FLPMA's Legislative Veto Provisions and INS v. Chadha: Who Controls the Federal Lands?

William P. Lee
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I. INTRODUCTION

On August 1, 1983, the Secretary of the Interior, James Watt, made several large tracts of federal land available for long term coal leases.1 On August 3, 1983, Morris Udall, Chairman of the House Interior and Insular Affairs Committee, requested that Secretary Watt withdraw the tracts from consideration for leasing.2 The authority allowing Chairman Udall to request and require such action of the Secretary is granted to the Interior Committee by the Federal Land Policy and Management Act (FLPMA).3 A legislative veto provision in FLPMA allows either the Senate Natural Resources Committee or the House Interior Committee4 to require the Secretary of the Interior to withdraw an area of federal land from consideration for leasing if that Committee believes that an emergency exists which threatens the land in question.5 Secretary Watt refused to comply with the Committee's request,6 claiming that the Supreme Court's decision...
in Immigration and Naturalization Service v. Chadha\(^8\) had rendered the provision granting the Committee that authority unconstitutional. Secretary Watt proceeded to hold an auction in direct opposition to the House Committee’s resolution, accepting bids for coal leases permitting exploration and mining in the wilderness areas.\(^9\) Chairman Udall challenged the Secretary’s action in the District of Columbia Federal District Court in National Wildlife Federation v. Watt.\(^10\) The court initially granted Udall an injunction preventing exploration of the lands in question.\(^11\) The court later held that Secretary Watt could not ignore the Committee vote because his own regulations required him to carry out the Committee’s wishes.\(^12\) The court thus avoided ruling on the main issue involved—whether the Supreme Court’s decision in Chadha struck down the legislative veto provisions in FLPMA—and instead decided the case on a technicality.

This confrontation between the Congress and executive branch was a direct consequence of the Supreme Court’s decision in Chadha. In that case the Court held that a legislative veto provision in the Immigration and Nationality Act (INA)\(^13\) was unconstitutional.\(^14\) The Court stated that because the provision in question allowed one House of Congress to take legislative action without the concurrence of the other House or of the President, such action was unconstitutional.\(^15\)

Nearly 200 legislative veto provisions are presently contained in different federal statutes.\(^16\) All of these provisions would probably be struck down as unconstitutional under the Supreme Court’s analysis.\(^17\) Included in these 200 legislative veto provisions are seven legislative vetoes in FLPMA.\(^18\) If the FLPMA legislative vetoes were to be held unconstitutional, the Act would collapse.

\(^8\) U.S. ___ 103 S. Ct. 2764 (1983).
\(^10\) National Wildlife Federation v. Watt, 571 F. Supp. 1145 (D.D.C. 1984). The Court held that the proposed leasing was illegal because it violated the Secretary’s own regulations which require the Secretary to abide by Committee resolutions such as the one in question in this case.
\(^11\) Id. at 1147-48.
\(^12\) Id. at 1156.
\(^13\) 8 U.S.C. §§ 1101-1525 (1982); 8 U.S.C. § 1254(c)(2) was the provision in question.
\(^14\) 103 S. Ct. at 2788.
\(^15\) Id. at 2787-88.
\(^16\) Id. at 2792 (White, J., dissenting).
\(^17\) Id.
\(^18\) 43 U.S.C. §§ 1712(e)(2); 1713(c); 1714(c)(e)(f),(l)(2); 1722(b) (1982). For a description of each provision see infra note 205.
The legislative vetoes in FLPMA are central to the goals of the Act, which are to retain the federal lands under public ownership and to re-assert Congress as the body with final power over the administration of the federal lands. Without the FLPMA legislative veto provisions most of the important land use decisions would lie solely with the President, acting through the Secretary of the Interior, because Congress would no longer have the right to review the proposals of the Secretary regarding these decisions.

This Article suggests that the Supreme Court use a different analysis than it used in Chadha if it evaluates the constitutionality of the legislative veto provisions contained in FLPMA. The Court’s analysis in Chadha has serious practical and constitutional defects. The Chadha analysis does not take into account the nature of the legislative vetoes, the purpose served by the different vetoes, or even the constitutional power used to enact the individual legislative vetoes. A better standard to use when evaluating the constitutionality of legislative vetoes is the separation of powers standard that the lower courts have used and that Justices Powell and White encouraged the Court to employ. Under a separation of powers evaluation the useful and harmful aspects of each different legislative veto would be considered. The FLPMA legislative vetoes would pass constitutional muster under a separation of powers doctrine evaluation. In this way Congress could retain its constitutional power over the federal lands and provide some check on the executive branch to ensure that the nation’s resources are protected for future use and enjoyment.

This Article examines the Chadha opinion and the analysis used by the Court in that case. It is proposed that courts employ a different analysis if they consider the constitutionality of FLPMA’s legislative vetoes. The Article first describes the legislative veto and its development. The Article then discusses the Chadha opinion and why the analysis used in Chadha is not as
useful as the separation of powers analysis. The FLPMA is then reviewed, with particular emphasis on the statute's legislative veto provisions. The final section of the Article presents a separation of powers evaluation of the FLPMA legislative veto provisions and concludes that the use of FLPMA's legislative vetoes is a constitutional exercise of Congress' property clause power.

II. THE LEGISLATIVE VETO

The history of the legislative veto is one of controversy. Every President confronted with legislative vetoes has opposed their use in at least some situations. At the same time, Congress increasingly has relied on the legislative veto as a means of monitoring delegated powers. The Supreme Court decision in Chadha is the most recent chapter in the continuing controversy between Congress and the Executive over the constitutionality of legislative veto provisions. This section discusses the history and development of the legislative veto and describes the different veto mechanisms in use today.

A legislative veto is a statutory device that gives Congress a right of final approval over executive agency or independent agency actions. Legislative vetoes are most often found in enabling statutes that delegate authority over a legislative area to an executive or independent agency. Congress delegates the power to the agency to make regulations or to take actions in order to carry out the purposes of a statute. Typically these regulations and actions represent the important but detailed work of the statutes that Congress is incapable of performing itself. A legislative veto provision in a statute allows Congress to review and possibly reject the regulations or actions taken by the

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23 Henry, The Legislative Veto: In Search of Constitutional Limits, 16 HARV. J. ON LEGIS. 735, 737 n.7 (1979).
25 An executive agency is a department of the executive branch of government whose activities are subject to statutes and whose contracts are subject to judicial review. BLACK'S LAW DICTIONARY 510 (5th ed. 1979).
26 An independent agency is any agency outside the eleven executive departments. In an independent agency, unlike an executive agency, the President has no power to discharge the agency heads without cause. 1 DAVIS, ADMINISTRATIVE LAW TREATISE ch. 2, § 7 (2d ed. 1978).
28 Abourezk, supra, note 24, at 324.
agency under the statute.\textsuperscript{29} Congress exercises legislative vetoes unilaterally, that is, without Presidential approval or consultation.\textsuperscript{30}

For example, Congress has the power to designate certain waters as marine sanctuaries. Congress has delegated the power to create marine sanctuaries and the terms relating to any such sanctuary to the Secretary of Commerce.\textsuperscript{31} At the same time, however, Congress withholds for itself the power to disapprove any designation of a marine sanctuary or any conditions that the Secretary imposes.\textsuperscript{32} Under this legislative veto provision Congress will have sixty days after it is notified of a proposed sanctuary designation in which to pass a concurrent resolution disapproving the action of the Secretary.\textsuperscript{33} If Congress passes such a resolution, the sanctuary designation is terminated.\textsuperscript{34} If Congress does not pass such a resolution within the sixty days the designation becomes effective.\textsuperscript{35}

There are many different forms of legislative vetoes. A legislative veto provision may require action by both Houses of Congress,\textsuperscript{36} one House,\textsuperscript{37} one committee,\textsuperscript{38} or even one committee chairman.\textsuperscript{39} Similarly, a legislative veto provision may require Congressional approval or disapproval to occur within thirty days,\textsuperscript{40} ninety days,\textsuperscript{41} or two years\textsuperscript{42} of the executive branch or agency action under review. While the specific terms of legislative veto provisions differ, they all share one important characteristic: they allow Congress, acting alone, to have final review over the exercise of powers delegated to administrative agencies.\textsuperscript{43}

Ironically, the legislative veto first appeared in 1932 at the request of President Herbert Hoover, who sought authority from

\textsuperscript{29} Martin, supra, note 27, at 256-57.
\textsuperscript{30} Id.
\textsuperscript{32} Id. at § 1432(b)(2)(B).
\textsuperscript{33} Id. at § 1432(h).
\textsuperscript{34} Id. at § 1432(b)(2)(B).
\textsuperscript{35} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 373.
\textsuperscript{39} Id. at 374.
\textsuperscript{40} See Martin, supra note 27, at 256.
\textsuperscript{41} See, e.g., 43 U.S.C. § 1713(c) (1982).
\textsuperscript{43} Martin, supra note 27, at 256-57.
Congress to reorganize the executive branch.\textsuperscript{44} In return for this grant of authority, Hoover agreed to allow Congress to review and reject his final reorganization plan.\textsuperscript{45} Congress accepted President Hoover’s deal and passed the first of many Reorganization Acts containing legislative vetoes.\textsuperscript{46} 

While the use of the legislative veto has expanded greatly since its inception, its use had increased most markedly during the past fifteen years.\textsuperscript{47} This increase is primarily the result of two factors. First, the abuses of power by the executive branch during the Watergate era prompted Congress to utilize new methods to police executive actions.\textsuperscript{48} Congress’ enactment of legislative vetoes in the War Powers Act\textsuperscript{49} and the Congressional Budget and Impoundment Control Act\textsuperscript{50} are two expressions of this Congressional desire to limit the power of the Executive.\textsuperscript{51} Second, the recent proliferation of independent administrative agencies has led Congress increasingly to rely on the legislative veto as a method of monitoring agency decisions.\textsuperscript{52} The legislative veto requires independent agencies which are otherwise politically unaccountable, to answer to Congress for their actions.\textsuperscript{53} 

Today a legislative veto provision is included as part of almost 200 federal statutes,\textsuperscript{54} covering almost every field of national interest.\textsuperscript{55} Legislative vetoes have been enacted in such disparate fields as foreign policy,\textsuperscript{56} energy,\textsuperscript{57} environmental regulation,\textsuperscript{58} trade,\textsuperscript{59} and economics.\textsuperscript{60} The Supreme Court’s opinion in \textit{Chadha} now threatens to invalidate all of these legislative veto provisions.\textsuperscript{61}

\textsuperscript{44} 103 S. Ct. at 2793 (White J., dissenting).
\textsuperscript{46} 103 S. Ct. at 2793.
\textsuperscript{47} Abourezk, \textit{supra} note 24, at 324.
\textsuperscript{48} Martin, \textit{supra} note 27, at 259.
\textsuperscript{51} Martin, \textit{supra} note 27, at 259.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} Henry, \textit{supra} note 23, at 737.
\textsuperscript{54} 103 S. Ct. at 2792 (White, J., dissenting).
\textsuperscript{55} \textit{Id.} at 2792-93.
\textsuperscript{58} Coastal Zone Management Improvement Act of 1980 § 12, 16 U.S.C. § 1403(a) (1982).
\textsuperscript{61} 103 S. Ct. at 2792 (White, J., dissenting).
In 

In Chadha, the Supreme Court ruled that a legislative veto provision in the Immigration and Nationality Act was unconstitutional. Since this was the Supreme Court's first review of a legislative veto, Chadha has become the centerpiece of the debate over the constitutionality of the legislative veto. The Court's opinion may very well invalidate the use of all legislative vetoes. Two Justices argued that the Court's rationale was too sweeping and that the opinion should have been confined to a more narrow analysis. This section discusses the Chadha opinion and its likely effect on the future use of other legislative veto provisions.

A. The Chadha Decision

In Chadha, the Supreme Court ruled on the constitutionality of a legislative veto provision in the Immigration and Nationality Act (INA). This provision allowed either House of Congress to overturn the Attorney General's decision to allow a deportable alien to remain in the United States. Under this legislative veto provision the House and Senate were given two sessions of Congress in which to review all deportations suspended by the Attorney General. If either House passed a resolution disapproving any suspension during the two year period following a decision to suspend deportation, the suspension was revoked and the alien was required to be deported.

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63 103 S. Ct. at 2788.
65 103 S. Ct. at 2792 (White, J., dissenting).
66 Id. at 2789 (Powell, J., concurring); id. at 2792 (White, J., dissenting).
67 8 U.S.C. §§ 1101-1525 (1982). 8 U.S.C. § 1254(c)(2) (1982) provides: "In the case of an alien specified in paragraph (1) of subsection (a) of this subsection [an alien whose deportation is suspended]—if during the session of Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which the 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 said deportation, the Attorney General shall thereupon deport said alien...."
68 8 U.S.C. § 1254(c)(2) (1982). The power to suspend deportations was exercised by the Attorney General through administrative judges in the Immigration and Naturalization Service in the Department of Justice.
69 Id.
70 Id.
Pursuant to this legislative veto power, the House of Representatives in December, 1975, passed an undebated, voice vote resolution overruling the Attorney General’s decision to suspend the deportation of one Jagdish Rai Chadha. Chadha subsequently filed petition for review of the House’s action with the Court of Appeals for the Ninth Circuit claiming that the legislative veto provision in the INA used to compel his deportation was unconstitutional. The Ninth Circuit held that the legislative veto provision of the INA was an unconstitutional violation of the separation of powers doctrine. The court held that the provision permitted Congress to interfere with the designated functions of the executive and judicial branches.

The Supreme Court affirmed the court of appeals decision, but used a different constitutional theory to arrive at its conclusions. The Court, in an opinion authored by Chief Justice Burger, analyzed the INA legislative veto provision under article I of the United States Constitution. The Court held that the legislative veto was unconstitutional because it allowed Congress to legislate without following the procedures of article I that require all legislation to be approved by both Houses and by the President.

The Court outlined three steps in its article I analysis. First, it held that all “legislative actions” by the Congress must adhere to the procedural requirements for legislating found in article I. Second, the Court held that the House action taken pursuant to the INA legislative veto was a “legislative action.” Finally, the Court held that the only exceptions to the procedural requirements of article I were those explicitly provided for in the Constitution.

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72 103 S. Ct. at 2772.
73 Chadha v. INS, 634 F.2d 408 (9th Cir. 1980).
74 Id. at 421.
75 103 S. Ct. at 2780-88.
76 Chief Justice Burger’s opinion was joined by Justices Brennan, Blackmun, O’Connor, Marshall and Stevens. Justice Powell concurred in the result of the case. Justice White dissented and joined in the dissent by Justice Rehnquist. Justice Rehnquist’s dissent is not discussed in this Article because it dealt solely with the issue of the severability of unconstitutional provisions. 103 S. Ct. at 2816-17.
77 103 S. Ct. at 2780-88.
78 U.S. CONST. art. I, § 1; § 7, cls. 2, 3.
79 Id. These clauses include the bicameralism requirement, which requires all bills to pass both Houses of Congress, and the presentment clause which requires that all bills be presented to the President and signed by him or passed over his veto by a 2/3 majority of each house.
80 103 S. Ct. at 2780-84.
81 Id. at 2784-86.
The House action in question was held unconstitutional: it was a “legislative action” that did not meet the requirements of article I and it was not one of the exceptions allowed by the Constitution.\(^{82}\)

The Court began its analysis by examining the pertinent provisions of article I of the Constitution. The article I bicameralism clause requires that all bills pass both Houses of Congress before being sent to the President.\(^{84}\) The presentment clauses of article I require that all bills must be presented to the President and signed by him, or passed over his veto, to become effective as law.\(^{85}\) According to the Court, the Framers created these procedural requirements to advance the goals of the separation of powers doctrine.\(^{86}\) The Court stated that the Framers designed the presentment clauses to prevent Congress from arrogating the powers vested in the Executive.\(^{87}\) The Framers’ secondary purpose in giving the President veto power was to ensure that Congress did not have sole control over the type of legislation passed.\(^{88}\) According to the Court the bicameralism requirement was designed to prevent legislative tyranny by dividing the legislative power into two independent houses.\(^{89}\) The Chadha majority held that the article I procedures represent “a single, finely wrought and exhaustively considered, procedure”\(^{90}\) that must be followed in order to protect the important purposes of the Framers.\(^{91}\)

In the second part of its opinion the Court defined legislative actions as those actions which must comport with the article I procedures, and held that the House of Representatives action overturning Chadha’s suspension of deportation was such a legislative action.\(^{92}\)

The Court stated that whether an action was legislative depends not on the form that the action takes, but on the effect of the action.\(^{93}\) The Court noted that any action by Congress contain-
ing "matter which is properly to be regarded as legislative in its character and effect," should be regarded as legislative action. The Court noted three characteristics of legislative action which were exhibited by the House action taken pursuant to the INA legislative veto provision.

First, the Court noted that the House action altered the legal rights and duties of people outside the legislative branch. Second, the Court stated that "without the challenged provision [Chadha's deportation] could have been achieved, if at all, only by legislation requiring deportation." Third, the Court held that the 'vetoing' of Chadha's deportation suspension was a policy determination by Congress and as such may only be effectuated through full legislation in accordance with article I. From this the Court concluded that the House's action was an exercise of Congress' legislative power and therefore must follow the article I procedures.

In the third part of its opinion, the Court examined the exceptions to the article I requirements. The Court stated that there are only four instances in which one House of Congress may act with the force of law and not be subject to the procedural requirements of bicameralism and presentment, all four of which are explicitly stated in the Constitution. The four exceptions are (1) the House of Representatives’ power to initiate impeachments under article I; (2) the Senate’s power to conduct impeachment trials under article I; (3) the Senate’s power of approval of presidential appointments under article II; and (4) the Senate’s power to ratify treaties under article II.

The House’s action compelling Chadha’s deportation was held to be an exercise of Congress’ legislative power taken without adherence to the article I requirements. The Court held that because this action did not come

94 Id. at 2784 quoting S.REP. No. 1335, 54th Cong., 2d Sess. 8 (1897).
95 103 S. Ct. at 2784.
96 Id. at 2785.
97 Id. at 2786.
98 Id. at 2787.
99 Id. at 2786-87.
100 Id. at 2786.
101 U.S. Const. art. I, § 2, cl. 5.
102 U.S. Const. art. I, § 3, cl. 6.
103 U.S. Const. art. II, § 2, cl. 2.
104 Id.
105 103 S. Ct. at 2787.
within one of the four constitutional exceptions, it was unconsti-
tutional.\textsuperscript{106}

In his concurring opinion,\textsuperscript{107} Justice Powell argued that the legisla-
tive veto provision in the INA was an unconstitutional
violation of the separation of powers doctrine.\textsuperscript{108} He asserted that
Congress' action in this case constituted a usurpation of the
power of the Judiciary.\textsuperscript{109} According to Justice Powell, it is the
province of the Judiciary to interpret the laws and see that legis-
latable standards are correctly applied in individual cases.\textsuperscript{110} Just-
tice Powell felt that Congress' veto of the Attorney General's
decision to allow Chadha to remain in the United States
amounted to a congressional determination that the executive
branch had applied the statute's standards for suspension of
deportation incorrectly.\textsuperscript{111} Justice Powell objected that a con-
gressional determination that Chadha did not satisfy the INA
criteria for suspension of deportation violated the separation of
powers doctrine. According to Justice Powell when Congress de-
cides the rights of specific individuals, it is assuming a judicial
function.\textsuperscript{112} If Congress were allowed to do this it would enjoy
unchecked power.\textsuperscript{113} Congress, Justice Powell stated, is not re-
quired to follow any procedural or substantive safeguards, such
as the right to counsel and the right to an impartial tribunal, that
protect individuals tried in court.\textsuperscript{114}

While Justice Powell would have struck down the legislative
veto in the INA for violating the separation of powers doctrine, he
would not have reached the question of whether legislative vetoes
are unconstitutional \textit{per se}.\textsuperscript{115}

Justice White dissented from the majority opinion.\textsuperscript{116} Like the
majority, Justice White examined the constitutionality of the INA
legislative veto under article I of the Constitution.\textsuperscript{117} Unlike the
majority, however, he would have upheld the validity of the legis-

\begin{itemize}
\item[\textsuperscript{106}] Id. at 2788.
\item[\textsuperscript{107}] Id. at 2788-92 (Powell, J., concurring).
\item[\textsuperscript{108}] Id. at 2789.
\item[\textsuperscript{109}] Id.
\item[\textsuperscript{110}] Id. at 2791.
\item[\textsuperscript{111}] Id.
\item[\textsuperscript{112}] Id. at 2792.
\item[\textsuperscript{113}] Id.
\item[\textsuperscript{114}] Id. at 2791.
\item[\textsuperscript{115}] Id.
\item[\textsuperscript{116}] Id. at 2792-816 (White, J., dissenting).
\item[\textsuperscript{117}] Id. at 2798-808.
\end{itemize}
lative veto because he felt it did not violate the requirements of article I.\textsuperscript{118}

Justice White asserted that the article I procedural requirements should not apply to Congress' use of its legislative veto power since such action, in his opinion, did not rise to the level of legislative action.\textsuperscript{119} Rather, he argued, in exercising such powers, Congress is merely acting under a provision of an already approved statute to reject an executive proposal.\textsuperscript{120} Justice White contended that executive branch or independent agency recommendations are not law; at most, he argued, they should be considered potential law.\textsuperscript{121} Thus, congressional action disapproving a recommendation did not constitute an exercise of legislative power, according to Justice White; it is more analogous to a congressional decision not to pass a certain bill.\textsuperscript{122}

Justice White further argued that even if the INA legislative veto is considered a legislative act, the spirit of the article I procedures was met when Congress used the INA legislative veto.\textsuperscript{123} He claimed that under the INA provision both Houses of Congress and the President have the opportunity to approve or reject the action being considered, as they do with normal legislative proposals.\textsuperscript{124} According to Justice White the President approves the action in question when his delegates in the executive branch propose it.\textsuperscript{125} Similarly, both the Senate and the House approve the action by not rejecting it under their veto power, according to Justice White.\textsuperscript{126}

Justice White also defended the use of the INA legislative veto on separation of powers grounds.\textsuperscript{127} Like Justice Powell, Justice White would have rather had \textit{Chadha} decided under a separation of powers analysis than under an article I analysis.\textsuperscript{128} Unlike Justice Powell, however, he would have upheld the constitutionality of the INA legislative veto.\textsuperscript{129} Justice White felt that this

\begin{flushright}
\textsuperscript{118} Id. at 2798.
\textsuperscript{119} Id. at 2799.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 2807.
\textsuperscript{122} Id. at 2806-07.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 2806.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 2808-10.
\textsuperscript{128} Id. at 2792.
\textsuperscript{129} Id. at 2798.
\end{flushright}
legislative veto did not interfere with the legitimate functions of either the executive or judicial branches.\textsuperscript{130}

Justice White noted that the purpose of the separation of powers doctrine was to prevent one branch of government from arrogating too much power.\textsuperscript{131} Nevertheless, he asserted that "accommodation and practicality" were the hallmarks of the Court's decisions regarding the doctrine.\textsuperscript{132} Justice White argued that the Court should not strike down the legislative veto unless it's use usurped an expressly granted power of a coordinate branch.\textsuperscript{133} Legislative vetoes, he asserted, are useful tools allowing Congress to oversee the exercise of powers it has delegated to the sprawling executive bureaucracy and independent regulatory agencies.\textsuperscript{134}

White claimed that the use of the legislative veto did not take any power away from the executive branch.\textsuperscript{135} By delegating the power to the Attorney General to qualifiedly suspend deportations, Justice White felt that Congress was increasing, rather than decreasing, the power of the executive branch.\textsuperscript{136} He disagreed with Justice Powell's assertions that the legislative veto infringed upon the authority of the judicial branch.\textsuperscript{137} He noted that there was no constitutional duty to provide for judicial review of decisions to deport aliens.\textsuperscript{138} Congress did provide for judicial review of the Attorney General's decision if the alien was not granted a suspension,\textsuperscript{139} but Congress reserved for itself the power to review a decision to grant a suspension.\textsuperscript{140} Justice White felt that the 'practical' benefits of the legislative veto outweighed any separation of powers problems that might be caused by blurring the distinctions between the three branches of government.\textsuperscript{141} Justice White, therefore, would have upheld the use of the INA legislative veto.

\textsuperscript{130} Id. at 2809-10.
\textsuperscript{131} Id. at 2808.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 2809.
\textsuperscript{134} Id. at 2793.
\textsuperscript{135} Id. at 2810.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. See also Fung Yue Ting v. U.S., 149 U.S. 689, 713-14 (1983).
\textsuperscript{139} 103 S. Ct. at 2810 (White, J., dissenting). See also INS v. Wang, 450 U.S. 139 (1981) (per curiam).
\textsuperscript{140} 8 U.S.C. § 1254(c)(2) (1982).
\textsuperscript{141} 103 S. Ct. at 2810 (White, J., dissenting).
B. The Future of the Legislative Veto After Chadha

Justices White and Powell both claimed that the Court's holding in Chadha "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a legislative veto." \(^{142}\) If the Court's holding were to be applied broadly, all legislative veto provisions, by definition, would be struck down under the Court's reasoning. \(^{143}\) That the Court intended the opinion to be applied to all legislative vetoes is confirmed by comparing the legislative veto provision in the INA to other legislative veto provisions struck down in the wake of Chadha. \(^{144}\)

The week after Chadha was handed down the Supreme Court summarily affirmed two lower court opinions striking down legislative vetoes that were different in form and substance from the INA legislative veto struck down by Chadha. \(^{145}\) These legislative vetoes were contained in the National Gas Policy Act \(^{146}\) and the Federal Trade Commission Improvements Act \(^{147}\).

In the first case, Consumer Energy Council of America v. Federal Energy Regulatory Commission, \(^{148}\) the Supreme Court reviewed a legislative veto provision allowing either House of Congress to veto pricing levels for natural gas proposed by the Federal Energy Regulatory Commission (FERC). The legislative veto was an integral part of the National Gas Policy Act because it allowed Congress to oversee the deregulation of the natural gas industry and the effect it would have on American gas consumers. \(^{149}\) The Court summarily affirmed the D.C. Circuit decision striking down the legislative veto in question. \(^{150}\) Similarly, in Consumers Union of the United States v. Federal Trade Commission, \(^{151}\) the Supreme Court examined a legislative veto provision permitting Congress to veto a proposed Federal Trade Commis-

\(^{142}\) Id. at 2792.

\(^{143}\) Id.


\(^{145}\) See Note, supra note 64, at 191.


sion (FTC) regulation upon a resolution by both Houses. Again, the Supreme Court affirmed the D.C. Circuit’s ruling striking down the legislative veto.¹⁵²

The legislative vetoes struck down by the D.C. Circuit can be easily distinguished from the legislative veto struck down in Chadha. The legislative veto in the INA struck down by the Court in Chadha was a one House veto; the provision ruled unconstitutional in Consumers Union v. FTC and affirmed by the Court was a two house legislative veto.¹⁵³ The INA legislative veto allowed Congress to overturn a judicial decision concerning an individual’s rights. In contrast, the legislative vetoes in the two subsequent cases allowed Congress to review regulations issued by independent agencies that have broad policy implications for the whole nation.¹⁵⁴

The INA legislative veto provision held unconstitutional in Chadha is a “somewhat atypical and more-readily indictable exemplar of the class” of all legislative veto provisions, according to Justice White.¹⁵⁵ The INA legislative veto is atypical because it is especially intrusive on the executive and judicial branch functions.¹⁵⁶ It allows one House of Congress to reverse the ruling of an immigration judge.¹⁵⁷ The subject matter of the INA provision concerns an individual’s right to remain in the United States while most other legislative veto provisions deal with policy choices that affect large segments of the population.¹⁵⁸ These latter choices are more legitimately the business of Congress to oversee.

The Supreme Court’s summary affirmation of the circuit court decisions striking down legislative vetoes that are markedly different from the legislative veto considered in Chadha demonstrates that the Court intends the Chadha result to apply to all legislative vetoes.¹⁵⁹

¹⁵³ Id. at 3936 (White, J., dissenting).
¹⁵⁴ Id. at 3935-36.
¹⁵⁵ 103 S. Ct. at 2796 (White, J., dissenting).
¹⁵⁶ See Chadha v. INS, 634 F.2d 408 (9th Cir. 1980).
¹⁵⁷ 8 U.S.C. § 1254(c)(2) (1982). The actual decision to suspend deportation or to deport is made by INS judges. See supra note 68.
¹⁵⁸ 103 S. Ct. at 2796 (White, J., dissenting).
¹⁵⁹ See Note, supra note 64, at 191.
C. The Article I Analysis versus the Separation of Powers Analysis

The Court's opinion in *Chadha* casts serious doubt on the continued viability of all of the legislative veto provisions currently embodied in federal law.160 The Court's article I analysis and language make the Court's opinion inflexible and indiscriminate. There are practical and constitutional problems with the *Chadha* opinion, though, that make it unlikely that *Chadha* will serve as a powerful precedent.161 These problems should lead the Court to consider a different analysis with which to evaluate legislative veto provisions in the future. This analysis should be the separation of powers analysis under which Justices Powell and White would have decided the *Chadha* case.162

Justice White noted that the *Chadha* decision "strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."163 Both he and Justice Powell argued that the Court has always decided the constitutionality of congressional statutes on the narrowest means available to overturn the statute.164 "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an Act of Congress .... The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."165 The Court in *Chadha*, however, formulated the broadest rule possible with which to strike the INA provision down. This provision could most probably have been overturned on separation of powers grounds, but the Court's analysis goes much further and threatens many more provisions.

There are also serious problems with the content of the Court's analysis. The Court held that the House's use of the INA legislative veto was an exercise of its legislative power because the use of the provision fit within the Court's definition of legislative action.166 The Court defined legislative action as any action which (1) affects the legal rights of persons outside the legislative

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160 103 S. Ct. at 2796 (White, J., dissenting).
162 103 S. Ct. at 2789 (Powell, J., concurring); *Id.* at 2792 (White, J., dissenting).
163 *Id.* at 2810-11 (White, J., dissenting).
164 *Id.* at 2789 (Powell, J., concurring); *Id.* at 2796 (White, J., dissenting).
166 103 S. Ct. at 2784-86.
branch,\textsuperscript{167} (2) represents a policy determination,\textsuperscript{168} and (3) any action whose result could otherwise only be accomplished through full legislation.\textsuperscript{169} The Court held that whenever Congress takes legislative action it must follow fully the article I requirements of bicameralism and presentment, unless the action is one of the four constitutional exceptions to the article I procedures.\textsuperscript{170}

The Court's definition of legislative action poses practical problems for later courts trying to interpret other congressional actions. The Court's definition is too broad; it encompasses almost every action Congress might take.\textsuperscript{171} Even the subpoenaing of a witness by a committee or the request by Congress that an agency initiate an investigation, would be included under the Court's definition of legislative action.\textsuperscript{172} These actions would then be subject to the bicameralism and presentment requirements, to which they have never been subject in the past.\textsuperscript{173} This is an impractical and unintended result of strict application of the Chadha rationale.

There also appears to be a constitutional problem with the Court's holding.\textsuperscript{174} The Court's definition of legislative action, besides encompassing most congressional actions, would include most executive department and independent agency actions.\textsuperscript{175} Both the majority and the dissent in Chadha agreed that agencies exercise the functional equivalent of lawmaking power when they promulgate rules under a congressional statute.\textsuperscript{176} Justice White noted that even private groups and individuals are able to take legislative action, as defined by Chadha, whenever acting pursuant to a congressional delegation of power.\textsuperscript{177} These agencies and groups all exercise legislative action but none are required to

\textsuperscript{167} \textit{Id.} at 2784.
\textsuperscript{168} \textit{Id.} at 2786.
\textsuperscript{169} \textit{Id.} at 2785.
\textsuperscript{170} \textit{Id.} at 2786.
\textsuperscript{171} See Note, \textit{supra} note 64, at 192.
\textsuperscript{172} "First a committee that subpoenas a witness has made the 'policy decision' that his testimony is required. Second, if the witness fails to appear, he is subject to contempt-Congress proceedings, at that point his legal duties have been altered. Finally, without the subpoena process Congress presumably would have to pass bills in order to require persons to testify before its committees." \textit{Id.} at 192 n.45.
\textsuperscript{173} See Note, \textit{supra} note 64, at 192.
\textsuperscript{174} See Tribe, \textit{supra} note 21.
\textsuperscript{175} \textit{Id.} at 9-10. 103 S. Ct. 2801-04 (White, J., dissenting).
\textsuperscript{176} 103 S. Ct. at 2785 n.16; \textit{Id.} at 2802 (White, J., dissenting).
\textsuperscript{177} \textit{Id.} at 2801.
fulfill the procedures for legislating found in article I. Justice White noted that "[p]erhaps this odd result could be justified on other constitutional grounds ... but certainly it cannot be defended as consistent with the Court's view of the article I presentment and bicameralism commands." The Court states in Chadha that the basis of the article I procedures was the separation of powers doctrine. The purpose of this doctrine is to ensure that none of the three branches of the federal government acts outside of its sphere and that each branch's powers are exercised only by that branch. Under the Court's ruling in Chadha it would appear that the executive branch agencies and other groups may exercise legislative power, but that the legislature cannot delegate legislative power to itself. This is in direct contravention of the purposes for which the article I procedural requirements were created. It seems inconsistent, at the least, for the Court to require Congress to fulfill procedural requirements and at the same time undermine the purposes of those same requirements.

The practical and constitutional deficiencies in the Chadha holding may very well cut back upon Chadha's precedential value. Chadha could become the third in a series of 'one-shot' cases in which the Supreme Court has limited Congress' authority on separation of powers or federalism grounds. The first and second cases in this set are Buckley v. Valeo and National League of Cities v. Usery. Neither of these two cases has had any noticeable generative effect or cut any lasting trails for constitutional law. In fact, National League of Cities was recently

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178 Id. at 2802.
179 Id. See also Tribe, supra note 21, at 10.
180 103 S. Ct. at 2803 (White, J., dissenting).
181 Id. at 2781.
182 634 F.2d at 425.
183 103 S. Ct. at 2804 (White, J., dissenting).
184 Id. at 2803 n.20.
185 Tribe, supra note 21, at 1-3.
186 Id.
189 Tribe, supra note 21, at 2.
overturned by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*. In overruling *National League of Cities*, the Court commented that the principle set out in that case is "not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles in which *National League of Cities* purported to rest." A similar fate may await *Chadha* in the near future.

If *Chadha*, because of its problems, goes the way of *Buckley* and *National League of Cities*, the courts will have to turn to another standard by which legislative veto provisions can be evaluated. This standard should be the separation of powers doctrine analysis which was suggested by Justices Powell and White.

**D. The Separation of Powers Doctrine**

The separation of powers doctrine is the underlying basis of the Constitution. The doctrine serves two purposes: first, it prevents a dangerous accumulation of power in any one branch of government, and second, it divides the governing functions between the branches to provide for effective government. The doctrine stands for the sometimes conflicting ideas that power must be separated to prevent tyranny, but that interaction between the different branches is necessary to govern.

The separation of powers analysis of a legislative veto provision is more precise than the article I analysis. A separation of powers analysis, such as that used by the Ninth Circuit in *Chadha*, considers each legislative veto on its own merits and its own faults. Rather than sweeping away all legislative vetoes, such a separation of powers analysis would look to how intrusive each legislative veto is on the functions of the executive or judicial branch, and also look to the purposes served by each veto.

According to the majority, the separation of powers doctrine, as the basis of the article I procedures, was the foundation of the *Chadha* opinion. Unfortunately, the rationale used in *Chadha*

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191 Id. at 4136.
192 103 S. Ct. at 2781.
193 634 F.2d at 422.
194 Id. at 423.
195 Id. at 422-25.
196 634 F.2d 408.
197 Id. at 425.
198 103 S. Ct. at 2781.
would overturn all legislative veto provisions, regardless of whether they violate the separation of powers doctrine. If the separation of powers doctrine is used to evaluate legislative vetoes the purposes of article I will be safeguarded while the goals of the separation of powers doctrine will not be disregarded.

If the Supreme Court had used a separation of powers analysis in *Chadha* the INA legislative veto still could have been held unconstitutional, as both the Ninth Circuit and Justice Powell demonstrated. The Ninth Circuit held that the INA legislative veto violated the separation of powers doctrine by allowing Congress to interfere with the functions of the judicial and executive branches. Justice Powell believed that the INA provision was unconstitutional because it violated the separation of powers doctrine by permitting Congress to usurp the function of the judiciary to decide whether the executive branch has applied the statutory standards correctly in individual cases. A separation of powers analysis could have set a precedent that would distinguish between abusive legislative vetoes and less intrusive legislative vetoes that serve a more valid constitutional purpose. Instead the article I analysis and the language used by the Court to define ‘legislative action’ make the opinion inflexible, indiscriminate, and contradictory. The *Chadha* opinion takes no cognizance of the purposes served by different legislative vetoes or the historical reasons for their use. As the opinion stands now, it will strike down all legislative veto provisions including the important legislative vetoes in the Federal Land Policy and Management Act.

IV. THE FEDERAL LAND POLICY MANAGEMENT ACT

There are seven legislative veto provisions in FLPMA. These provisions are central to the accomplishment of the goals of

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199 *Id.* at 2788 (Powell, J., concurring).
200 *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980).
201 103 S. Ct. at 2788-92 (Powell, J., concurring).
202 *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980).
203 103 S. Ct. at 2788-92 (Powell, J., concurring).
204 See Baldwin, *infra* note 144, 29-30.
205 The seven legislative veto provisions are:
1) 43 U.S.C. § 1712(e)(2) (1982), giving Congress final disapproval by concurrent resolution of decisions excluding a major land use from a tract of land 100,000 acres or more for two or more years.
2) 43 U.S.C. § 1713(c) (1982) giving Congress the right to disapprove sales of tracts of federal land greater than 2,500 acres by passing a concurrent resolution of disapproval.
FLPMA and therefore central to the issue of federal land use in America.\textsuperscript{306} FLPMA dictates how the publicly owned lands in the United States—more than 450 million acres—will be administered and whether the lands will be sold off or leased to private industry.\textsuperscript{307} The passage of FLPMA in 1976 marked the beginning of a new era in federal land policy.\textsuperscript{308} It changed the way in which the federal government administered the public lands, as well as the goals toward which these lands were administered.\textsuperscript{309} The new goal of federal land management became the retention of the federal lands in public ownership.\textsuperscript{310} The means to this end were the legislative veto provisions which allowed Congress the right to review all of the major executive branch decisions regarding the disposition of the federal lands.\textsuperscript{311}

This section discusses federal land management prior to FLPMA and the ways that FLPMA changed national land use policy. This section will also evaluate the constitutionality of the legislative veto provisions in FLPMA in light of the Supreme Court’s decision in \textit{Chadha}.

\textbf{A. The Changes Wrought in Federal Land Management by FLPMA}

Prior to the enactment of FLPMA, federal land administration was in disarray.\textsuperscript{212} Despite the enormity of the duty of administering 1,800 million acres of public lands,\textsuperscript{213} Congress did not enact a comprehensive land policy until 1976 when FLPMA was passed.

\textsuperscript{3} 43 U.S.C § 1714(c) (1982) allowing Congress to disapprove by concurrent resolution withdrawals of 5,000 or more acres.
\textsuperscript{4} 43 U.S.C § 1714(e) requires the Secretary of the Interior to withdraw lands when notified by the House Interior and Insular Affairs Committee or the Senate Energy and Natural Resources Committee that an emergency requires a withdrawal.
\textsuperscript{5} 43 U.S.C. § 1714(f) (1982) gives Congress the power to disapprove by concurrent resolution extensions of withdrawals.
\textsuperscript{6} 43 U.S.C. § 1714(k)(2) 1982 giving Congress the power to approve by concurrent resolution the termination by the Secretary of certain withdrawals.
\textsuperscript{7} 43 U.S.C. § 1722(b) (1982) allowing Congress to suspend disposal of certain areas.
\textsuperscript{306} \textit{House Report}, supra note 19, at 204.
\textsuperscript{307} Id. at 2.
\textsuperscript{308} Id. at 34-5.
\textsuperscript{309} Backiel, supra note 20, at 19.
\textsuperscript{311} \textit{House Report}, supra note 19, at 3.
\textsuperscript{312} Id. at 34.
\textsuperscript{313} Id. at 2.
In the early part of this century the federal lands were administered through the General Land Office of the Department of the Interior. In 1934 Congress created the Grazing Service to assist the General Land Office with the managing of the government’s extensive landholdings in the West. In 1946 these two agencies were combined and the Bureau of Land Management (BLM) was created.

During this time there was no comprehensively delegated authority over the public lands, and no coherent land use policy. The federal land agencies derived their mission from over 3,000 land use statutes that had been enacted over the span of 170 years. Far from providing a coherent authorization for federal land management, these statutes were “seriously inadequate, incomplete, and sometimes conflicting.” The executive branch took it upon itself to fill in many of the gaps left by these statutes. In United States v. Midwest Oil the Supreme Court held that congressional silence in the face of the executive branch actions was an implied grant of power to the executive branch. Over the years the executive branch assumed a great deal of power over the federal lands in this way.

The primary goal of public land administration under statutes prior to FLPMA was to distribute the federal lands to private parties or to the states. The federal government gave away the lands in order to encourage settlement of the West and to foster productive use of the lands. Over seventy percent of the public domain in the contiguous forty-eight states was transferred to non-federal ownership during the period of disposal-oriented management prior to FLPMA.

The enactment of FLPMA, however, brought about distinct
policy changes in several areas of federal land management. FLPMA has three main goals: (1) to change the mission of the BLM from the disposal to retention of the public lands;\textsuperscript{226} (2) to give the BLM a comprehensive authorization, including specific guidelines and standards;\textsuperscript{227} and (3) to re-establish Congress’ constitutional authority over the federal lands.\textsuperscript{228}

Congress’ goal of retaining the federal lands in public ownership reflected the national desire to preserve the beauty of the federal lands for the future rather than have them sold off and exploited by private interests.\textsuperscript{229} In contrast to the government’s former policy of giving away federal lands, FLPMA expressly provides for retention of the public lands and preservation of all “scenic, historical, ecological [and] environmental” values.\textsuperscript{230}

FLPMA delegates to the BLM the statutory authority to carry out its mission of administering the lands in public ownership.\textsuperscript{231} Among the powers Congress gave the BLM were the powers to buy and lease federal lands.\textsuperscript{232} BLM also was granted the authority to issue rules and regulations concerning the federal lands and the power to enforce those rules.\textsuperscript{233} FLPMA repealed or amended many of the old land use laws in order to create a uniform and coherent statement of national policy.\textsuperscript{234} By so doing, the Act clearly delineates the powers of the Secretary of the Interior and the BLM and provides comprehensive goals for the administration of federal lands.

FLPMA also marked the end of the executive branch’s assump-

\textsuperscript{226} 43 U.S.C. § 1701(a)(1) (1982) states that it is the policy of the United States that “the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest....”


\textsuperscript{228} 43 U.S.C. § 1701(a)(4) (1982) states that “Congress exercise its Constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specific purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action....” See also Backiel, supra note 20, at 19.

\textsuperscript{229} HOUSE REPORT, supra note 19, at 34.


\textsuperscript{231} HOUSE REPORT, supra note 19, at 34.


\textsuperscript{233} See id. §§ 1733, 1740.

\textsuperscript{234} HOUSE REPORT, supra note 19, at 2.
tion of congressional power over the federal lands. Although FLPMA delegated a great deal of authority to the BLM, it also provided for congressional review of BLM actions taken pursuant to that delegated power. In FLPMA Congress explicitly reasserted its constitutional authority under the property clause to make federal land use decisions. FLPMA allowed Congress to exercise this authority primarily through the use of its legislative vetoes, which permit Congress to review and overturn certain BLM actions such as sales or withdrawals of federal lands.

B. FLPMA Legislative Vetoes After Chadha

All of the legislative veto provisions in FLPMA allow Congress to exercise final control over important federal land management decisions. This subsection evaluates the constitutional viability of FLPMA's legislative vetoes in light of the Chadha opinion.

Section 204(c) of the Act typifies the legislative veto provisions in FLPMA. This section allows Congress to overturn any decision by the BLM to withdraw a tract of federal land of more than 5,000 acres. When the Secretary withdraws the land he must notify Congress of his decision. If Congress passes a concurrent resolution of disapproval within ninety days of receiving notice of the action, the withdrawal must be terminated.

Using this provision, Congress is able to exercise its power, bestowed by the Constitution, to regulate the disposition of the public lands. Like the other legislative veto provisions in FLPMA, this section permits Congress, without the approval of the President, to veto decisions of the Secretary of the Interior. In
this respect, the FLPMA legislative vetoes appear constitutionally flawed under Chadha.\textsuperscript{245}

Chadha held that Congress must adhere to the article I procedural requirements of bicameralism and presentment when taking legislative action. Although most of the legislative vetoes in FLPMA require bicameral action,\textsuperscript{246} none of them provide for presentation to the President in order to reject a BLM decision. By permitting Congress to take legislative action without fulfilling the procedural requirements of article I, the legislative vetoes in FLPMA appear to be unconstitutional under the rationale of Chadha.\textsuperscript{247}

A congressional veto of a decision made by the Secretary constitutes legislative action under Chadha's definition of that term. First, Congress' action affects the rights and duties of people outside the legislative branch, including the Secretary and any person for whose use the lands in question were being withdrawn.\textsuperscript{248} Second, according to Chadha, since a decision by the Secretary could not be overruled without full legislation in the absence of a legislative veto, the action is legislative in nature.\textsuperscript{249} Third, Congress' determination that certain lands should not be withdrawn is a policy determination, and, according to Chadha, can only be done pursuant to Congress' legislative powers.\textsuperscript{250} Thus, the termination of the withdrawal would be considered an exercise of Congress' legislative power, and can only be exercised if the procedural requirements of article I are fulfilled.\textsuperscript{251}

The legislative veto provisions in FLPMA appear to suffer the same constitutional defects as the INA legislative veto struck down in Chadha. As was asserted above, the Chadha opinion is constitutionally and practically flawed.\textsuperscript{252} The overbreadth and indiscriminate sweep of the Chadha Court's article I analysis would be especially severe in its application to the FLPMA legislative veto provisions. FLPMA's legislative vetoes should be evaluated in terms of the separation of powers doctrine because of the

\textsuperscript{245} See supra text at notes 78-83.
\textsuperscript{246} See supra note 205.
\textsuperscript{247} See Baldwin, supra note 144, at 14.
\textsuperscript{248} Letter from James Watt, Secretary of Interior, to Congressman Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, (Sept. 9, 1983) (discussing Secretary Watt's refusal to comply with the Committee resolution).
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} See supra text and notes at notes 161-84.
more practical, flexible nature of that doctrine as opposed to the Court's article I evaluation.

A separation of powers evaluation of FLPMA's legislative vetoes would take into account the nature of Congress' authority pursuant to the property clause, which is the power under which Congress passed FLPMA. The separation of powers doctrine would also take cognizance of the intent of Congress in passing FLPMA, and the interference, if any, with the other branches created by the use of FLPMA's legislative veto provisions.

V. A SEPARATION OF POWERS DOCTRINE EVALUATION OF FLPMA'S LEGISLATIVE VETOES

The separation of powers doctrine has two main purposes: to prevent a dangerous concentration of power in any one branch of government, and as a "practical measure to facilitate administration of a large nation." The separation of powers doctrine is a pragmatic, flexible doctrine that places great worth in political comity and the necessities of governing.

There are no strict lines defining the point where one branch's authority leaves off and another branch's authority begins. In the past, the Supreme Court has only found a violation of this doctrine in instances where one branch has usurped a power that was granted by the Constitution with great specificity to another branch. 259

The Ninth Circuit, in holding that the INA legislative vetoes violated the separation of powers doctrine, defined a violation of the doctrine as "an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy." Justices Powell and White applied a similar

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253 See Baldwin, supra note 144, at 14.
255 Chadha v. INS, 634 F.2d 408, 422 (9th Cir. 1980).
256 Id. at 423.
257 Id. at 421-22.
258 Id. at 423-24.
259 103 S. Ct. at 2809 (White, J., dissenting); 634 F.2d at 420.
260 634 F.2d at 425.
standard when the Supreme Court reviewed the INA legislative veto provision.261

Congress' use of the legislative veto provisions in FLPMA is not a violation of the separation of powers doctrine as defined by the Supreme Court. The Constitution grants Congress the power to regulate and dispose of the federal lands under the property clause of article IV.262 This power is granted specifically and expressly to the legislature in the property clause. Therefore, when Congress exercises its property clause power through FLPMA's legislative vetoes it is not usurping a power specifically given to another branch by the Constitution.

Additionally, Congress' exercise of its constitutional power through the legislative veto provisions in FLPMA is not a violation of the standard used by the Ninth Circuit. Congressional use of these provisions does not entail usurpation of, nor an intrusion into, the central functions of the other two branches of government. Unlike the INA legislative veto struck down in Chadha, the FLPMA legislative veto provisions do not allow Congress to review or overturn judicial determinations.263 Moreover, the FLPMA legislative vetoes do not permit Congress to decide the rights of specific individuals or review executive actions to ensure that they are taken in accordance with statutory criteria.264 Congressional exercise of FLPMA's legislative veto provisions is thus not a violation of the judicial branch's constitutional sphere.

Congressional use of the FLPMA legislative vetoes is not an "assumption of power essential to the operation" of the executive branch. The Secretary of the Interior, through the BLM, is not prevented from carrying out the administration of the public lands. The legislative veto provisions merely permit Congress to retain the power to make policy decisions reflecting the national interest.

Congress is granted the power over the federal lands by the Constitution.265 Congress' authority pursuant to the property

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261 103 S. Ct. at 2790 (Powell, J., concurring); Id. at 2809 (White, J., dissenting).
262 U.S. CONST. art IV, § 3, cl. 2 grants Congress the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States....”
263 See supra note 205. The FLPMA legislative veto provisions merely allow Congress to review BLM land management proposals. There are no adjudicatory proceedings involved in these proposals as there were in the immigration judge's suspension of deportation under the INA. See supra note 68.
264 See supra note 205.
265 U.S. CONST. art. IV, § 3, cl. 2.
clause is that of both a private landowner and a government.\textsuperscript{266} Congress can thus delegate authority over the federal lands in whatever manner that it chooses,\textsuperscript{267} and Congress can also regulate the use of the federal lands in ways that private landowners cannot.\textsuperscript{268} Congress' constitutional power over the federal lands has been held to be "without limitations."\textsuperscript{269}

The framers of the Constitution intended that the power over the federal lands reside with Congress.\textsuperscript{270} Congress, it would seem, is not usurping the executive branch's power when it uses a legislative veto provision to oversee executive agency use of delegated power over the federal lands.

The Ninth Circuit in \textit{Chadha}\textsuperscript{271} argued that Congress interfered with the executive branch's constitutional function of executing the laws when it used the INA legislative veto provision.\textsuperscript{272} Justice White answered this assertion by stating that the executive branch is constitutionally permitted to execute only the laws that Congress passes.\textsuperscript{273} FLPMA delegates power to the BLM to manage the federal lands but reserves to Congress the final review over important federal land management decisions.\textsuperscript{274} Rather than usurping executive branch power, FLPMA augments it by delegating to the executive branch authority over the federal lands that it would not otherwise have.

A federal district court has held that one of FLPMA's controversial legislative vetoes—the same provision that was at issue in \textit{National Wildlife Federation v. Watt}\textsuperscript{275}—did not violate the separation of powers doctrine. In \textit{Pacific Legal Foundation v. Watt},\textsuperscript{276} a Montana Federal District Court held that section 402(e)\textsuperscript{277} of the

\textsuperscript{266} U.S. v. Midwest Oil Company, 236 U.S. 459, 474 (1915).
\textsuperscript{267} Id.
\textsuperscript{268} See Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).
\textsuperscript{269} Id. at 539, quoting U.S. v. San Francisco, 310 U.S. 16 (1940).
\textsuperscript{270} See U.S. CONST. art. IV, § 3, cl. 2. See also 103 S. Ct. at 2800 n. 118 (White, J., dissenting). Justice White argues in his dissent that the framers envisioned a type of legislative veto power for Congress to exercise under its constitutional property clause power. For a complete discussion of the argument that Congress' property clause power need never be exercised pursuant to the article I procedural requirements, see Baldwin, \textit{supra} note 144.
\textsuperscript{271} 634 F.2d 408 (9th Cir. 1980).
\textsuperscript{272} Id. at 431-32.
\textsuperscript{273} 103 S. Ct. at 2809-10 (White, J., dissenting).
\textsuperscript{274} See \textit{supra} note 205.
\textsuperscript{277} 43 U.S.C § 1714(e) (1982).
Act did not allow Congress to impermissibly interfere with the functioning of the executive branch. This section of the Act allows the Interior Committee of either House of Congress to notify the Secretary of the Interior to withdraw an area from certain uses if the Committee feels that an emergency exists which threatens the land. The court ruled that this section, as interpreted, was constitutional.

Violations of the separation of powers doctrine, as defined by the Ninth Circuit, do not include actions that are “implementing a legitimate policy.” Some actions are therefore not considered violations of the separation of powers doctrine because they further the second purpose of the doctrine: facilitating the practical administration of the nation.

The FLPMA legislative veto provisions are practical measures designed to facilitate the federal government’s job of regulating and protecting the nation’s public lands. The purpose of the veto provisions is to give Congress the final say over major federal land use decisions. All seven FLPMA legislative vetoes permit Congress to review the sale or withdrawal of large tracts of public lands. Congressional approval or disapproval of proposed BLM actions under the legislative veto provisions therefore represent Congress’ determination of national policy regarding federal lands. This manner of congressional decision making is constitutional under the separation of powers doctrine: Congress has delegated to the executive branch the day-to-day administrative details of regulating federal lands, while retaining for itself the freedom to formulate national policy.

It is not practical for Congress to legislate beforehand on whether or not certain lands should be sold or retained or withdrawn from specific uses. These are decisions that can only be made on a case by case basis. The most efficient way to administer the federal lands in Congress’ view is to delegate to the Secretary of the Interior and the BLM the power to administer the details of federal land management while allowing Congress to retain final authority over the most important land use decisions.

280 529 F. Supp. at 1005.
281 634 F.2d at 425.
282 103 S. Ct. at 2808 (White, J., dissenting).
283 See Backiel, supra note 20, at 19.
284 See supra note 205.
Congress' use of the FLPMA legislative veto provisions is consonant with the purposes of the separation of powers doctrine. The exercise of the FLPMA legislative vetoes does not impermissibly interfere with the executive or the judicial branches' central functions. Rather, their exercise is an exercise of Congress' constitutional power under the property clause. Moreover, the legislative veto provisions promote the practical administration of government since they allow Congress to make policy decisions in this area without becoming entangled in the details of day-to-day land use administration. The separation of powers doctrine does not draw strict borderlines between the three branches. It is a practical, flexible doctrine which allows for deviations when unique circumstances require it. Congress does not violate the separation of powers doctrine when it uses the legislative veto provisions in FLPMA to protect the nation's natural resources from exploitation.

VI. CONCLUSION

The Federal Land Policy and Management Act is the most comprehensive federal land statute ever enacted. The seven legislative vetoes that Congress included in the Act are central in carrying out the goals of the Act: they help to ensure that the public lands will be retained in the hands of the federal government, and they return to Congress the power to formulate land management policy. Under the article I analysis announced by the Supreme Court in Chadha, however, these legislative veto provisions would be held unconstitutional. The Supreme Court's reasoning in Chadha has both practical and constitutional flaws. The Court's analysis in Chadha is too sweeping and indiscriminate to be useful; it would strike down almost any congressional action taken without presentment to the President.

The separation of powers analysis suggested by Justices Powell and White is a more finely tuned, pragmatic standard by which to evaluate the constitutionality of legislative veto provisions. Under the separation of powers analysis, it would be possible to differentiate between constitutionally useful and unconstitutionally intrusive legislative vetoes.

The FLPMA legislative veto provisions demand a more pragmatic, constitutional evaluation under the separation of powers.

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386 See 103 S. Ct. at 2808 (White, J., dissenting). See also 634 F.2d at 423-24.
doctrine. The veto provisions do not violate the separation of powers doctrine. Their use does not intrude on the functions of the other branches of government. Moreover, they permit Congress to efficiently and effectively utilize its property clause power to ensure that the nation’s public lands are not unwisely or irretrievably damaged. The FLPMA legislative vetoes are valuable tools which Congress must be able to use to protect our national resources.