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Immigration and Naturalization Service v. Chadha: The Legislative Veto Declared Unconstitutional

Robert E. Lannan II
West Virginia University College of Law

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**IMMIGRATION AND NATURALIZATION SERVICE
V. CHADHA: THE LEGISLATIVE VETO
DECLARED UNCONSTITUTIONAL**

I. INTRODUCTION

Interbranch conflict between Congress and the executive branch over the proper division of constitutionally mandated powers is inherent to the American democratic system of government.¹ With increasing instances of executive omnipotence in all areas of government² and legislation by agency regulation,³ the notion of 1789 that Congress, and not the President, would be *primus inter pares*⁴ among the three departments of national government became obsolete.⁵ Recently, as a means of containing these practices, Congress has resorted with increasing frequency to the use of the legislative veto.

First invented during the Herbert Hoover administration,⁶ the legislative veto is a statutory device which allows Congress to control both executive and agency actions outside the confines of the ordinary legislative process.⁷ Typically inserted into legislation directing agencies to promulgate rules and regulations on a specific subject, the device requires that proposed actions of a prescribed type be reported by the agency to Congress before they take effect.⁸ Any such action may then proceed after a stated period, which is typically thirty to ninety days unless Congress formally states its disapproval within that time.⁹ The expression of disapproval is not sent to the

¹ James Madison's conception of the separation of powers doctrine emphasizes his viewpoint that government was, by nature, a series of institutional conflicts.

The provisions of defense must in this, as in all other cases, be made commensurate to the danger of attack. . . . It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections of human nature? If men were angels, no government would be necessary. . . . In forming a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST No. 51 at 354 (J. Madison) (1901 ed.).

² See A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

³ See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and The Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788 (1975).

⁴ The phrase means the first among equals. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1802 (3rd ed. 1966).

⁵ Van Alstyne, *supra* note 3, at 791.

⁶ Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414.

⁷ Martin, *The Legislative Veto and The Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 256 (1982).

⁸ *Id.* at 256.

⁹ There are several types of legislative vetoes, including: (1) plans vesting veto power in a committee chairman, *see, e.g.*, Supplemental Appropriation Act of 1953, ch. 14, § 1413, 66 Stat. 661 (1952); (2) plans vesting affirmative approval rights in one or both Houses before a proposed agency action becomes effective, *see, e.g.*, War Powers Resolution, § 5, 87 Stat. 555, 556-557 (1973); and

President for his review and possible veto; the action of Congress alone prevents the proposal from becoming effective. Scholars¹⁰ and lower federal courts¹¹ have considered the topic on numerous occasions and have reached conflicting and inconsistent results.

The 1983 case of *Immigration and Naturalization Service v. Chadha*¹² presented the United States Supreme Court with the opportunity to address the constitutional validity of the legislative veto. The Court held that the one-house legislative veto provision contained in the Immigration and Nationality Act¹³ was legislative in character when action was taken by the House; thus, the provision was held to be subject to the procedural requirements of article I, sections 1 and 7.¹⁴ Since the House action did not meet these dual strictures of bicameral consideration and presentment to the President, the provision was held to be unconstitutional.¹⁵

II. STATEMENT OF THE CASE

The appellee-respondent, Jagdish Rai Chadha, an East Indian native of Kenya, had been lawfully admitted to the United States on a non-immigrant student visa in 1966. He subsequently overstayed his visa, which expired in

(3) plans which provide that a negative vote in one House may be overridden by simple resolution of the other House thus allowing Agency rule to take effect, *see, e.g.*, H.R. 12048, 94th Congress, 2d Sess. § 4 (1976).

¹⁰ *See generally* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Nathanson, *Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064 (1981); Martin, *The Legislative Veto and The Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Abourezk, *Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative*, 52 IND. L.J. 323 (1977).

¹¹ *Compare* *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), (legislative veto was constitutional) with *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *appeals pending*, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177, and 81-209 (legislative veto was unconstitutional).

¹² 103 S. Ct. 2764 (1983).

¹³ Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1976).

¹⁴ 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, § 1, cl. 2.

Every Order, Resolution or Vote to which the concurrence of the Senate and the 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.

¹⁵ *Chadha*, 103 S. Ct. at 2788.

1972, and was ordered by the Director of the Immigration and Naturalization Service in 1974 to show cause why he should not be deported from the United States. Pursuant to section 242(b) of the Immigration and Nationality Act,¹⁶ a deportation hearing was convened. At the hearing, Chadha conceded his deportable status but requested a suspension of deportation, as allowed by section 244(a)(1) of the Act.¹⁷

After a hearing before an immigration judge, the suspension was granted¹⁸ and duly reported to Congress as required by statute.¹⁹ The suspension order remained outstanding for a year and a half. On December 16, 1975, acting within power specifically reserved in the Act,²⁰ the United States House of Representatives passed a resolution disapproving the suspension of deportation.²¹ Deportation proceedings were subsequently reopened and a final order of deportation was entered. Chadha then unsuccessfully appealed to the Board of Immigration Appeals, contending that the veto provision was unconstitutional.²²

Exercising authority pursuant to section 106(a) of the Act,²³ Chadha then filed a petition for review of the deportation orders with the United States Court of Appeals for the Ninth Circuit.²⁴ The Immigration and Naturalization Service, while properly a defendant in the action, joined Chadha in arguing that the legislative veto provision contained in the Act was unconstitutional. The Senate and the House of Representatives were invited to file amicus briefs. The court of appeals held that section 244(c)(2), the veto provision, was an unconstitutional violation of the separation of powers doctrine and directed the Attorney General to cease and desist from taking any further steps to deport Chadha pursuant to the House resolution.²⁵

On certiorari, the United States Supreme Court affirmed the decision of the Ninth Circuit Court of Appeals.²⁶ In a seven to two decision, the Court held that the Congressional action pursuant to the veto was legislative action and, as such, must conform to the strictures imposed by article I, sections 1

¹⁶ 8 U.S.C. § 1252(b) (1976).

¹⁷ 8 U.S.C. § 1254(a)(1) (1976).

¹⁸ The special inquiry officer found in part that "it would be extremely difficulty, if not impossible for [Chadha] to return to Kenya or go to Great Britain by reason of his [East Indian] racial derivation." *Chada v. Immigration and Naturalization Serv.*, 634 F.2d 408, 411 (9th Cir. 1980).

¹⁹ Reports of this nature under the Act were to be reported on the first day of every month to Congress when it was in session. 8 U.S.C. § 1254(c)(2).

²⁰ 8 U.S.C. § 1254(c)(2) (1976).

²¹ H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

²² The Board held that it had "no power to declare unconstitutional an act of Congress." *Chadha*, 103 S. Ct. at 2772.

²³ 8 U.S.C. § 1105(a) (1976).

²⁴ *Chadha v. Immigration and Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980).

²⁵ *Id.* at 436.

²⁶ *Chadha*, 103 S. Ct. at 2788.

and 7 of the Constitution.²⁷ A concurring opinion argued that the veto was violative of the separation of powers doctrine as it unconstitutionally impinged on the judicial sphere.²⁸ A vigorous dissent argued that the veto was not an affirmative legislative action because the status quo was not altered in any manner. In addition, the dissent contended that separation of powers concerns had not been violated because the veto did not intrude on any inherently executive or judicial functions.²⁹

III. PRIOR LAW

The constitutional validity *vel non* of the legislative veto had, until recently, been anything but clear cut. Congress and the executive have been at odds over the use of the device for decades,³⁰ but lack of judicial direction from the United States Supreme Court had led to a variety of judicial treatments and inconsistent results.³¹

The basic constitutional challenges which have been leveled against legislative vetoes are that (1) they are an unconstitutional delegation of power from Congress to administrative rule making bodies, (2) they avoid Constitutional imposition of standards elaborated in article I, sections 1 and 7 for the passage of legislative actions, and (3) they are a violation of the doctrine of separation of powers in that they unconstitutionally impinge on executive and judicial authority. At the time the United States Supreme Court tackled the issue, one federal court had held the veto constitutional³² and two federal courts of appeals had held the device unconstitutional.³³ Four cases at the court of appeals level, while not reaching the merits, commented on the issue.³⁴

²⁷ See *supra* note 14.

²⁸ *Chadha*, 103 S. Ct. at 2788 (Powell, J., concurring).

²⁹ *Id.* at 2792 (White, J., dissenting).

³⁰ A recent study has shown that there have been no less than 259 separate veto provisions enacted in 196 different acts of Congress since 1932. See Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 471 (1977). All ten Presidents from Wilson to Carter have gone on record as opposed to the veto. See Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. LEGIS. 735 (1979).

³¹ See and compare *Atkins v. United States*, 556 F.2d 1028, 1057-71 (Ct. Cl. 1977) *cert. denied*, 434 U.S. 1009 (1978) (legislative veto constitutional); *Buckley v. Valeo*, 424 U.S. 1, 284 (1976) (White, J., concurring in part, dissenting in part) (legislative veto constitutional) *with* *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (*per curiam*) (legislative veto unconstitutional) and *Consumers Union of United States v. Federal Trade Comm'n*, 691 F.2d 575 (D.C. Cir. 1982) (*per curiam*) (legislative veto unconstitutional).

³² *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

³³ *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *appeals docketed*; *Consumers Union of United States v. Federal Trade Comm'n*, 691 F.2d 575 (D.C. Cir. 1982); *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982); *Chadha v. Immigration and Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980).

³⁴ *Ohio Ass'n of Community Action Agencies v. FERC*, 654 F.2d 811 (D.C. Cir. 1981); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Clark v.*

A. Cases Not Reaching the Merits of the Veto³⁵

*Buckley v. Valeo*³⁶ marked the first time that a federal court took judicial notice of the legislative veto. The case involved the validity of Congressional appointment of representatives, pursuant to the Federal Election Campaign Act of 1971,³⁷ to the newly constituted Federal Election Commission. While the majority found "no occasion to address"³⁸ the issue of the veto, Justice White in a concurring and dissenting in part opinion argued that the legislative veto was constitutional.³⁹ The opinion noted that the use of a one-house veto was similar in nature to disapproval of proposed legislation by either house of Congress;⁴⁰ therefore, the requirements imposed by article I, sections 1 and 7 of the Constitution⁴¹ did not apply. Furthermore, separation of powers concerns were not implicated, because, in light of history and modern reality, the veto does not appear to transgress constitutional designs, particularly where the President has agreed to legislation containing the disapproval procedure or where the legislation has been passed over his veto.⁴² Review of agency rulemaking is basically legislative in character and does not impose itself on the Presidential veto power, whose main purpose is to provide the executive branch with some bargaining and survival power against what the framers feared would be the overwhelming power of the legislature.⁴³

The District of Columbia and the Fourth Circuit, during the next year, again failed to address the merits of the veto provisions contained within the pieces of legislation under constitutional scrutiny, but nevertheless they added some insight into possible future judicial treatment of the device on the merits.⁴⁴ In *Clark v. Valeo*,⁴⁵ the District of Columbia Court of Appeals considered the validity of the newly reconstituted Federal Elections Commission which had previously been ruled unconstitutional in *Buckley*. The court,

Valeo, 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 431 U.S. 950 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976).

³⁵ Organization compels the creation of the classification scheme used in this comment in order to lend coherence to the otherwise imprecise treatment by the judiciary of the legislative veto prior to *Chadha*. It should be noted that this comment is limited in its discussion to cases decided beyond the federal district court level.

³⁶ 424 U.S. 1 (1976).

³⁷ Federal Election Campaign Act of 1971; 2 U.S.C. §§ 431-456 (1976).

³⁸ *Buckley*, 424 U.S. at 282-86.

³⁹ *Id.* at 284.

⁴⁰ *Id.* at 284-85.

⁴¹ *See supra* note 14.

⁴² *Buckley*, 424 U.S. at 286.

⁴³ *Id.* at 285.

⁴⁴ *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 431 U.S. 950 (1977); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

⁴⁵ 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom.* Clark v. Kimmitt, 431 U.S. 950 (1977).

refusing to consider the constitutional validity of the veto on the merits, suggested that for the case to meet ripeness requirements, an actual exercise of the veto provision must have occurred.⁴⁶ The *Clark* ripeness test was subsequently reaffirmed in 1981 in *Ohio Association of Community Action Agencies v. FERC*,⁴⁷ a case not reaching the constitutional question involving the legislative veto because of a decision on the merits on natural gas deregulation rules promulgated by the Federal Energy Regulatory Commission.

More noteworthy in *Clark* was a strongly worded dissent of Judge MacKinnon which took issue with Justice White's *Buckley* opinion and argued strenuously that the veto was unconstitutional.⁴⁸ In discussing the legislative veto provision at issue, the same one which had been involved in *Buckley*, Judge MacKinnon took issue with Justice White's assessment of the veto act as an act similar to disapproval of proposed legislation by either house of Congress. The dissent pointed out that the reality of the situation is that failure to veto requires the concurrence of both houses, since if one house disagrees, the regulations are killed.⁴⁹ Hence, Congress clearly engages in a legislative act which must conform to the presentation and bicameralism requirements of article I, sections 1 and 7. The United States Supreme Court however, not reaching the issue, summarily affirmed the court of appeals' decision in *Clark v. Kimmitt*.⁵⁰

The same year, the Fourth Circuit announced another procedural rule upon which future challenges to the validity of the legislative veto would rely.⁵¹ To reach the constitutional question as to the legislative veto, the section containing the veto provision under scrutiny must itself be severable from the rest of the legislation. The court noted: "The canons of constitutional litigation dictate that we initially consider the statutory issue of separability before we turn to the question of constitutionality."⁵² The *Champlin Refining* test was adopted to be used to determine the question of severability: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law."⁵³ By concluding that the veto provision was not severable from the rest of the legislation, the Court did not reach the merits of the veto provision itself.⁵⁴

⁴⁶ *Id.* at 649.

⁴⁷ 654 F.2d 811, 818, n.15 (D.C. Cir. 1981).

⁴⁸ *Clark*, 559 F.2d at 679.

⁴⁹ *Id.* at 690.

⁵⁰ 431 U.S. 950 (1977).

⁵¹ *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

⁵² *Id.* at 1261-62.

⁵³ *Champlin Refining Co. v. Corporation Comm.*, 286 U.S. 210, 234 (1932).

⁵⁴ *McCorkle*, 559 F.2d at 1262.

B. *Cases Holding the Veto Constitutional*

One court beyond the federal district court level has upheld the Constitutionality of the legislative veto. In *Atkins v. United States*,⁵⁵ a divided United States Court of Claims sustained for the first time the constitutionality of a legislative veto provision applicable to proposed executive branch pay raises. A close majority of the court found that the one-house veto provision at issue was a constitutionally permissible, legislative oversight mechanism. The court found the authorization for this in article I, section 1,⁵⁶ which places the legislative power in Congress and in article I, section 8, clause 18,⁵⁷ the "necessary and proper" clause. The court held that the validity of an act of Congress must be judged by standards first enunciated in *McCulloch v. Maryland*:⁵⁸ "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."⁵⁹

In addition, the court noted that the legislative veto provision did not violate the principal of bicameralism,⁶⁰ the presentment clause,⁶¹ or the separation of powers doctrine.⁶² The classification of the legislative veto as falling within the confines of the article I, section 1, coupled with the extremely deferential *McCulloch* test, would seem to indicate that virtually any veto could pass constitutional muster. However, the court of claims was very definite in limiting the scope of its holding in the case to the statutory provision before the court at that time.⁶³ It refused to expand its analysis to encompass any other veto provisions in any other statutes.⁶⁴

⁵⁵ 556 F.2d 1028 (Ct. Cl. 1977).

⁵⁶ See *supra* note 14.

⁵⁷ "Congress shall have power to make all laws which shall be necessary and proper to carry into execution . . . and . . . powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

⁵⁸ 17 U.S. (4 Wheat.) 316 (1819).

⁵⁹ *Id.* at 421.

⁶⁰ The one-house veto does not alter the existing law in any fashion but only preserves the legal status quo. *Atkins*, 556 F.2d at 1063.

⁶¹ The president was permitted to recommend whatever he wished, including no recommendation at all. *Id.* at 1065.

⁶² The veto provision is an aid to legislative policy-making; it does not interfere with any essential executive function. *Id.* at 1069-70.

⁶³ The court emphasized that it was focusing only "on this specific mechanism in this specific statute—how it works, what it involves, what values and interests are implicated—not on an overarching attempt to cover the entire problem of the so-called legislative veto, or even a large segment of it." *Id.* at 1059.

⁶⁴ *Id.* at 1059.

C. Cases Holding the Veto Unconstitutional

In *Chadha v. Immigration and Naturalization Service*,⁶⁵ the Ninth Circuit Court of Appeals struck down, as unconstitutional, the exercise of a one-house legislative veto on a suspension of deportation granted by the Attorney General pursuant to the Immigration and Nationality Act.⁶⁶ The majority opinion concluded that the statutory mechanism under consideration was a prohibited legislative intrusion into executive and judicial branch affairs and, therefore, was a violation of the doctrine of separation of powers.⁶⁷

The use of the legislative veto was held to be an impermissible interference with the judiciary's function of determining whether the executive branch has correctly applied the statute granting its authority. By reason of this de facto correction procedure, all judicial determinations of the criteria established in section 244 of the Act were rendered impermissible advisory opinions.⁶⁸ In addition, because the veto device was used as a "means for sharing the administration of a statute with the Executive on an ongoing basis,"⁶⁹ it was held to violate traditional executive branch functions.

The majority, as did the court in *Atkins*, sought to limit the scope of its holding.

Although the practicality of alternatives to legislative disapproval in other situations raises difficult questions, we are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.⁷⁰

Subsequent to the court's decision, the case was appealed to the United States Supreme Court, where it was affirmed.⁷¹

The use of a necessary and proper analysis similar to that used by the court of claims in *Atkins* was specifically rejected by the District of Columbia Circuit Court of Appeals in *Consumer Energy Council v. FERC*.⁷² There, the court declared that a one-house legislative veto of rules promulgated under the Natural Gas Policy Act of 1978⁷³ was unconstitutional.⁷⁴ Furthermore, the

⁶⁵ 634 F.2d 408 (9th Cir. 1980).

⁶⁶ 8 U.S.C. § 1254(c)(2) (1976).

⁶⁷ *Chadha*, 634 F.2d at 420.

⁶⁸ *Id.* at 430.

⁶⁹ *Id.* at 429.

⁷⁰ *Id.* at 433.

⁷¹ *Chadha*, 103 S. Ct. at 2764.

⁷² 673 F.2d 425, 455 (D.C. Cir. 1982), *appeals docketed*.

⁷³ 15 U.S.C. § 3332 (Supp. III 1979).

⁷⁴ The majority opinion in *Atkins* and Congressional amici in *Consumer Energy Council con-*

majority held because the veto is a distinctly legislative act it must conform to presentation and bicameralism requirements imposed by article I, sections 1 and 7 unless it is found to be an exception to those requirements elsewhere in the Constitution.⁷⁵ The court rejected the government's contention that the legislative veto was a mere delegation of power to an agency with a condition precedent attached.⁷⁶ Simply styling something as a condition on a grant of power from Congress does not automatically end the constitutional question. If this were true, Congress would, as in this case, attempt to condition all rights and duties established by legislation on the approval of either house. This would effectively enable repeal of all legislation by simple resolution.

In continuing its analysis, the D.C. Circuit found that the legislative veto was a violation of the doctrine of separation of power.⁷⁷ Even using the relatively toothless standard proclaimed in *Buckley v. Valeo*,⁷⁸ the majority

tended that Congress' power to employ the veto comes from the second half of the "necessary and proper" clause which deals with Congress' power over the executive and the judiciary. *Consumer Energy Council*, 673 F. 2d at 455. This theory, recently expounded by Professor Van Alstyne, asserts that the clause gives an exclusive right of Congressional control over all nonessential powers exercised by the other two branches. "[T]he sole power of Congress [is] to determine, and to make provision for, incidental (but not indispensable) power that in its view may promote greater efficiency in the executive or judicial departments." Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 807 (1975) (emphasis in original). The Court in *FERC* felt that adoption, if at all, of such a doctrine should only come from the United States Supreme Court. In addition, the question in the case was not whether some power is implicitly in the Constitution's grant of power to the executive branch, but whether Congress may veto executive decisions made pursuant to legislative delegation. The second half of the "necessary and proper" clause does not empower Congress to contravene constitutional requirements found elsewhere in the document. *Consumer Energy Council*, 473 F.2d at 455 n.127.

⁷⁵ Justice White's *Buckley* argument that agency rules are mere legislative proposals and have no legal force was found to be logically flawed. If neither house acts to approve a bill, the bill dies; but when neither house acts to disapprove an agency rule, the rule becomes law. Clearly, the agency rule has some legal force that a proposed bill does not. *Consumer Energy Council*, 473 F.2d at 465.

⁷⁶ Primary reliance for the government's argument was placed on *Currin v. Wallace*, 306 U.S. 1 (1939), and *United States v. Rock Royal Coop. Inc.*, 307 U.S. 533 (1939). In *Currin*, a statute which provided for promulgation of rules by the Secretary of Agriculture concerning tobacco markets and inspection of tobacco subject to an affected party referendum and approval was held to be constitutionally valid. In *Rock Royal*, the Court upheld a statute authorizing the Secretary of Agriculture to define marketing areas and propose marketing regulations in the dairy industry subject to approval of the affected parties. It reasoned that conditioning administrative decisions on approval of private sector parties can be no more constitutionally valid than conditioning them on Congressional approval. See, e.g., Nathanson, *Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and The "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1083 (1981). See also Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 448-51 (1978) (no difference between delegation of power to private sector or to Congress).

⁷⁷ *Consumer Energy Council*, 673 F.2d at 471.

⁷⁸ A "total separation" was not contemplated. The framers, while "view[ing] the principle . . .

found that the Federal Energy Regulatory Commission performed essentially executive functions⁷⁹ and that legislative control of agency rulemaking violates the Constitution. To the extent that a use of the legislative veto is to prevent the effect of agency rules which exceed the statutory mandate, it also unconstitutionally intrudes upon the exercise of judicial powers of the courts.⁸⁰

Finally, the court dismissed the policy contentions that the legislative veto was an effective means of Congressional oversight over unaccountable rulemaking bodies and over an unfettered Presidency.⁸¹ Based on the apparent constitutional objections to the device, the majority found that congressional unwillingness to act in a manner specifically set forth in the Constitution cannot be deemed a sufficient reason for inventing new ways to act.⁸² Citing Justice Douglas' opinion in *Youngstown Sheet and Tube v. Sawyer*,⁸³ the court noted that the often cumbersome, time-consuming, and inefficient nature of legislative action is no excuse for circumventing constitutionally established checks and balances. Change must come from Congressional provision of meaningful standards for administrative action or from constitutional amendment. The legislative veto fits into neither of these categories.

Significantly, the all-encompassing nature of the holding of this case had not been altered to any degree prior to *Immigration and Naturalization Service v. Chadha*. Two years later two federal courts of appeals decisions⁸⁵ adopted the rationale of *Consumer Energy Council in toto* in declaring legislative veto provisions unconstitutional.

IV. SUPREME COURT ANALYSIS

A. Preliminary Issues

The *Chadha* majority, in quick order, dismissed a host of collateral objections made by the appellant-petitioners which did not go to the merits of the case.⁸⁶ In an apparent haste to reach the merits of the case, the justices either

as a vital check against tyranny . . . likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley*, 424 U.S. at 121.

⁷⁹ *Consumer Energy Council*, 673 F.2d at 472.

⁸⁰ *Id.* at 477-78.

⁸¹ *Id.* at 475-76.

⁸² *Id.* at 477.

⁸³ 343 U.S. 579, 629 (Douglas, J., concurring).

⁸⁴ *Consumer Energy Council*, 673 F.2d at 477.

⁸⁵ *Consumers Union of United States, Inc. v. Federal Trade Comm'n*, 691 F.2d 575 (D.C. Cir. 1982); *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982).

⁸⁶ *Chadha*, 103 S. Ct. at 2772-80.

totally ignored or hastily dismissed two procedural implications peculiarly indigenous to legislative veto cases heretofore mentioned in this comment⁸⁷—ripeness and severability.

It is curious that one finds no mention of the *Clark* ripeness test,⁸⁸ particularly in view of its reaffirmance by the District of Columbia Court of Appeals as recently as 1981 in *Ohio Association of Community Action Agencies v. FERC*.⁸⁹ The importance of the doctrine cannot be overstated; in the absence of the legislative veto act itself, the issue of its constitutionality becomes moot.

Implicit in the *Chadha* majority and concurring opinions is the fact that the option to use the legislative veto had been affirmatively exercised.⁹⁰ It is only after the veto act has occurred in this physical sense that a court can then assess whether the behavior of the legislative branch violated constitutionally mandated requirements. In *Chadha*, this can really be no more than a technical objection because the veto had, in fact, been exercised.⁹¹ Nonetheless, due to the significant role that the exercise of the veto plays in their respective analyses and the potential magnitude of the case, it is disconcerting that the majority and concurring opinions failed to mention this important test.

The issue of severability is also of particular significance to any consideration of the *Chadha* opinion. The majority and the dissent conflict on their positions relative to the severability of the veto provision from the remainder of the Act. The majority relied on the presence of a savings clause in the Act itself.⁹² Such clauses are typically inserted into statutes to protect the balance of that statute from invalidation should one or more particular sections or parts be found unconstitutional. The majority found that forty years of legislative history showing a Congressional intent to the contrary is insufficient to rebut the presumption of severability that the savings clause creates.⁹³ Thus, contrary to the contentions of Congress, section 244 remains a fully operative and workable piece of administrative machinery without the presence of the veto mechanism.⁹⁴ Justices Rehnquist and White, on the other

⁸⁷ See, e.g., *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (en banc) *aff'd mem. sub nom.* *Clark v. Kimmitt*, 431 U.S. 950 (1977) (for the decision to be ripe for adjudication on the merits, the legislative veto must have been exercised); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (veto provision must be severable from rest of act to be adjudicated on the merits).

⁸⁸ *Clark*, 559 F.2d at 649.

⁸⁹ 654 F.2d 811, 818, n.15 (D.C. Cir. 1981).

⁹⁰ H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

⁹¹ *Id.*

⁹² *Chadha*, 103 S.Ct. at 2774.

⁹³ *Id.*

⁹⁴ *Id.* at 2776.

hand, join in a dissent to the majority's position on this issue, claiming that the position taken is a denigration of the *Champlin Refining* test⁹⁵ and a frustration of the intent of Congress.⁹⁶

Clearly, the reasoning of the two dissents in this case seems logical. Elimination of the veto provision from the rest of the Act, observed Justice Rehnquist, permits suspension of deportation in a class of cases where Congress never stated that such suspension was proper⁹⁷ and confers upon the statute a positive operation beyond the legislative intent.⁹⁸ In addition, Justice White found that the majority so narrowly construed the severability test of *Champlin* as to allow not only severability of major parts of the act in question from one another, but also of different provisions within a single section of an act.⁹⁹ Even given the presumption of severability that a savings clause creates, it is difficult, under any reasonable view, to imagine how the better part of four decades of legislative history to the contrary can be frustrated. The paramount consideration that the majority gives to the presumption of severability to the almost total exclusion of any consideration of prior legislative history raises questions as to the proper severability test to be used with legislative veto provisions in other statutes. The failure of the majority to realize this, along with its textual twisting of the *Champlin Refining* test,¹⁰⁰ will in all probability serve as a basis for future criticism of this decision.¹⁰¹

B. *Delegation Doctrine*

The threshold question addressed by the United States Supreme Court in *Immigration and Naturalization Service v. Chadha* was whether one house of Congress, acting pursuant to section 244(c)(2) of the Immigration and Nationality Act, violated the constitutionally imposed strictures of presentation

⁹⁵ *Id.* at 2798, n.16 (White, J., dissenting).

⁹⁶ *Id.* at 2816 (Rehnquist, J., dissenting).

⁹⁷ *Id.*

⁹⁸ *Id.* (citing *Sprague v. Thompson*, 118 U.S. 90, 95 (1886)).

⁹⁹ *Id.* at 2798, n.16 (White, J., dissenting).

¹⁰⁰ The majority read the *Champlin* severability test to the strictest degree, thus finding authority to divide different provisions within the same section of the Act. The dissent understood the test as merely pertaining to the severability of the major parts of the Act from each other. *Id.* at 2798, n.16.

¹⁰¹ Another criticism of procedural issues in this case is noted by Professor Martin:

Unlike the more common application of the [veto] device to agency rulemaking or "informal" actions such as the siting of federal facilities, where the main constitutional disputes relate to the distribution of powers between the executive and legislative branches, this use to reject individual adjudications raises additional questions under the due process and bill of attainder clauses.

Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 261 (1982).

to the President and bicameral approval.¹⁰² Discussed in delegation of powers terms, the question becomes whether Congress may validly delegate to one house or one committee the power to oversee agency regulations by the use of veto resolutions.¹⁰³ The majority found that Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of Congressional veto.¹⁰⁴ That argument is premised on the fact that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral role, they narrowly and precisely defined the procedure for such action."¹⁰⁵

The majority's analysis however, goes no further than this bare assertion and, as Justice White's dissent pointed out, it totally ignores the fact that Congress routinely delegates legislative authority to executive branch agencies, independent regulatory agencies, and to private individuals or groups to promulgate rules having the force of law without being subject to bicameralism and presentation criterion.¹⁰⁶ In addition, the dissent reasoned, there are no strict limits on who may receive the delegations of authority.¹⁰⁷

The odd result created by the majority opinion is that Congress can delegate lawmaking power to lesser administrative bodies or private parties who may then issue regulations having the force of law that are subject to neither bicameral approval nor to presentment clause requirements. Yet, the standards that the majority found imposed by article I, sections 1 and 7 forbid Congress from reserving a check on this power for itself because the exercise of this check violates the same article I strictures which the majority curiously found do not pertain to administrative rulemaking.¹⁰⁸

¹⁰² *Chadha*, 103 S. Ct. at 2780.

¹⁰³ "Do these statutes represent attempts by Congress . . . to vest legislative power in a single House or in a Congressional committee?" Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 569-70 (1953).

¹⁰⁴ *Chadha*, 103 S. Ct. at 2786.

¹⁰⁵ *Id.*

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

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

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

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

¹⁰⁶ *Id.* at 2801.

¹⁰⁷ *Id.* at 2802.

¹⁰⁸ Professor Bernard Schwartz has observed:

If the holding that the legislature cannot be given the power to annul a rule . . . were to be consistently applied in an inflexible manner, it would practically destroy the rulemaking power of the administrative agencies themselves [A]gencies themselves are

The superficial treatment of the delegation questions by the majority opinion in the *Chadha* case implies that it is not an important consideration in the analytical scheme, particularly in view of the great reliance placed by the majority on the initial question of whether the legislative veto act meets the mandates of article I, sections 1 and 7. This may indicate that the doctrine will be given short shrift by future courts, however clearly plausible it may seem.

C. *Strictures Imposed by Article I, Sections 1 and 7: Presentation and Bicameralism*

The foundation upon which the majority relied is the assertion that the legislative veto is unconstitutional because it violates the requirements of article I, sections 1 and 7: bicameral approval and presentation to the President.¹⁰⁹ The premise underlying this contention is that the veto is an affirmative exercise of legislative power and, as such, is subject to the strictures imposed by the framers in article I.¹¹⁰ While there are exceptions to these criteria, they are specifically enunciated elsewhere in the Constitution.¹¹¹

The dissent however, in taking issue with the majority characterization of the veto, observed that the power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration, but merely a negative, already authorized by a duly enacted statute, on what an executive or an independent agency has proposed.¹¹² It does not alter the status quo. The appellee *Chadha* would still be deportable because the suspension order is merely a deferment of deportation. It can only result in cancellation of deportation and adjustment of status upon approval of Congress, by its subsequent inaction, under section 242(c)(2).¹¹³ Therefore, the dissent argued, article I should not apply.

As the majority realized, the key inquiry should be whether the act in question was "legislative" in nature.¹¹⁴ If the action is determined to be legislative, then, according to the majority test, it must conform to the presentation and bicameralism requirements of article I, sections 1 and 7 or a finding of unconstitutionality will result.

given the power to make laws through their rules: otherwise how can the legislature be enacting a change in the law through its annulment power. But, if that is true, following the rigid separation-of-powers approach, are not the delegations of such "law-making" power to the agencies equally invalid?

Schwartz, *Legislative Control of Administrative Rules and Regulations: 1. The American Experience*, 30 N.Y.U. L. REV., 1031, 1043 (1955).

¹⁰⁹ See *supra* note 14.

¹¹⁰ *Chadha*, 103 S. Ct. at 2787.

¹¹¹ See *supra* note 105.

¹¹² *Chadha*, 103 S. Ct. at 2799.

¹¹³ *Id.* at 2807.

¹¹⁴ *Id.* at 2784.

As a result of the majority opinion, it appears that the use of the "horizontal effect"¹¹⁵ of the necessary and proper clause as used in *Atkins* has been overruled *sub silentio*. Although the plain meaning of the clause appears to give Congress the power to condition its delegations so as to insure compliance with Congressional intent, the doctrine of constitutional conditions¹¹⁶ places a curb on some delegations. Since the legislative veto has been ruled unconstitutional, it is no longer a viable condition to which Congress can subject its delegations of power.

D. *Separation of Powers*

The majority's characterization of the veto as a legislative or quasi-legislative act virtually eliminated any reliance that the opinion would have placed on the contention that the legislative veto was an unconstitutional violation of the separation of powers doctrine. The majority found that where one house of Congress purports to act, it is presumptively acting within its assigned sphere.¹¹⁷ A further indication that the Act under consideration was legislative in character was that the House took action which had the purpose and effect of altering legal rights, duties, and relations of persons, outside the legislative branch, including the Attorney General, executive branch officials, and Chadha.¹¹⁸

The concurring opinion of Justice Powell, however, found that the legislative branch had impermissibly assumed a function that is more properly entrusted to another branch of government.¹¹⁹ Using standards enunciated in *Youngstown Sheet and Tube Co. v. Sawyer*,¹²⁰ the concurring opinion declared that by making a determination that a specific person did not comply with statutory criteria, the House assumed a clearly unconstitutional adjudicatory function.¹²¹ Justice Powell further stated that he would not reach the broader question of whether legislative vetoes are invalid under the presentment clause.¹²² Assuming the unconstitutionality of the veto, the con-

¹¹⁵ See Van Alstyne, *supra* note 3.

¹¹⁶ "[T]he means devised in the execution of a power granted must not be forbidden by the Constitution." *ICC v. Brimson*, 154 U.S. 447, 473 (1894).

¹¹⁷ *Chadha*, 103 S. Ct. at 2784.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2792.

¹²⁰ The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

¹²¹ *Chadha*, 103 S. Ct. at 2792.

¹²² *Id.*

curing opinion's holding is clearly the correct one in view of the respect normally given by the judiciary to the judgment of a coordinate branch of government.¹²³

The dissent of Justice White clearly provides the most cogent discussion of separation of powers concerns. The history of the doctrine is a history of accommodation and practicality; hence, the doctrine has heretofore led to the invalidation of government action only when the challenged action violated some express provision of the Constitution.¹²⁴ By use of the test enunciated in *Nixon v. Administrator of General Services*,¹²⁵ the dissent would find that the provision under question, section 244(c)(2), does not impermissibly infringe upon either the executive¹²⁶ or the judicial branch.¹²⁷

The practical effect of the adoption of the article I, sections 1 and 7 analysis employed by the majority is that the reasoning employed by the Ninth Circuit in the original *Chadha* case and the analysis used in the concurring opinion to the instant case are both implicitly overruled. Arguably, by this method of analysis, the Court could have reached the same result with a narrower holding.¹²⁸ By not accepting the validity of the separation of powers argument, the majority clearly expands the breadth of the holding to allow it to encompass every legislative veto with similar procedural qualities to the one in the instant case. It would be impossible not to suggest that this will make the Court the target of attacks charging that the decision was politically motivated and not based on the Constitution.¹²⁹

¹²³ In this regard, Justice Brandeis wrote: "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.'" *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345, 347 (1936).

¹²⁴ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 118-24 (1975); *Myers v. United States*, 272 U.S. 52, 61 (1926); *Springer v. Phillipine Islands*, 277 U.S. 189, 202 (1928) (Congressional action compromising an express Presidential power).

¹²⁵ [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-12.

Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

¹²⁶ *Chadha*, 103 S. Ct. at 2809.

¹²⁷ *Id.* at 2810.

¹²⁸ *Id.* at 2788.

¹²⁹ "[T]he Court's decision will be on the basis of political accommodation rather than 'principle'—for no one can believe that answers to such problems can logically be deduced from the spare language and silences of the Constitution." Miller, *Dames and Moore v. Regan: A Political*

V. CONCLUSION

The United States Supreme Court declared legislative veto provisions unconstitutionally violative of the strictures imposed by article I, sections 1 and 7 in *Immigration and Naturalization Service v. Chadha*. The Court declined to give weight to either the delegation doctrine or the separation of powers doctrine in its decision. Instead, the majority's reasoning relied heavily on an article I, sections 1 and 7 analysis to find that the veto was unconstitutional because it violated the presentation and bicameralism requirements explicitly stated in the Constitution. By the use of this approach, the majority casts grave doubt as to the future constitutional viability of more than two hundred congressional enactments in which the legislative veto or some similar device now plays a part.¹³⁰

In refusing to accept the notion that the legislative veto is anything other than a legislative or quasi-legislative act, the majority implicitly overruled the basis for the decision of the Ninth Circuit in the original *Chadha* case¹³¹ and also the reasoning supporting the concurring opinion.¹³² The fundamental difference between the majority and the dissenting opinion is their characterization of the legislative veto, with the majority characterizing it as an affirmative legislative act affecting substantive rights and the dissent as a negative which maintains the status quo. While one may argue over the proper characterization of the nature of the veto and how it affects the rights of the parties, a reasonable person cannot fail to see the effect of such a broad holding.

It may be suggested, in view of the presence of the veto in hundreds of Congressional enabling statutes which are now in constitutional doubt, that clearly the more appropriate decision, if indeed it was necessary to declare the veto unconstitutional, would have been reflected by the results reached by the concurring opinion.¹³³ This would have adequately informed the legislative branch of the grave reservations that the ultimate arbiter of the Constitution had about the legislative veto and allowed adequate time to correct the supposed infirmities. The United States Supreme Court refused to follow its own doctrine of judicial restraint,¹³⁴ however, and in so doing readjusted the balance of power between the Congress and the President. Although it remains to be seen what the ultimate effects of this readjustment

Decision by a Political Court, 29 U.C.L.A. L. REV. 1104, 1122 (1982) (referring to the then-pending *Chadha* case).

¹³⁰ *Chadha*, 103 S. Ct. at 2792.

¹³¹ *Chadha v. Immigration and Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980).

¹³² *Chadha*, 103 S. Ct. at 2788.

¹³³ *Id.*

¹³⁴ *Ashwander*, 297 U.S. at 347.

will be, one result of the *Chadha* decision will surely be an increase in legislative activity focusing on the potential effects of this momentous decision.¹³⁵

Robert E. Lannan II

¹³⁵ Two cases handed down subsequent to the decision in *Immigration and Naturalization Service v. Chadha*, in which the United States Supreme Court summarily affirmed the lower court's ruling on the unconstitutionality of the veto indicate the direction that the Court is taking. *United States Senate v. Federal Trade Comm'n*, 51 U.S.L.W. 3935 (July 6, 1983); *United States House of Representatives v. Federal Trade Comm'n*, 51 U.S.L.W. 3935 (July 6, 1983).