Duquesne Law Review

Volume 22 | Number 4 Article 7

1984

Characterization of the Legislative Veto: Courts Should Focus on the Power Itself

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Characterization of the Legislative Veto: Courts Should Focus on The Power Itself

The legislative veto[1] has become the subject of renewed academic debate.[2] Commentators were previously concerned with the veto provisions' utility[3] and constitutionality.[4] Discussion currently centers around the question of whether the recent United States Supreme Court decision in *Immigration and Naturalization Service v. Chadha*[5] has invalidated all federal veto provisions.[6] This

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1. The term legislative veto is used generically to describe a resolution by Congress to override or cancel a particular decision or rule of an administrative agency, or occasionally, an executive decision. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953). Apparently, the term was used initially in Millett & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. AD. REV. 176 (1941). *See* Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978).

Procedurally, veto provisions are of two basic types. Those requiring a vote by one house of Congress are known as simple resolutions, and those requiring a vote by both houses are called concurrent resolutions. Ginnane, *supra*, at 570 n.1. *See also* Saks, *Holding the Independent Agencies Accountable: Legislative Veto of Agency Rules*, 36 AD. L. REV. 41 (1984). This distinction may be important to the question of whether article I scrutiny is required, Ginnane, *supra* at 569, but, both types would be treated identically with regard to the discussion herein.

Veto provisions are found in the text of the act for which they are created. They appear in numerous federal statutes. *See generally* Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764, 2781 (1983); Schwartz, *supra*, at 351; Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 38 WM. & MARY L. REV. 79, 79-80 (1982). *But cf.* S. 1080, 97th Cong., 2d Sess. § 13 (1982) (adding §§ 801-803 to Title 5, U.S.C.) (Congress may veto proposed agency rules by concurrent resolution without submission to the President).

2. *See infra* notes 3-4.

3. Debate on the question of the veto's utility in administrative control has continued. *See, e.g.*, Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455 (1977).

4. For a comprehensive list of discussions on the general constitutionality of legislative vetos, *see Chadha*, 103 S. Ct. at 2797 n.12 (White, J., dissenting).

5. 103 S. Ct. 2764 (1983) (§ 244(c)(2) of the Immigration and Nationality Act unconstitutional). Chief Justice Burger's majority opinion was joined by Justices Blackmun, Marshall, Stevens, and O'Connor. *Id.* Justice Powell filed a concurring opinion. *Id.* at 2788 (Powell, J., concurring). Justice White filed a dissenting opinion. *Id.* at 2792 (White, J., dissenting). Justice Rehnquist filed a dissenting opinion, in which Justice White joined. *Id.* at 2816 (Rehnquist, J., dissenting).

6. In *Chadha*, Justice Powell expressed the opinion that the Court, by its broad reasoning, had invalidated all legislative vetoes. *Id.* at 2788 (Powell, J., concurring). Justice White agreed with this point, *id.* at 2792 (White, J., dissenting), but expressed some hope

comment is not concerned with either the utility or constitutionality, per se, of the legislative veto; rather, it seeks to expose a problem found in two of the federal cases in which the validity of a veto was in question.[7]

An initial and accurate determination of the character of each veto provision—as either executive, legislative, or judicial—is essential in defining the legal parameters within which its constitutionality will be judged. In making this determination, the courts have concentrated on the effects of an *exercise* of that power, rather than focusing on the nature of the *power* itself.[8]

The impact of this characterization of a legislative veto may be illustrated by the divergent positions of the majority and concurring opinions in *Chadha*. In *Chadha*, the Supreme Court declared the veto provision in section 244(c)(2) of the Immigration and Nationality Act (INA)[9] unconstitutional.[10] The majority held that Congress' exercise of the INA veto violated the constitutional requirements for legislative enactment: bicameral consideration and presidential presentment.[11] Justice Powell found, in his concurrence, that section 244(c)(2) was indeed unconstitutional,[12] but on the theory that Congress' exercise of the veto constituted an im-

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that the Court may have avoided this result. *See id.* at 2796 n.11 (White, J., dissenting).

For general views with regard to the effect of *Chadha* on other legislative veto provisions, *see, e.g., After Chadha, A Legal Void,* NAT'L LAW J., April 23, 1984 at 1, col.1; Tolchun, *Legislative Veto Thrives Despite Court Ruling,* L.A. DAILY J., Dec. 26, 1983, at 3, col.1; *Congress Has Post-Chadha Legislative Veto Options,* LEGAL TIMES, Dec. 5, 1983, at 12, col.1.

7. Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983); Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978).

8. *See infra* text accompanying notes 36, 37 & 39-42.

9. 8 U.S.C. § 1254(c)(2) (1982).

10. 103 S. Ct. at 2788.

11. *Id.* at 2787. The requirements of bicameral consideration and presidential presentment are embodied in Article I of the United States Constitution: "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 (emphasis added). "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. . ." *Id.* at art. I, § 7, cl. 2 (emphasis added).

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

Id. at art. I, § 7, cl. 3 (emphasis added).

12. 103 S. Ct. at 2788-92 (Powell, J., concurring).

permissible violation of the separation of powers doctrine.[13] The differing analyses presented in these opinions stem from differing conclusions as to the character of the veto, or more particularly, the character of the power as exercised by Congress in utilizing the veto.[14] In *Chadha*, Chief Justice Burger determined that, by utilizing section 244(c)(2), Congress exercised a legislative power.[15] Justice Powell, on the other hand, found that Congress was acting in a judicial manner.[16]

Without having first made such a determination, no decision regarding constitutionality could be made; the possible constitutional violations could not have been discerned.[17] A conclusion that Congress acted within its designated area would indicate no violation of the separation of powers doctrine. Then, however, an analysis of the individual proscriptions of article I of the Constitution would be mandated.[18] An initial determination that Congress had assumed a judicial responsibility, on the other hand, would necessitate finding that the veto is impermissible within the broader framework of the separation of powers doctrine, with no further analysis required.[19]

Because a characterization of any congressional action as nonlegislative indicates a violation of the separation of powers doctrine,[20]

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13. *Id.* at 2792 (Powell, J., concurring). Justice Powell, having decided the question of constitutionality, *vel non*, on the basis of an infringement of the separation of powers doctrine, found it unnecessary to reach the presentment and bicameralism issues. *Id.*

Further, Justice Powell reasoned that the Court would have more properly narrowed the scope of its decision by adhering to his analysis. *Id.* at 2788-89 (Powell, J., concurring). *See also supra* note 6.

14. *Compare* 103 S. Ct. at 2789 (Powell, J., concurring) (Congress assumed a judicial function), *with id.* at 2784 (Congress acted within the legislative sphere). That both opinions reached an ultimate finding of unconstitutionality is immaterial to this discussion, as either result is possible after the characterization is made. For example, Justice White, in his dissent, reached the conclusion that § 244(c)(2) does not violate the bicameralism and presentment provisions of article I, and is therefore constitutional. He made this determination by finding that Congress had exercised a legislative power. *Id.* at 2792-2811 (White, J., dissenting).

15. *Id.* at 2784-86.

16. *Id.* at 2789 (Powell, J., concurring).

17. *See, e.g., id.* at 2784 ("[n]ot every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. [sic]").

18. *Id.* at 2781. *See supra* note 11 and accompanying text.

19. *See* 103 S. Ct. at 2792 (Powell, J., concurring). Justice Powell stated: "In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses." *Id. But cf. id.* at 2781 (the bicameral and presentment clauses "are integral parts of the constitutional design for the separation of powers"). *Id.*

20. *But cf. infra* note 37 and accompanying text.

the general inquiries made under that doctrine are applicable first.[21] As pointed out by Justice Powell in his *Chadha* concurrence, there are two ways the doctrine may be violated:[22] interference with the performance of another branch's duties, or assumption of governmental functions properly exercisable only by another branch.[23] Justice Powell correctly identified the "assumed function" problem as relevant in the legislative veto setting.[24] Moreover, the inclusion of the veto in any act is not merely an assumption by Congress of the right to *exercise* some power; it is, in fact, the assumption of that *power*, itself.

Before *Chadha*, only one federal court had established a test for characterizing the power involved in a legislative veto provision.[25] In *Atkins v. United States*,[26] the Federal Court of Claims held that the Senate's exercise of the legislative veto provision in the Federal Salary Act of 1967 (Salary Act)[27] did not constitute a legislative action.[28]

Atkins involved a dispute over judicial compensation.[29] In 1973, the President made a recommendation that federal judges receive 7.5% pay increases pursuant to section 225(h) of the Salary Act[30] in 1974, 1975 and 1976.[31] On March 6, 1973, the Senate disapproved this recommendation by exercising its veto as authorized by section 225(i)(1)(B) of the Salary Act.[32] The judges involved,

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21. 103 S. Ct. at 2790 (Powell, J., concurring).

22. *Id.*

23. Justice Powell noted: "Functionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. This case presents the latter situation." *Id.* (citations omitted). *See* Nixon v. Administrator of General Services, 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974) (impermissible interference). *And see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Springer v. Philippine Islands, 277 U.S. 189 (1928) (improperly assumed function).

24. 103 S. Ct. at 2790.

25. For a discussion of methods of determining the character of state veto provisions, *see* Comment, *The Legislative Veto: Is it Legislation?*, 38 WASH. & LEE L. REV. 172 (1981).

26. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

27. Federal Salary Act of 1967, § 225(i)(1)(B). 2 U.S.C. § 359(1)(B) (1982) (either House of Congress may veto presidential salary recommendations).

28. 556 F.2d at 1063. *See infra* note 37 and accompanying text. The United States Supreme Court had not directly addressed the issue of the constitutionality of legislative vetoes prior to *Chadha*. *See* Saks, *supra* note 2, at 44.

29. 556 F.2d at 1033.

30. 2 U.S.C. § 358 (1982).

31. 556 F.2d at 1033.

32. 2 U.S.C. § 359(1)(B) (1976) provides:

(1) Except as provided in paragraph (2) of this section, all or part (as the case may

having been denied the pay raise, filed suit against the government.[33] Had Congress not availed itself of the veto, the President's recommendations would have become law, and the pay increases would have been initiated.[34] But, because Congress vetoed the guidelines, the salary levels were controlled by existing legislation.[35] In analyzing the character of the veto provision, the court looked to the effect of the Senate's action on existing legislation, and found none.[36] Thus, the court determined that Congress' veto did not "alter the law," and so, was not legislative.[37] This analysis is clearly circular and unreliable. The particular veto provision in question allowed Congress to reject a Presidential recommendation which, had it not been vetoed, would itself have "altered the law."[38]

In *Chadha*, the Court purported to utilize an effect test also,[39] but examined the effect of the veto's exercise on those individuals involved, rather than on the law, as did the *Atkins* court.[40] In defining its test, the Court said, "[w]hether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and

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be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

. . . .

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations. . . .

Id. (*amended by* 2 U.S.C. § 359(1) (1982)).

33. 556 F.2d at 1033. This action involved 140 United States circuit and district court judges. *Id.*

34. *Id.* at 1034. *See also supra* note 32.

35. 556 F.2d at 1064.

36. *Id.* at 1063. *See also* Comment, *supra* note 25, at 178-79.

37. 556 F.2d at 1063. Because of this non-legislative characterization, the *Atkins* court found no violation of the bicameral provision of article I. *Id.* In spite of Congress' extra-legislative action, the Court of Claims upheld the constitutionality of the veto, stating that the separation of powers doctrine was flexible enough to allow it. *Id.* at 1070.

38. *Id.* at 1064. A non-exercise by Congress would have had legislative effect. *See also* Comment, *supra* note 25, at 178-79.

39. 103 S. Ct. at 2784. *See infra* note 41 and accompanying text. The remainder of the Court's analysis clearly elevates form over substance in its comparison of *procedurally* legislative actions that Congress "could have" taken to achieve deportation of Chadha. *See* 103 S. Ct. at 2785.

40. *See supra* notes 36 & 37 and accompanying text.

effect.' "[41]

In ascertaining this effect, the Court noted that:

> In purporting to exercise power defined in Art. I, § 8, cl. 4 to "establish an uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch.[42]

From this, the Court concluded that Congress had acted in a legislative manner.[43] This analysis is not convincing, because a governmental action properly taken by any branch could have effects similar to legislation on these individuals.[44]

Closer examination of the particulars of the INA veto, and the statutory scheme to which the parties were subject, shows an effect on those involved which would more commonly result from a judicial proceeding.[45] *Chadha* presents a typical case involving the INA veto. Jagdish Rai Chadha had been in the United States since 1966, on a nonimmigrant student visa, which expired on June 30, 1972.[46] On October 11, 1973, Chadha was ordered to show cause why he should not be deported for staying in the country after his visa had expired.[47] Chadha's deportation hearing was held on January 11, 1974, and subsequently adjourned so that he could file an application under section 244(a)(1) of the INA,[48] for suspension of

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41. 103 S. Ct. at 2784. The Court made no reference to *Atkins* in this regard.

42. *Id.*

43. *Id.* at 2785.

44. *See, e.g., infra* text accompanying note 62.

45. *See* 103 S. Ct. at 2789 (Powell, J., concurring). Justice Powell began his analysis of the veto's character with the statement that Congress' action was judicial in character by noting that, "[t]he House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria." *Id.* at 2791 (Powell, J., concurring).

46. *Id.* at 2770.

47. *Id.*

48. 8 U.S.C. § 1254(a)(1)(1982) provides:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

his deportation.[49] The application having been filed, Chadha's hearing was resumed on February 7, 1974.[50] On June 25, 1974, the immigration judge entered an order suspending Chadha's deportation; ruling on evidence from the hearing, affidavits attached to the initial application, and findings of an INS character investigation, the judge found that Chadha met the criteria prescribed in section 244(a)(1),[51] so that suspension was warranted.[52] The suspension decision was reported to Congress[53] as required by section 244(c)(1) of the INA.[54] Once such report is received by Congress, section 244(c)(2)[55] authorized (prior to *Chadha*) a single house to pass a resolution expressing disfavor with the INS's determination.[56] The House disagreed with the agency's finding that Chadha met the statutory requirements for suspension and ordered his deportation.[57]

Id.

49. 103 S. Ct. at 2770.

50. *Id.*

51. *See supra* note 48.

52. 103 S. Ct. at 2770.

53. *Id.* at 2770-71.

54. 8 U.S.C. § 1254(c)(1) (1982) provides:

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

Id.

55. 8 U.S.C. § 1254(c)(2) (1982). *See infra* note 56.

56. 8 U.S.C. § 1254(c)(2) provides:

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—

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

Id. This is the legislative veto provision of the INA.

57. 103 S. Ct. at 2791 (Powell, J., concurring). Although authorized to act on it immediately, the House did not consider a resolution on Chadha's deportation until three days before the last date on which it could exercise the veto. *Id.* at 2791 n.6 (Powell, J., concurring). This was a year and one half after the report was submitted. *Id.*

Along with Chadha, 339 other persons were included in the report presented to Congress. *Id.* at 2790 (Powell, J., concurring). Of the 340 listed for suspension of deportation, Congress

It is clear that the only person whose rights were affected by the exercise of the veto was Chadha.[58] His status was returned to that of illegal alien. The "rights, duties and relations"[59] of the Attorney General and officials of the INS remained constant, as originally established by the INA. The Attorney General retained the right to make a determination of an individual's status within the confines of section 244, with the right to suspend deportation of proper persons[60] and the duty to deport those whose status does not meet that section's requirements.[61] Further, a decision by the INS to deny suspension of an applicant's deportation would have the same purpose and effect as the veto itself, an action which the Court specifically denied legislative character.[62]

The tests applied in both cases are based on an analysis of the effect of an *exercise* of the power embodied in their respective veto provisions. Although it may be that only upon such exercise can the veto power be questioned,[63] it is not the exercise of that power that must be scrutinized to determine its character, but the power itself.

In *Atkins*, the initial assumption by Congress of the power to override the Presidential recommendation should have been examined. The *potential* to "alter the law," even through non-exercise, is the real power involved. The court's "effect on the law" test, is not itself defective;[64] rather the court's focus on the veto's exercise is inappropriate.

In *Chadha*, notwithstanding the Court's misapplication of its "effect" test,[65] a more accurate determination of the veto's character would have been reached by noting the potential for a change in an individual alien's status embodied in the provision itself.

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resolved to deport six, including Chadha. *Id.* at 2790-91 (Powell, J., concurring). It is interesting to note that the resolution was not distributed, nor was the vote recorded. *Id.* at 2791 (Powell, J., concurring).

58. *See supra* note 45 and accompanying text.

59. 103 S. Ct. at 2784.

60. By finding the veto provision of section 1254(c)(2) severable from the remainder of section 1254, the Court preserved that part of the INA authorizing the Attorney General to suspend deportation pursuant to section 1254(c)(1). *See* 103 S. Ct. at 2774-76.

61. 8 U.S.C. § 1251 (1982). The decision in *Chadha* had no effect on the remainder of the INA.

62. 103 S. Ct. at 2785 n.16.

63. An attempt to challenge the constitutionality of an unexercised legislative veto would present obvious standing problems, because an injury in fact may be lacking. *Id.* at 2776.

64. *See supra* text accompanying notes 36-37.

65. *See supra* text accompanying notes 58-61.

It is the ability to wield power, rather than the mere use of that power, that the framers of the Constitution intended to distribute among the three branches. The actual *power* assumed by Congress in the creation of each legislative veto should be subject to constitutional inspection. If Congress *assumes a power* that may be exercised only by the executive or judicial branch, the separation of powers doctrine has been violated. Conversely, if the power embodied in the legislative veto is, in fact, legislative in character, there would be no improper assumption, and no violation of the doctrine. Only at this point does the *exercise* of that power become important, as it relates to article I procedural standards.

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