supra* note 9, at 818.

29. 19 U.S.C. § 2253(c)(1) (1982).

30. The fact that the escape clause veto is bicameral still leaves it objectionable on presentment grounds.

31. 19 U.S.C. § 2251(a)(1) (1982).

threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.³² The ITC reports its findings, decision, and the basis therefor to the President within six months.³³ The President is to base his decision on whether and in what form to grant import relief on statutory considerations.³⁴ After his decision, section 203(c) gives Congress the opportunity to review the remedy the President proposes, if it differs from the ITC remedy.

In *Chadha* the Supreme Court reasoned that Chadha's rights were altered. In the absence of the Immigration and Nationality Act veto, Chadha would have maintained a legal right to remain in the U.S. Although the statute did not grant Chadha this right absent Congressional inaction, the Supreme Court considered this expectation of governmental inaction a "right" sufficient to undergo legal alteration. By analogy, a domestic industry's rights may be altered by the exercise of section 203(c) of the Trade Act of 1974. The domestic producers materially injured by imports develop an expectation of relief once the President finalizes a grant of relief either by adopting the ITC view, or by modifying it, although Congress under the statute may then reinstate the recommended form of relief.

The extent to which these two legislative vetoes circumscribe the legal rights and duties of executive agencies or of the President is different in relation to each statutory scheme. In the Immigration and Nationality Act Congress delegated to itself the authority to overturn the Attorney General's decision for the INS to suspend deportation, though Congress had already delegated to the INS the power to make the deportation decision. Chadha's fate was decided in the last administrative instance by the Attorney General. The veto circumscribed the INS' authority. The effect of the section 203(c) veto on the ITC's legal rights and duties, however, presents an interesting variation. In escape clause cases the ITC renders the final administrative decision. Unlike the review process in the INS context, the escape clause veto does not operate to review the agency decision. If the President simply adopts the ITC recommendation there is no congressional review.³⁵ As a result, the agency decision remains intact, free from intru-

32. 19 U.S.C. § 2251(b)(1) (1982). The ITC also may undertake the investigation upon the request of the President, the United States Trade Representative, upon its own motion, or upon resolutions of the House Ways and Means Committee or the Senate Finance Committee. 19 U.S.C. § 2251(b)(1) (1982). This last trigger also raises the legislative/adjudicative quandary. See *supra* notes 23-27 and accompanying text.

33. 19 U.S.C. § 2251(d)(1)-(d)(2) (1982).

34. 19 U.S.C. § 2252 (1982).

35. Note that it is possible to see in a congressional decision *not* to overturn the President's modification a negative review of the agency decision. The concern here, however, is with review of already delegated final authority, i.e., the President's and not the ITC's.

sion by the legislative branch. It is difficult to prove that the section 203(c) veto would alter the legal rights and duties of the ITC.

The argument that the veto alters the legal rights and duties of the President is more successful. The delegation of authority and discretionary right to the President to choose the type and amount of import relief is clearly compromised by the possibility of a congressional veto. The grant of final decisional authority to the President provides in relevant part:

(a) After receiving a report from the Commission containing an affirmative finding under section 2251(b) of this title that increased imports have been a substantial cause of serious injury or the threat thereof with respect to an industry, the President—

(1)(A) shall provide import relief for such industry pursuant to section 2253 of this title, unless he determines that provision of such relief is not in the national economic interest of the United States. . . .

(b) Within 60 days . . . after receiving a report from the Commission containing an affirmative finding under section 2251(b) of this title. . . , the President shall—

(1) determine what method and amount of import relief he will provide, or determine that the provision of such relief is not in the national economic interest of the United States. . .³⁶

Under the section 203(c) veto, only if the President alters the recommended grant of relief does congressional review occur. Moreover, that review is limited to reinstating the agency decision. Thus, in the escape clause context it is not the administrative agency decision which is subjected to legislative veto, but the President's decision itself. The final Executive decision may be influenced by political considerations which the ITC may not entertain.³⁷ To impose congressional review over such a discretionary decision would indeed alter the executive's legal rights and duties.

36. 19 U.S.C. § 2251(a), (a)(1)(A), (b) & (b)(1) (1982).

37. Reference may be had to President Reagan's deferral of the ITC's recommendation of selective import relief in the recent steel escape clause case. On September 18, 1984, the President denied the relief which the ITC announced in July 1984 in Inv. No. TA-201-51, Steel Import Relief Determination, 49 Fed. Reg. 36, 813 (1984). See *N.Y. Times*, Sept. 19, 1984, at A1, col. 6. The obvious political consideration was the impending presidential election, in which the imposition of or refusal to impose a steel quota would have weighed heavily. The alternative of beginning negotiations for trade agreements with exporting nations carries a much more remote political accountability.

The Supreme Court's summary affirmance of the reasoning of the Court of Appeals for the District of Columbia in *Consumer Energy Council of America v. FERC*³⁸ supports this result. The Court of Appeals considered whether a congressional veto over regulations promulgated to shift some of the cost of natural gas deregulation to industrial users was a policy decision. *Consumer Energy* held that the veto change the law (or was "legislative" because it narrowed the FERC's discretion.³⁹ When the veto is used to block regulations not pleasing to Congress, "[t]here is no question that the effect of a congressional veto is to alter the scope of the agency's discretion. In this case the practical effect probably was to withdraw the discretion altogether."⁴⁰ Accordingly, §203(c) fits this prong of the "legislative action" definition in application to the President.

As to the second element of the definition set forth in *Chadha*, the only other method of forcing the President to implement the ITC recommendation would be to enact a statute. Assuming that the President would not sign such a bill absent other political conditions making it advantageous to do so, Congress would be required to muster a two-thirds majority to override his veto. As to the policy characteristic of legislative action, the third element of the test, the Supreme Court argued in *Chadha* that simple disagreement with the Attorney General was a policy determination. Congressional disagreement with the President's rejection of the ITC recommendation is no less a "policy" choice, by this standard.⁴¹ It may nonetheless be argued that the policy determination in the use of section 203(c) is less sweeping. Congress thereby asserts that one executive decisionmaker's policy (the ITC's) is preferable to another executive decisionmaker's policy (the President's). In the *Chadha* situation, however, Congress chose a policy itself, and then imposed it on the Attorney General as part of his duty to execute. Finally, since the section 203(c) veto is bicameral, the question whether it falls under any of the enumerated Constitutional provisions for unicameral legislative action is irrelevant.

C. Decisional Law

Of the courts treating the validity of legislative vetoes in the aftermath

38. 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom.* Porcess Gas Consumers Group v. Consumer Energy Council of Am., 103 S. Ct. 3556 (1983). See also, New England Note, *supra* note 9, and Iowa Note, *supra* note 6.

39. 673 F.2d at 465.

40. *Id.* at 469.

41. The fact that adjudicative action may implement policy, though on a different scale, as clearly as legislative action may do so, merely underscores the ambiguity of the Court's definition of "legislative action."

of *Chadha*, only two have seriously considered the question of "legislative" action, and then only obliquely. The remaining five decisions focus on the severability issue, apparently assuming the presence of an unconstitutional legislative veto, or attempting to sidestep that question.

*EEOC v. Allstate Ins. Co.*⁴² was the first decision to measure *Chadha*'s impact. The district court found that the mere presence of the legislative veto provision in the Reorganization Act of 1977⁴³ did invalidate the transfer of enforcement authority from the Secretary of Labor to the EEOC.⁴⁴ In summary fashion the court asserted that the jurisdictional transfer did alter individuals' legal rights.⁴⁵ By contrast, the Fifth Circuit consequently considered this issue in a separate case, *EEOC v. Hernando*,⁴⁶ and concluded that the transfer of the Equal Pay Act enforcement power was valid.⁴⁷ Thus, *Allstate* appears presumptively reversible. The *Hernando* court stressed the severability of the veto provision, and also referred to the debated provision as "the unconstitutional legislative veto provision."⁴⁸ Thus the opinion again indicates an unexamined assumption of the veto's unconstitutionality. Nevertheless, the Court noted, echoing the language of the District Court for the Western District of Tennessee in *Muller v. Optical Co. v. EEOC*,⁴⁹ that the exercise of a veto provision was distinct from its mere presence. It continued, "[i]n the instant case, there was no congressional delegation and subsequent withdrawal of delegated legislative process. Further, no action was taken that affected the substantive rights of any person."⁵⁰

In *Muller Optical Co. v. EEOC*, the district court found that a congressional veto provision in the Reorganization Act of 1977⁵¹ did not alter the legal rights and duties of the interested parties. The plaintiff employer was defending against suit by the EEOC for age discrimination. Muller argued that the Reorganization Act's transfer of enforcement authority for the Age Discrimination in Employment Act⁵² from the Secretary of Labor to the EEOC was void, such that the EEOC had no jurisdiction over the

42. 570 F. Supp. 1224 (S.D. Miss. 1983).

43. 5 U.S.C. §§ 901-906 (1982).

44. 570 F. Supp. at 1228. The Court was considering a summary judgment motion in a suit under the Equal Pay Act.

45. *Id.* at 1228.

46. 724 F.2d 1188 (5th Cir. 1984).

47. *Id.* at 1190.

48. *Id.*

49. 574 F. Supp. 946 (W.D. Tenn. 1983).

50. *Id.* at 1192 n.2.

51. 5 U.S.C. §§ 901-906 (1982).

52. 29 U.S.C. §§ 621-634 (1982).

employer.⁵³ The obvious distinction between *Muller* and *Chadha*, the court noted, was that in *Chadha*, the veto had been exercised. The transfer of enforcement authority did not involve the use of a veto at all. Though either House might have used the provision, neither did.⁵⁴ Secondly, the Reorganization Act transfer did not "affect any substantive rights," as the legislation to be enforced had already been approved.⁵⁵ *Muller* would eventually face an age discrimination claim, from one or the other agency. In spite of the distinctions the court drew, it stopped short of holding that the veto provision was constitutional.

Indeed, in discussing the severability of this provision, the court referred to the veto as "the invalidated legislative veto provision."⁵⁶ Implicit in the consideration of severability was the likelihood of constitutional infirmity. Thus, *Muller* refused to find that *Chadha* destroyed the EEOC's authority only two months after the federal district court for the southern district of Mississippi held the contrary in *Allstate*.

The Southern District of New York took a cautious approach in choosing whether to follow *Muller* or *Allstate*. In *EEOC v. Pan American Airways*,⁵⁷ the court stayed an order of compliance with a subpoena *duces tecum* in an age discrimination suit. In light of its view that the reasons given in *Muller* were "no more or no less rational and persuasive than the reasoning relied on in *Allstate* to support a contrary result" the court simply refused to rule on the merits of the transfer's validity. Rather, it emphasized that the Supreme Court had noted probable jurisdiction in *Allstate*, and that creating a conflict among the circuits would be wasteful.⁵⁸

In sum, these cases reveal judicial reticence to challenge the definitional breadth of *Chadha* and little attempt to differentiate vetoes. Moreover, no circuit has held that the presence of a legislative veto provision can invalidate the operation of discrete provisions in the same statute. This emerging line of authority is particularly significant in the escape clause situation, since Congress *need* not exercise its veto to reject the Presidential remedy decision.

53. 574 F. Supp. at 948-49.

54. *Id.* at 951.

55. *Id.*

56. *Id.*

57. 576 F. Supp. 1530 (S.D. N.Y. 1984).

58. *Id.* at 1536. The Court denied certiorari on June 11, 1984, holding that it lacked jurisdiction to review. Justice Burger with whom Justice O'Connor joins, dissented because of the "significance of not only the jurisdictional but the underlying substantive issues presented by this appeal, . . ." 52 U.S.L.W. 3889 (U.S. June 11, 1984) (No. 83-1021).

III. SEVERABILITY

In *Chadha*, three factors were considered in concluding that the veto was severable. First, the Court found a presumption of severability in section 406 which stated that the invalidity of any particular provision would not affect the remaining provisions' validity.⁵⁹ Second, the legislative history contained insufficient evidence to rebut this presumption. There was no indication that Congress would have chosen not to delegate the suspension power at all, had it known that the veto was unavailable as a control device. On the contrary, the history illustrated the burdensomeness to Congress of entertaining private bills for each alien, which practice the act was to supplant. Third, section 244 was deemed "fully operative as law" even without the veto provision.⁶⁰ Under *Champlin Refining Co. v. Corporation Comm'n*,⁶¹ meeting this test further establishes severability.

The bulk of the case law responsive to *Chadha* treats the severability issue. The question is crucial in the escape clause situation. Should the President select relief differing from the ITC recommendation, proponents of the President's choice will argue that the legislative veto is unconstitutional, but especially that it is severable from sections 202 and 203. In this manner, the President's delegated authority to disagree with the ITC would remain untouched. Opponents of the President's choice would necessarily contend that Congress would never have delegated such authority without some continuing congressional control.

A. Legislative History

1. Severability Clause

Unlike the Immigration and Nationality Act considered in *Chadha*, the Trade Act of 1974 does not contain a severability clause. Section 605 on "separability" was not enacted, and provided:

If any provision of this Act or the application of any provision to any circumstances or persons shall be held invalid, the validity of the remainder of this Act, and of the application of such provision to other circumstances or persons, shall not be affected thereby.⁶²

59. *Chadha*, 103 S. Ct. at 2774.

60. *Id.* at 2775.

61. 286 U.S. 210, 234 (1932).

62. 19 U.S.C. § 2101 (1982) Historical Note. Trade Act of 1974 Pub. L. No. 93-618, 1974 U.S. CODE CONG. & AD. NEWS (88 Stat.) 2290, 2403.

Under *Chadha*, such a clause would raise a presumption of severability.⁶³ Nevertheless, the absence of a severability clause is not dispositive of legislative intent to have an Act fail in its entirety as an inseparable whole.⁶⁴ Without the benefit of this presumption, it is necessary to inquire whether the "[l]egislature would not have enacted those provisions which are within its power, independently of that which is not."⁶⁵ Some of the evidence indicates that the legislative veto provision was integral to the drafting of the statute, and so inseverable. Other evidence points in the opposite direction.

2. Precursor Statutes

The legislative history of provisions allowing Congress to veto Presidential divergences from agency relief recommendations indicates a continuity in congressional oversight. A provision in the precursor to the 1974 Act, section 351(a)(2) of the Trade Expansion Act of 1962 provided for a concurrent congressional resolution to force the President to implement the [then] Tariff Commission's relief recommendation. Congress had 60 days in which to act.⁶⁶ The presence of this override provision in the 1962 Act supports the view that Congress would not have delegated this same authority to the President in 1974 without a similar override.

Prior to the 1962 Act, section 7 of the Trade Agreements Extension Act of 1951, however, provided essentially the same escape clause protection for domestic industries, without reserving any veto authority to Congress.⁶⁷ Instead of a veto, the committee report provided for congressional

63. 103 S. Ct. at 2774.

64. See *United States v. Jackson*, 390 U.S. 570, 585 n.7 (1968); *EEOC v. Hernandez*, 421 U.S. 593, 607 n.11 (1975); *Chadha*, 462 U.S. 491, 507 n.11 (1983). There is also authority for the presumption of inseverability inherent in a statute. *Carter v. Carter Coal*, 298 U.S. 238, 312-13 (1936). In *Consumer Energy Council*, the Court dispensed with the conflict: "We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." 673 F.2d at 442.

65. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

66. Trade Expansion Act of 1962, Pub. L. No. 87-794, 1962 U.S. CODE CONG. & AD. NEWS (76 Stat.) 1021, 1054; S. Rep. No. 2059, 87th Cong., 2d Sess., reprinted in 1962 U.S. CODE CONG. & AD. NEWS 3110, 3121.

67. Section 7(c) of the Trade Agreement Extension Act of 1951, Pub. L. No. 50, 1951 U.S. CODE CONG. & AD. SERV. 70, 72 provides that:

Upon receipt of the Tariff Commission's report of its investigation and hearings, the President may make such adjustments in the rates of duty, impose such quotas, or make such other modifications as are found and reported by the Commission to be necessary to prevent or remedy serious injury to the respective domestic industry. If the President does not take such action within sixty days he shall immediately submit a report to the Com-

control by requiring the President to be accountable for the decision not to apply recommended relief:

If, after the Tariff Commission has completed its investigation, the President does not take the escape action recommended by it, he must submit a report to the Committee on Ways and Means and the Committee on Finance stating why he has not made the adjustments or modifications recommended.⁶⁸

It is important to remember, however, that the legislative veto had not gained as great a currency in 1951.⁶⁹ It is impossible to evade the argument that the *Chadha* severability test becomes less meaningful the further one casts back in time. Eventually it signifies little to inquire whether a delegation would have been made without a congressional veto to rein it in. The inquiry must therefore be limited to asking whether a Congress which did have access to a legislative veto would have delegated this authority to the President without such a veto. In 1951 Congress clearly thought some accountability was required of the President. Whether it would have used a veto to achieve that accountability, had the veto been available, is not known.

3. *Legislative History of the 1974 Act*

An inquiry into statutory purpose may be helpful, since examination of the history of section 203 itself does not reveal an unequivocal answer. Sections 202 and 203 appear in trade statutes, the main purposes of which are delegating authority over trade relations to the executive branch. Placing sections 202 and 203 in the larger context of the entire Trade Act illustrates how Presidential authority to choose escape clause relief in these sections helps effect the overall purposes of the Act to "foster economic growth," "eliminate barriers to trade," "establish fairness and equity in international trading relations," and especially "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition. . ."⁷⁰

mittee on Ways and Means of the House and to the Committee on Finance of the Senate stating why he has not made such adjustments or modifications, or imposed such quotas.

Id.

68. Section 7, Trade Agreements Extension Act of 1951, S. Rep. No. 299, 82nd. Cong., 1st Sess., reprinted in 1951 U.S. CODE CONG. & AD. SERV. 1465, 1467-68.

69. Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Perogatives*, 52 IND. L.J. 323, 324 (1977).

70. 19 U.S.C. §2102 (1982).

The Act was a massive renewal of the delegation of trade relations authority to the President:

Article I, Section 8 of the Constitution vests in the Congressional plenary authority to "lay and collect taxes, duties, imposts" and to "regulate commerce with foreign nations." Since 1934, Congress has periodically delegated to the President specific and limited authority to conduct negotiations with other countries for reciprocal tariff and trade concessions. . . .

As passed by the House, the bill represented the largest delegation of trade negotiating authority to the Executive in history. The Finance Committee's Amendments seek to establish appropriate and constitutionally sound guidelines and criteria to govern the exercise of the authority granted by the bill. The intractable nature of modern barriers to trade, both tariff and nontariff, make this grant of extensive negotiating authority to the Executive necessary.⁷¹

The grant of authority was undisputedly considered expedient to effecting the statutory purpose, so that this expediency supports severability.

In addition, Congress took care to establish criteria for the exercise of this authority. First, it stated its intent thus: "That relief ought not to be denied for reasons that have nothing whatever to do with the merits of the case as determined under U.S. law."⁷² Next, section 202 enumerates the factors the President must consider.⁷³ These safeguards also suggest the veto's severability, as they preempt to a certain degree the veto's control function. Finally, it was only when the Committee reported the bill that §203(c), allowing Congress to *require* the President to implement the ITC — recommended relief, was added.⁷⁴

Several additional points, however, more persuasively support the argument that absent the override provision, the authority on choice of import relief embodied in section 202 might not have been granted. First, although section 202 did provide criteria, a closer look reveals these guidelines to be

71. S. Rep. No. 1298, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7196. Note that it may have been "necessary" but other trade bills failed to pass. It was clearly advisable, as the grant facilitates the exercise of inherent Presidential powers to negotiate. Negotiation would proceed, probably more clumsily, without the grant. Thus, since the grant simply enhances executive power, a veto over it could be made essential; the costs of the defeat of the section as a result would not necessarily be excessive. *See* discussion, *infra* Section IV.

72. 19 U.S.C. §2252 (1982).

73. *Id.*

74. 1974 U.S. CODE CONG. & AD. NEWS 7196, 7205.

factors for the President's consideration. The President weighs them as he thinks best in his discretion. Since the final decision involves balancing factors, no "correct" decision is immediately apparent. Thus, proponents of inseverability would understandably argue that these guidelines are an inadequate alternative means of controlling the grant of power to the President. Rather, the criteria in section 202 illustrate a subordinate purpose to delimit the President's exercise of statutory authority. In light of the broad purposes of the statute,⁷⁵ it is clear that section 202 was meant to vest the President with added negotiating power. In light of the subordinate purpose of limiting that power, the section 203(c) veto appears to have been the most obvious and effective means.

Finally, a brief examination of section 203(h)(4) illustrates the extent to which sections 202 and 203(c) are intertwined. That section allows the President later to modify the relief finally imposed, after consulting with the Secretaries of Labor and Commerce. The bounds of that power are simply that a consultation is required; after all, the power to alter the relief after the fact implies a decision which is less politically flammable. While section 203(h)(4) stands alone, the section 203(c) veto is explicitly cross-referenced to the more impressive grant in section 202 of the power to modify or deny the recommended relief. All things considered it is more logical to perceive the inseverability of sections 202 and 203(c) from each other than to view the veto as severable from section 202.

As a review of the statute illustrates, good arguments may be made for either result, severability or inseverability. The absence of a severability clause is not dispositive of the issue. The precursor statutes present a congressional habit of seeking control of trade policy authority, but are inconclusive as to the method of achieving it. The purposes of the statute emphasize the need to vest negotiating authority in the President. At the same time, the structure of sections 202 and 203 demonstrate an attempt to limit the use of the section 202 power to given circumstances. Probably the most astute observation on the issue is that there is at present an inescapable bias towards finding severability, because of the government structure at stake.⁷⁶ Indeed, because of the wide dispersion of legislative vetoes in sundry statutes, "the repercussions [of inseverability] would topple significant government institutions."⁷⁷ In application to the escape clause context, the repercussions of a finding of inseverability could be more extensive than a finding of severability. Inseverability would dismantle the governmental mechanism for settling industry-wide import trade disputes. It would excise entirely the

75. See *infra* notes 69-72 and accompanying text.

76. Levitas & Brand, *supra* note 5, at 807-09.

77. *Id.* at 809.

President's role, leaving the decision in the ITC' hands. Of course, Congress' role would also be removed. A finding of severability, in comparison, would leave the ITC and Presidential roles intact.

B. *Decisional Law*

Gulf Oil Corp. v. Dyke,⁷⁸ reiterates the principle that absent an affirmative showing that a veto provision is *essential* to the statute, the provision is severable. The Temporary Emergency Court of Appeals, in hearing a suit for gasoline overcharges under the Emergency Petroleum Allocation Act and the Energy Policy and Conservation Act, decided that legislative veto provisions in those Acts were severable.⁷⁹ The jurisdiction of the TECA thus was valid.

Like the Trade Act, the EPAA and EPCA have no severability clauses. Looking to the legislative history, the court reasoned that "[w]hile the stated purposes of the EPCA include a reference to the congressional veto, it does not follow that the veto provisions are inseverable."⁸⁰ Moreover, records of heated debate, illustrating the fragile compromise between executive and legislative power effected by the EPCA were not equivalent to a clear indication that the Act would not have passed without its veto.⁸¹ The absence of these clear indicators also led the Fifth Circuit in *Hernando* to find that the legislative veto in the Reorganization Act of 1977 is severable. While one Congressman argued that the veto was integral to the bill, his view alone could not overcome the general absence of such expressed intent within the legislative history and the statutory language.⁸²

In *American Federation of Government Employees v. Pierce*,⁸³ a clause containing a veto provision was held inseverable from the preceding part of the same sentence. Thus, the HUD Appropriation Act, without the clause, would have placed a blanket prohibition on reorganization costs before a certain date. This inflexible approach was in indisputable conflict with the legislative history. The *Allstate*⁸⁴ court departed from the general trend in finding the legislative veto in the Reorganization Act to be inseverable simply because Congress' intent to control Presidential choices was evidenced by the presence of the veto provision. This reasoning seems highly unpersuasive as it ignores what Congress might have done if told the veto

78. 734 F.2d 797 (Temp. Emer. Ct. App. 1984).

79. *Id.* at 805.

80. *Id.* at 803.

81. *Id.* at 804.

82. *Hernando*, 724 F.2d at 1191.

83. 697 F.2d 303 (D.C. Cir. 1982).

84. 570 F. Supp. 1224 (S.D. Miss. 1983).

was not available. On the other hand, speculation as to what Congress then might have done may also be unpersuasive. In fact, these findings of severability and inseverability are all predicated on what Congress did do. Where severability is the result, the absence of legislative history pointing to massive insistence or inclusion of a veto is important. When one court stops to point out that such absence is irrelevant since the veto was enacted, it simply underscores the impossibility of imagining what Congress might otherwise have done.

The final factor to consider in determining severability is whether what remains after severance is "fully operative as a law."⁸⁵ In *Chadha*, what remained after severing section 244(c)(2) was an authorization of the Attorney General to suspend deportations in defined circumstances, and a requirement that he report all suspensions to Congress. The Court noted that section 244 resembled the "report and wait" procedure approved in *Sibbach v. Wilson*.⁸⁶ Congress is thus notified of its chance to pass blocking legislation, which would fully conform to the dynamics of Article I.

Title II of the Trade Act of 1974, comprising the three sections pertaining to general import relief, sections 201, 202, and 203, presents a coherent administrative procedure. The ITC conducts an investigation under §201 to determine:

[W]hether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article. . .⁸⁷

Under section 202(a), the President must provide import relief on receiving the ITC's affirmative injury finding, unless he "determines that provision of such relief is not in the national economic interest of the United States. . ."⁸⁸ Section 202(b) requires the President to make this decision and to choose the method and amount of relief usually within 60 days.⁸⁹ Section 202(c) lists nine economic factors which the President must consider in making his determination.⁹⁰ Finally, Section 203(a), 19 U.S.C. §2253(a), provides five possible types of relief the President may choose to implement his decision. The Executive may impose or change duties, tariff-

85. *Champlin*, 286 U.S. at 234.

86. 312 U.S. 1 (1941).

87. 19 U.S.C. §2251(b)(1) (1982).

88. 19 U.S.C. §2252(b)(1) (1982).

89. 19 U.S.C. §2252(b) (1982).

90. 19 U.S.C. §2252(c) (1982).

rate quotas, quotas, orderly marketing agreements, or any combination of these.⁹¹ Section 203(b), 19 U.S.C. §2253(b), requires the President to transmit his proposal to Congress, and to set forth the reasons for any departure from the ITC recommendation, whether he chooses different relief or decides that import relief is not in U.S. interests.⁹²

Section 203(c) contains the legislative veto provision which Congress may exercise within 90 days.⁹³ Removal of section 203(c)(1) and (2) would leave the prior provisions fully operative. Congress would be free to pass a statute to oppose the President's divergent proposal. The single complication arises in scheduling any congressional action. The severed section 203(c)(1) and (2) also would remove the 90 day period for congressional disapproval. Under section 203(e)(1), however, import relief finally determined takes effect within 15 days of determination, unless a marketing agreement is involved.⁹⁴ Significantly, section 203(h)(4) allows the President to reduce or terminate the relief finally imposed if he determines this action is in the U.S. interest, after consulting with the Secretaries of Labor and Commerce.⁹⁵ Thus, as discussed above, to a certain degree, the veto's role in delimiting Presidential discretion to fashion import relief, is already neutralized by later, unfettered presidential authority to modify that relief.

IV. DISTINCTIONS AMONG LEGISLATIVE VETOES

Federal courts have now considered the constitutionality of legislative vetoes in the Reorganization Act of 1977,⁹⁶ the Emergency Petroleum Allocation Act, the Energy Policy and Conservation Act,⁹⁷ the Presidential Recordings and Materials Preservation Act,⁹⁸ the Immigration and Nationality Act,⁹⁹ the HUD Appropriation Act,¹⁰⁰ the Natural Gas Policy Act of

91. 19 U.S.C. §2253(a) (1982).

92. 19 U.S.C. §2253(b) (1982).

93. 19 U.S.C. §2253(c) (1982).

94. 19 U.S.C. §2253(e)(1) (1982).

95. 19 U.S.C. §2253(h)(4) (1982).

96. *EEOC v. Allstate*, 570 F. Supp. 1224 (S.D. Miss. 1983); *Muller Optical Co. v. EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983); *EEOC v. Pan American Airways*, 576 F. Supp. 1530 (S.D.N.Y. 1984); *EEOC v. Hernando Bank*, 724 F.2d 1188 (5th Cir. 1984).

97. 15 U.S.C. §§751-760(h) (1982) (legislative veto provision at §757(e)(2)); 42 U.S.C. §§6201-2 (1982) (legislative veto provisions at §§6239, 6240, 6261, 6421, 6422). *See In re Department of Energy Stripper Well Exemption Litig.*, 578 F. Supp. 586 (D. Kan. 1983); *Gulf Oil v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App. 1984).

98. 44 U.S.C. §2107 note (1982). *See Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983).

99. 8 U.S.C. §§1101-1503 (1982) (legislative veto provision at §1254(c)(2)). *See* 103 S.Ct. 2764 (1983).

100. Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982). *See American Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982).

1978,¹⁰¹ and the FTC Improvements Act.¹⁰² None draws distinctions among the vetoes to reflect the myriad statutory contexts where they appear. In the words of one commentator, "use of the veto as an instrument of the continuing political dialogue between President and Congress, on matters having high and legitimate political interest to both, and calling for flexibility for government generally, does not present the same problems as its use to control, in random and arbitrary fashion, those matters customarily regarded as the domain of administrative law."¹⁰³

Unlike vetoes over agency rulemaking, which are most often criticized as the type of veto that epitomizes an escape from political accountability,¹⁰⁴ inadequate legislating of standards for agency action,¹⁰⁵ and an exclusion of rightful Presidential power,¹⁰⁶ vetoes used in high-profile political areas such as national security and foreign affairs may transfer greater authority to the Executive. International agreements and the setting of tariffs are together one such area of "direct presidential initiative and responsibility."¹⁰⁷ Moreover, where *both* Congress and the Executive have constitutional powers in a certain region of government, the congressional veto can enhance the harmonious exercise of overall federal power.¹⁰⁸ For several reasons, a veto on the exercise of presidential discretion over import relief falls in this category of political accommodations between branches of government.

First, both Congress and the President have spheres of direct influence over international trade. Article I, section 8 of the Constitution grants Congress the power to regulate commerce of foreign nations.¹⁰⁹ At the same time, Article II, section 2 describes the President's constitutional power over external affairs.¹¹⁰ Among others the power is granted to make treaties

101. 15 U.S.C. §§3301-3432 (1982) (legislative veto provision at §3342). See *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 103 S.Ct. 3556 (1983).

102. 15 U.S.C. §§41-58 (1982) (legislative veto provision at §57a(1)(a)). See *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd sub nom. United States Senate v. FTC*, 103 S.Ct. 3556 (1983).

103. Strauss, *supra* note 9, at 791-92.

104. Breyer, *supra* note 5, at 796.

105. Strauss, *supra* note 9, at 810-811.

106. *Id.*

107. *Id.* at 806.

108. Strauss, *supra* note 9, at 817; Breyer, *supra* note 5, at 787.

109. U.S. CONST. art. I, §8.

110. Article II, §2 provides that the President is Commander-in-Chief of the armed forces, that the President will receive ambassadors and ministers, that the President will appoint ambassadors, ministers and councils subject to Senate confirmation.

with foreign nations with the advice and consent of the Senate.¹¹¹ Thus, treaties concerning foreign trade require an interweaving of legislative and executive branch initiative.

Because of the difficulty and delay involved in obtaining the two-thirds Senate majority necessary for treaty-making, the device of executive agreements shares the field with Presidentially negotiated foreign compacts.¹¹² The executive power to make such agreements does not rest on a textual Constitutional grant as does the treaty-making power. It does rely to a certain extent, however, on Constitutionality derived authority. Nevertheless, statutory authority, and then authority subject to Congressional approval, usually precede implied constitutional power as the sources of the President's executive agreement power.¹¹³ Thus, the President may make international agreements entirely independently of Congress.¹¹⁴

The practical limitations on this power illustrates the necessity in this context of a high degree of power sharing between the legislative and executive branches. First, unlike self-executing treaties, it is unlikely that a non-self-executing agreement can supersede a prior inconsistent statute. But, like treaties, they can be superseded by later legislation. Finally, unless self-executing they require implementing legislation as do treaties.¹¹⁵ The essence of an executive officer is the ability to act decisively and immediately when necessary; the executive agreement serves this concept. Yet the executive agreement, and thus the efficacy and credibility of the executive as negotiator, are vulnerable to hostile Congressional action or inaction. Thus, the various statutory accommodations of the executive foreign affairs power with congressional claims can only intensify the executive's foreign clout.

The purposes of the Trade Act of 1974, which enacted the present escape clause and accompanying congressional veto, are given in 19 U.S.C. §2102:

The purposes of this chapter are, *through trade agreements* affording mutual benefits —

(1) to foster the economic growth of and full employment in the

111. U.S. CONST. art. II, §2.

112. It is agreed, however, that the two types of compact are not mutually exclusive in scope. See e.g., Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 J. AIR L. & COM. 438-44 (1950).

113. DEP'T OF STATE, CIRCULAR NO. 175, FOREIGN AFFAIRS MANUAL §311.1 (1966), reprinted in *INTERNATIONAL LAW* 149 (L. Henkin, R. Pugh, O. Schachter & H. Smit eds. 1980).

114. *B. Altman & Co. v. United States*, 224 U.S. 583 (1912); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942).

115. Lissitzyn, *supra* note 112, at 444.

United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade;

(2) to harmonize, reduce, and eliminate barriers to trade on a basis which assures substantially equivalent competitive opportunities for the commerce of the United States;

(3) to establish fairness and equity in international trading relations, including reform of the General Agreement on Tariffs and Trade;

(4) to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm [sic], workers, and communities to adjust to changes in international trade flows;

(5) to open up market opportunities for United States commerce in nonmarket economies; and

(6) to provide fair and reasonable access to products of less developed countries in the United States market.^{115,1}

The comprehensive listing begins by designating the general means of proceeding: through trade agreements. The Act represents a working dynamic between the executive's power to negotiate executive agreements on trade, and Congress' power to regulate commerce. By delineating the situations where imports, fair and unfair, will be penalized, Congress enhances the executive negotiating power. To illustrate, the Presidential discretion over escape clause relief allows the President to reject unilaterally imposed quotas and tariffs for the chance of negotiating trade agreements with originating nations.¹¹⁶

Secondly, the established tendency of the executive and Congress to use power sharing statutory schemes in the foreign trade area is strengthened by the distinctly implicative constitutional interpretation given to foreign affairs grants of power. *United States v. Curtiss-Wright Export Co.*¹¹⁷ is the classic example; the Court concluded that Congress may make more extensive delegations of foreign affairs powers to the President than it might in internal affairs, although the constitutional text is sparse in the former area.¹¹⁸ Finally, the validity of delegations of executive authority conditional on the finding of statutorially defined facts, which are remarkably similar to the power sharing function of certain legislative vetoes,¹¹⁹ is

115.1. 19 U.S.C. § 2102 (1982) (emphasis added).

116. 19 U.S.C. § 2253(a)(4) (1982).

117. 299 U.S. 304 (1936).

118. See, e.g., Dixon, *supra* note 6, at 436-38.

119. Strauss, *supra* note 9, at 816 (noting that the two distinctions between constitution-

also more leniently examined from the foreign relations perspective.¹²⁰

If indeed sections 202 and 203 were to be found inseverable from each other, then these two provisions represent Congress' attempt to fashion its power sharing mechanism. Insofar as this mechanism actually enhances Presidential power to negotiate abroad, the Trade Act's assignment of executive and legislative functions may not directly run afoul of the rationale behind the proper separation of powers. This power-enhancing capacity distinguishes the escape clause veto from the regulatory type of veto to which is ascribed the vice of political unaccountability. Legislative vetoes over the decisions of independent regulatory commissions are especially suspect as they seek to control an executive agency process from which the President has already been excluded. While the ITC is an independent commission, it is not a rulemaking body.¹²¹ Moreover, the escape clause petitioning process over which it presides does not exclude the President. Rather, the ITC serves the function of investigating and analyzing empirical data in order to report to the President. Its independence is in its analysis. But the ITC investigation's primary reason for existence is to create a basis for Presidential decision and action.

Assuming, then, the validity of Professor Strauss' distinction between political and regulatory legislative vetoes,¹²² the escape clause veto in many ways exhibits the positive aspects of a "political" legislative veto.

V. CONCLUSION

We have seen that under *Chadha's* strict analysis, the exercise of the

ally valid contingent delegations and political veto arrangements are that Congress in the latter does not give the standards for the exercise of retained authority, and that it is the legislature, usually a subcommittee thereof, not the executive, that decides whether the conditions are met).

120. *Field v. Clark*, 143 U.S. 649 (1892), upheld the tariff act allowing the President to shift imports to a fee schedule upon his finding of mandated facts.

121. 19 U.S.C. §§ 2101-2487 (1982).

122. Thus far, only the New Jersey Supreme Court has recognized this view, in application to State constitutional issues. Strauss, *supra* note 9, at 812. In *General Assembly v. Byrne*, 90 N.J. 576, 448 A.2d 438 (1982), the court found a provision allowing both houses of the legislature to veto any state agency rule both an intrusion into executive process and an "unconstitutional mechanism for legislative policy making beyond the Governor's control." 448 A.2d at 439. In *Enourato v. New Jersey Building Authority*, 90 N.J. 396, 448 A.2d 449 (1982), however, the same court held that a legislative veto to approve or reject building projects that require ongoing appropriations did not violate the state presentment clause. The veto could not "disrupt executive branch functions," as it was so limited. 448 A.2d at 451. Further, not every action by the Legislature would constitute lawmaking requiring a bicameral majority and presentment. The court concluded that the veto could foster cooperation between the legislature and the Executive as an area of mutual concern. *Id.* at 452.

escape clause veto would probably be "legislative."¹²³ At the same time, such a ruling would present a question of degree because the section 203(c) veto simply *shifts* the President's discretion in time to its potential exercise under section 203(h)(4). The issue would be whether this time-alteration of discretion is enough an alteration of rights and duties to be "legislative." Next, under the case law a court would likely find the section 203(c) veto to be severable.¹²⁴ By the same token it can be forcefully argued that it is severable from the legislation as a whole only if the section 202 grant of power falls with it. Finally, given that greater interpretative flexibility has been warranted in the past towards grants of power to the executive in external affairs, and given that section 202 enhances the executive trade bargaining position, the section 203(c) veto would be a qualified candidate for preservation, should *Chadha's* span ever contract.

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123. *See supra* notes 29-41 and accompanying text.

124. *See supra* notes 59-77 and accompanying text.