Toward a Proper Constitutional Approach to the One-House Legislative Veto: Atkins and Chadha

June K. Ghezzi

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Constitutional Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol13/iss1/7

This Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact library@luc.edu.
Toward a Proper Constitutional Approach to the One-House Legislative Veto: Atkins and Chadha.

INTRODUCTION

Legislative veto provisions occur in enabling statutes to allow Congress, or a portion of it, to block or modify executive action taken under a statutory grant of authority, without resorting to a statutory amendment. From a congressional standpoint, the veto

1. An example of a bicameral veto provision is found in the War Powers Resolution of 1973, Pub. L. No. 93-148, § 5(c), 87 Stat. 556, 50 U.S.C. § 1544(c) (1973) which provides that "any time United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."

Examples of the one-House veto provision can be found in notes 59 and 91 infra. Generally, such a provision sets forth the executive action to be implemented, followed by a clause which states that such action or proposal will become effective absent disapproval by either House of Congress within a statutory time period.

Since the early 1970's, legislative veto provisions have been attached routinely to bills, and presently number over three-hundred. For a compilation of statutes containing veto provisions see Congressional Research Service, Library of Congress, Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and Inventory of Statutory Authority (C. Norton comp. 1976); Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 CALIF. L. REV. 983, 1089-94, apps. A and B (1975) [hereinafter cited as Watson].

2. This article will confine discussion to the one-House veto. Congress, however, may exercise its veto in a variety of ways. Some veto provisions call for approval or disapproval by concurrent resolution. Other provisions require approval or disapproval by simple resolution, that is, a majority of only one House. Still others allow the veto to be exercised by a committee of Congress. See Rehnquist, Committee Veto: Fifty Years of Sparring Between the Executive and Legislature 9-10 (Speech before the Section of Admin. Law of the Am. Bar Ass'n., Aug. 12, 1969). See also Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U.L. REV. 455 (1977) [hereinafter cited as Javits & Klein]. At least one statute contains a provision which authorizes a veto to be exercised by a Committee Chairman. See Supplemental Appropriations Act, 1953, ch. 758, § 1416, 66 Stat. 637 (1953). See also Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 HARV. L. REV. 1369, 1417 (1977) [hereinafter cited as Bruff & Gellhorn].

3. Executive action affected by the veto provision ranges from agency rulemaking authority to the sale of AWACS abroad. The specific effect of each exercise of the veto will differ depending on the context in which the executive acts. The veto's function, however, remains constant. It operates to retract authority delegated to an agency or member of the executive branch, without upsetting the existing statute and without the need for presidential concurrence. Additionally, the veto functions, as do traditional oversight mechanisms, to insure that executive actions meet congressional objectives. Some of the traditional methods
serves as a safety switch which can be thrown when Congress perceives its policy objectives dissolving in the hands of the President and unelected administrators. From the administration’s point of view, the veto invades executive spheres of expertise and impedes consistent and efficient execution of the law. These diverging

of overriding the executive include formal reporting requirements, hearings and investigations, withdrawal of appropriations, program audits, supervision by standing and special committees, and policy reviews. See Bruff & Gellhorn, supra note 2, at 1373 n.10 and 1430; Javits & Klein, supra note 2, at 460-61; Cooper & Cooper, The Legislative Veto and the Constitution, 30 GEO. WASH. L. REV. 467, 468-70 (1962) [hereinafter cited as Cooper & Cooper]; Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 HARV. L. REV. 569, 570-99 (1953) [hereinafter cited as Ginnane].


4. Bruff & Gellhorn, supra note 2, at 1370 and 1417. See generally, Abourezk, supra note 3; Javits & Klein, supra note 2, at 460-61.

5. As noted in Henry, supra note 3, at 737-38 n.7, every president since Woodrow Wilson has questioned the validity of the veto. The Reagan administration seemingly broke with tradition in its party platform of 1980 which stated:

The unremitting delegation of authority to the rulemakers by successive Democratic Congresses and the abuse of that authority has led to our current crisis of overregulation. For that reason, we support use of the Congressional veto, sunset laws, and strict budgetary control of the bureaucracies as a means of eliminating unnecessary spending and regulations.”

viewpoints can lead to a constitutional clash of great proportion.

In particular, the exercise of a veto by one House of Congress can provoke a constitutional challenge on several fronts. First, the veto may disrupt the separation of powers balance among the three branches of government. Second, the one-House aspect of the veto may be condemned as violative of the constitutional imperative of bicameralism. Third, the veto may be attacked as a device used to circumvent the presidential veto, a power expressly granted in the presentation clause.

In Chadha v. Immigration and Naturalization Service, currently pending before the Supreme Court, the veto of an executive agency decision by the House of Representatives triggered a pri-

6. The doctrine of separation of powers does not appear in the Constitution as a compactly articulated clause or provision. Instead, the doctrine emerges from a reading of the document as a whole, wherein the basic functions of government are allocated among three branches by three distinct articles. They are as follows: U.S. CONST. art. I, § 1, cl. 1 provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Art. II, § 1, cl. 1 provides: "The executive Power shall be vested in a President of the United States of America."

Art. III, § 1, cl. 1 provides: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

See text accompanying notes 16-31 supra.

7. The requirement that an act of legislation must be occasioned by action of both Houses of Congress is expressed in U.S. CONST. art. I, § 7, cl. 2 and cl. 3. Clause 2 provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law

U.S. CONST. art. I, § 7, cl. 3, provides:

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.

8. Id. When one House of Congress approves or disapproves executive action by simple resolution, an argument can be made that the veto enables Congress to do indirectly what it cannot do directly; that is, create new law or amend existing law without presenting such to the President for his possible veto.

private cause of action alleging government violations of separation of powers and bicameralism. The circuit court in Chadha upheld the challenge to the veto provision contained in the Immigration and Nationality Act (INA), finding unconstitutional an intrusion by Congress upon the two coordinate branches, absent a constitutional provision granting the disputed power specifically to those branches. In contrast, the only other federal court to reach the merits of the one-House veto issue arrived at an opposite result. In Atkins v. United States, the Court of Claims held that the Senate veto exercised under the Federal Salary Act of 1967 did not violate either separation of powers or bicameralism, nor did it infringe upon the presidential veto power.

After discussing the principles underlying the challenges to the one-House veto, this article will analyze the Atkins and Chadha decisions. The emerging judicial standard of review will then be examined in light of the factors common to each court's analysis. This examination will demonstrate that although the cases reach

10. Id. at 420 and 433.
12. As this article went to print, the D.C. Circuit, in Consumer Energy Council of America v. Federal Energy Regulatory Comm'n, No. 80-2184; No. 80-2312 (D.C. Cir. Jan. 29, 1982), held a one-House veto exercised in connection with rulemaking unconstitutional in that it violated the doctrine of separation of powers, the presentment clause, and the bicameralism requirement of art. I, § 7. Several state courts have decided the veto issue. See, e.g., Alaska v. A.L.I.V.E., 606 P.2d 769 (Alaska 1980) (legislative veto held violative of state constitution); Opinion of the Justices, — N.H. —, 431 A.2d 783 (1981) (court held legislative veto violated state constitution); In Re Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950) (held one-House veto provision in state Reorganization Act violative of state constitution); Reith v. South Carolina State Housing Authority, 267 S.C. 1, 225 S.E.2d 847 (1976) (the one-House veto provision violated state constitutional enactment requirements); In Re Opinion of the Justices, 87 S.D. 114, 203 N.W.2d 526 (1973) (upheld a one-House veto in state Reorganization Acts); State ex rel. Barker v. Manchin, — W. Va. —, 279 S.E.2d 622 (1981) (legislative veto held violative of state constitution’s separation of powers doctrine). In addition, the Supreme Court has very recently held that “the States are free to allocate the lawmaking function to whatever branch of state government they may choose.” Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981).

Other federal cases presented the issue of the veto’s constitutionality but were not decided for lack of ripeness: Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Ohio Assoc. of Community Action Agencies v. Federal Energy Regulatory Comm’n, 654 F.2d 811 (D.C. Cir. 1981); Pacific Legal Foundation v. Department of Transportation, 593 F.2d 1338, 1349 (D.C. Cir. 1979); Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (per curiam), aff’d mem. sub nom., Clark v. Kimmitt, 431 U.S. 950 (1977); McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977). See discussion of Clark and Buckley in Dixon, supra note 3, at 458-70.
15. 556 F.2d at 1070-71.
One-House Legislative Veto

contrary results, striking similarities surface in the judicial standard posited by each court. Finally, the article will propose a framework for assessing the constitutionality of the one-House veto, after indicating which factors a court should consider when reviewing any future challenge. The article concludes that the veto dilemma, if it is to be resolved judicially, should be approached on a case-by-case basis, rather than by adoption of a broad per se rule.

BACKGROUND

The essential design of the Constitution contemplates a division of government and its functions among three branches. Theoretically, each branch exists as a distinct entity with unique power, free from coercion or encroachment by a coordinate branch. The premise is that power dispersed provides a check against excess. The ultimate success of the system depends on how well the branches work together to avoid confrontation and to preserve the delicate power balance. When struggle does occur, it most often involves the legislative and executive branches. Such tension is usually eased by accommodation and political compromise. Occa-


19. For specific examples, see note 21 infra. See also Levi, supra note 16, at 371, 387. As Mr. Levi suggests, in instances where legitimate demands appear on both sides of a controversy, accommodation and compromise "have been not only possible but a felt necessity." Levi, supra note 16 at 386. This is due, he asserts, to the mutual respect shared by each branch for the other's responsibilities and recognition of the need for flexibility. The courts also feel this need to avoid confrontation and tend to shun interference with the power squabbles between the other branches, preferring that conflicts be resolved by the
sionally, however, litigation results and the judiciary must assess intrusions by one branch into the sphere of another. 21

The Supreme Court has developed a flexible and pragmatic approach to separation of powers disputes. 22 The Court has acknowl-

- The court in Chadha noted that it was not set up to be the ideal arbiter of efficient administration, and recognized that there would be "accommodations not admitting of judicial arbitration because the only considerations are ones of organization not implicating a suspect form or degree of power." 634 F.2d 408, 424-25. In at least one instance, interestingly, the Supreme Court found a separation of powers violation, vis-à-vis Congress and the President, although the latter two branches had agreed there was none. Buckley v. Valeo, 424 U.S. 1 (1976).

21. Cases which have reached litigation include: Goldwater v. Carter, 481 F. Supp. 949 (D.D.C.), rev'd, 617 F.2d 697 (D.C. Cir.) (en banc) (per curiam), vacated and remanded with instructions to dismiss, 444 U.S. 996 (1979) (Court refused to reach the merits of a Senator's claim that the President's termination of the treaty with Taiwan deprived lawmakers of fulfilling their constitutional role); Nixon v. Administrator of General Services, 423 U.S. 425 (1977) (Court found no violation of separation of powers in the congressional regulation of tapes); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (method of appointment of members to the Federal Election Commission held violative of the President's appointment power); United States v. Nixon, 418 U.S. 683 (1974) (Court found no intrusion by either judicial or legislative branches into executive sphere under claim of privilege); Chandler v. Judicial Council, 398 U.S. 74 (1970) (Court held that it lacked jurisdiction to decide whether statute providing supervision over judges by Councils was improper interference with judicial independence); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President's attempt to seize steel mills absent statutory authority held unconstitutional); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (Congress may in some instances remove officials of independent regulatory agencies without intruding impermissibly into the sphere of presidential power); Springer v. Philippine Islands, 277 U.S. 189 (1928) (legislative branch may not exercise executive authority by retaining power to appoint); Myers v. United States, 272 U.S. 52 (1926) (Congressional exercise of removal power held to intrude upon President's appointment power and violate separation of powers); Kilbourn v. Thompson, 103 U.S. 168 (1880) (House action to arrest witness for refusing to testify held to be an unconstitutional attempt to extend rulemaking power to include punishing for contempt without a constitutional grant); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (Congress invaded province of the courts by prescribing a rule of decision in pending cases and infringed the presidential sphere by hindering his pardon power); Chadha v. Immigration and Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), prob. juris. noted, 50 U.S.L.W. 3211 (U.S. Oct. 5, 1981) (No. 80-1832, 1981 Term) (Court held that a one-House veto which overrode an adjudicatory determination violated separation of powers); Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981) (statute requiring federal judges to file personal financial report held not violative of separation of powers); Atkins v. United States, 556 F.2d 1028 (Cl. Ct. 1977) (en banc) (per curiam), cert. denied, 434 U.S. 1009 (1978) (Court held that a one-House veto of President's recommended salary increase for federal judges did not violate separation of powers); Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (en banc) (per curiam), aff'd mem. sub nom., Clark v. Kimmitt, 431 U.S. 950 (1977) (Court refused to reach the merits of the one-House veto due to lack of ripeness); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (upheld Senator's standing to sue executive branch for intrusion into legislative power).

edged that although the Framers intended the branches of government to be largely separate, they did not intend to isolate one branch from another. Accordingly, the concept of separation of powers has evolved to incorporate notions of cooperation, interdependence, and reciprocity among branches. Similarly, the Court has come to accept as routine congressional delegations of authority to members of the executive branch and its agencies to perform tasks outside the traditional sphere of law enforcement. This development has reinforced the practice of blending powers among the branches and agencies as opposed to a rigid compartmentalization of duties within each branch. As the cases demonstrate, the trend in the Court remains one of upholding broad delegations of power so long as Congress outlines basic policy standards initially in the enabling statutes.


23. Indeed, the Constitution expressly authorizes some overlapping of functions. The President participates in the lawmaking process by exercising a veto. U.S. Const. art. I, § 7, cl. 2. The Senate participates in the appointment process by confirming or refusing to confirm Presidential nominees, and in the creation of treaties by its advice and consent. U.S. Const. art. II, § 2, cl. 2. House impeachment power under art. I, § 2, cl. 5, and Senate conviction power manifest a judicial function, art. I, § 3, cl. 6. See also Madison's discussion of blended powers in The Federalist No. 47 (J. Madison) at 324-26 (J. Cooke ed. 1961).


25. An example of such tasks is the formulation of rules and regulations by executive agencies. Absent a veto provision in the enabling act, the rules promulgated by an agency become effective if, after a certain duration, Congress has failed to enact legislation voiding such rules. This process would seem to contravene the general grant of legislative power to Congress in art. I, § 1, cl. 1 where an agency regulation will become law through nonaction or acquiescence on the part of Congress. The validity of the process has been supported, however, by the delegation doctrine together with the necessary and proper clause which allows Congress to find ways of doing its job more efficiently. Moreover, it is recognized that Congress requires assistance from specially skilled administrators in formulating regulations to meet basic policy standards set in the statute.

The nondelegation principle posits that the lawmaking power granted to Congress may not be delegated elsewhere. Field v. Clark, 143 U.S. 649, 692 (1892). As the principle developed, courts eased the restrictions on delegation, provided Congress supplied standards in the enabling acts. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Court held legislative delegation under the National Industrial Recovery Act unconstitutional). But see Currin v. Wallace, 306 U.S. 1 (1939), where the pendulum began to swing toward allowing broad delegation. This trend has continued down to the present. See also Nathanson, supra note 3.


27. The cases which have held congressional delegation to the executive to be unconstitutionally broad concerned a grant of authority to the President, in his unfettered discretion, to prohibit the transportation of petroleum in interstate commerce, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and to make whatever laws he thought were needed for
The fact that certain functions overlap among branches, therefore, does not lead inevitably to a separation of powers problem and judicial correction.28 Rather, judicial concern begins when one branch's interference prevents another branch from fulfilling its essential constitutional functions.29 Where the potential for disruption exists, the Court balances the competing interests on both sides to determine if the intrusion is justified.30 The goal is to uphold the broad principle of separation of powers, without stifling government efficiency, by preserving the central functions of each branch.31

Just as the doctrine of separation of powers works to prevent one branch from becoming omnipotent, bicameralism provides an additional internal check on legislative power by requiring both Houses of Congress to participate in the enactment and modification of law.32 The principle of bicameralism derived from the Great

rehabilitating trade or industries. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). The statute in question in both cases, the National Industrial Recovery Act, did not qualify the President's future action, and supplied no policy standard for trades or industries. In short, the only limit to presidential action was the President's own discretion. See also Bruff & Gellhorn, supra note 3, at 1372; and Henry, supra note 3, at 752-53, for a discussion regarding limits to permissible delegation.

28. An executive agency, for example, would not invite rebuke for promulgating rules or regulations, a quasi-legislative function, or for adjudicating individual cases under proper statutory guidelines, a quasi-judicial function.

See Pillsbury Co. v. Federal Trade Commission, 354 F.2d 952 (5th Cir. 1966), for the leading case on judicial scrutiny of Congressional interference with agency adjudication. For a discussion of Congressional interference with specific federal agencies, see Bruff & Gellhorn, supra note 3, at 1433-34; Kaiser, supra note 3; Parnell, Congressional Interference in Agency Enforcement: The IRS Experience, 89 Yale L.J. 1360 (1980); Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169, 199-203 (1978). See also Nathanson, supra note 3.


31. In finding a violation of separation of powers based on the appointments clause (art. II, § 2, cl. 2), the Court in Buckley v. Valeo, 424 U.S. 1 (1976), indicated that Congress did not have authority to appoint members of the Federal Election Commission. The Court stated that Congress may appoint officeholders to carry out those functions that Congress itself may carry out, "in an area sufficiently removed from the administration and enforcement of the public law as to permit [those functions] being performed by persons not 'officers of the United States'." Id. at 139. See the discussion in text accompanying notes 96-107 infra. See also Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 420-21 (9th Cir. 1980), prob. juris. noted, 50 U.S.L.W. 3211 (U.S. Oct. 5, 1981) (No. 80-1832, 1981 Term).

32. James Madison expressed his concern for containing the legislative will this way: In republican government the legislative authority, necessarily, predominates.
Compromise reached during the Constitutional Convention whereby the Framers agreed that a mixture of proportional and equal representation would best promote the national interest over regional concerns. By dividing Congress into two bodies, dissimilar in size and function, the Framers hoped not only to contribute to the integrity of the lawmaking process, but to diffuse the natural tendency of the legislature to predominate over the other branches.

Three separate references to the bicameral requirement appear in article I of the Constitution. The first is found in article I, section 1, which vests all legislative power in both Houses of Congress. The argument has been made that under this section, any exercise of legislative power must result from concurrent action by both Houses. Indeed, except for the impeachment and adjournment clauses, and those clauses relating to internal congressional affairs, no provision in the Constitution expressly grants power to one House of Congress acting alone. This is not to say that one House may not perform any legislative task without participation from the other. One House may, for instance, express its opinion on various matters through the use of simple resolutions passed by
a majority vote, but such expressions do not constitute an exercise of legislative power in the sense of making law.\(^{48}\)

Section 7 of article I establishes the formal procedure which the House and Senate must follow in order to enact legislation.\(^{44}\) Clause 2 of section 7 provides that every bill, before becoming law, must be passed by both Houses and presented to the President for his signature or veto.\(^{48}\) If the President signs the bill, or two-thirds of both Houses repass it over his veto, the bill becomes law.

Likewise, clause 3 of section 7 provides that before every order, resolution or vote to which the concurrence of both Houses may be necessary shall take effect, each must be presented to the President and approved by him or repassed by two-thirds of both Houses over his veto.\(^{48}\) Thus, although one House of Congress may exert considerable influence over public affairs through traditional oversight mechanisms, such as hearings and investigations or through policy choices as to which bills to support on the floor, one House acting alone may not enact or modify any law and, therefore, cannot compel public adherence to its views.\(^{47}\) Moreover, Congress may not through legislation alter the constitutional requirement of bicameralism,\(^{48}\) nor delegate to one House the authority to legislate in an effort to avoid section 7 formalities.\(^{49}\)

Similarly, Congress may not through legislation or delegation circumvent the President’s veto power. The purpose of the presidential veto, as described by Alexander Hamilton, was to shield the President from encroachments by the legislature, and to serve as an additional check against the enactment of improper law.\(^{50}\) So intent were the Framers on bolstering the then tenuous position of the nation’s chief executive, they provided him a negative check on every bill to be enacted in clause 2 of section 7 so that he could not be “annihilated by a single vote.”\(^{51}\) Additionally, under clause 3 every measure Congress proposes, whether vote, order, or resolu-

---

43. See Watson, supra note 1, at 1065–68 for a discussion of the constitutionality of statutes authorizing simple and concurrent resolutions. Watson points out that both simple and concurrent resolutions have been used by Congress to try to retain control over the subject matter of laws. Id. at 1004–09. See also note 75 infra.
44. See note 7 supra for the relevant provision.
45. Id.
46. Id.
47. See Bruff and Gellhorn, supra note 2, at 1373 n.10. See also note 42 supra.
48. Bruff & Gellhorn, supra note 2, at 1374.
49. Ginnane, supra note 3, at 572–73.
51. Id. at 494.
tion, which purports to take effect as law, must be submitted to the President regardless of the label it bears.\textsuperscript{53} This provision effectively bars any attempt by Congress to disguise an effort to make law absent presentation to the President.\textsuperscript{53}

In assessing the constitutionality of the one-House veto, the courts in \textit{Atkins} and \textit{Chadha} each attempted to follow the pattern etched by the Supreme Court in the separation of powers cases. The problem facing the courts, however, was that authority as to the legal texture of the one-House veto was scant.\textsuperscript{64} No constitutional provision expressly precluded its use, and yet, facially at least, the veto seemed repugnant to the Constitution's lawmaking design. This paradox forced the courts to look behind the veto's form to determine whether its exercise fostered or hindered the purposes underlying the constitutional ban on unchecked power.\textsuperscript{65}

\textbf{Atkins v. United States}

The \textit{Atkins} case arose out of a salary dispute between federal judges and Congress.\textsuperscript{66} In 1973 the Commission on Executive, Legislative, and Judicial Salaries had proposed that judicial salaries be increased by about 25 percent.\textsuperscript{67} When President Nixon sent his recommendation to Congress, he indicated that Congress should raise judicial salaries \(7\frac{1}{2}\) percent each year for three successive years.\textsuperscript{68} Under section 359(1)(B) of the Federal Salary Act,\textsuperscript{69} the

\textsuperscript{52} The Constitution requires that bills and joint resolutions be submitted to the President because they will take effect as law, while simple and concurrent resolutions dealing primarily with internal congressional matters are not required to be presented. Ginnane, \textit{supra} note 3, at 570 n.1.

\textsuperscript{53} The argument has been made that as to those matters which the President initiates under art. II, § 3, he should not be heard to object to being deprived of his veto. Watson \textit{supra} note 1, at 1072. This represents an isolable situation known as "reverse legislation" in which use of the legislative veto may not violate the presentation clause since the President has already participated in the legislative process. See Henry, \textit{supra} note 3, at 740, and Dixon, \textit{supra} note 3, at 426, 481-86. While the veto's effect may be harmless in this instance in that neither Congress nor the President complains, the courts may nonetheless find a constitutional violation, where the other two branches agree there is none. Buckley v. Valeo, 424 U.S. 1 (1976).

\textsuperscript{54} \textit{See note 12 supra.}

\textsuperscript{55} \textit{See text accompanying notes 148-51 infra.}

\textsuperscript{56} \textit{Atkins v. United States}, 556 F.2d 1028 (Ct. Cl. 1977) (en banc) (per curiam), \textit{cert. denied}, 434 U.S. 1009 (1978).

\textsuperscript{57} 556 F.2d at 1057.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} 2 U.S.C. §§ 351 \textit{et seq.} (1976). Section 359 provides in part:

(1) Except as provided in paragraph (2) of this section, all or part (as the case may be) of the recommendations of the President transmitted to the Congress in
Senate disapproved the recommendation.\textsuperscript{60} The judges then sued the government in the Court of Claims to recover wages lost due to the legislative veto, claiming that disapproval of the pay increase violated their constitutional guarantee of nondiminishable compensation.\textsuperscript{61}

The judges' complaint also alleged that the Senate veto of the President's proposal violated constitutional principles of bicameralism and separation of powers, and infringed on the President's power to veto under article I.\textsuperscript{62} As part of the executive branch which has often expressed disfavor for the one-House veto, the Department of Justice conceded the unconstitutionality of the veto provision.\textsuperscript{63} This prompted the court to invite both Houses of Congress to file amici curiae briefs in order to complete argument on the merits.\textsuperscript{64} The Senate and House argued that Congress alone has power to fix judicial salaries;\textsuperscript{65} that Congress may properly delegate this task to the executive branch; and, that under the necessary and proper clause\textsuperscript{66} the veto provision was constitutionally valid as the means by which Congress completed its legislative function.\textsuperscript{67}

---

\textsuperscript{60} See note 7 supra.
\textsuperscript{61} 556 F.2d at 1058 n.15.
\textsuperscript{62} Id. at 1058.
\textsuperscript{63} Id. at 1058. The House and Senate drew on art. I, § 7, cl. 7 for its support. That section provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."\textsuperscript{64} U.S. Const. art. I, § 8, cl. 7 provides: "[T]hat Congress shall have Power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."
The Atkins court held that the one-House veto exercised under the Salary Act violated neither a specific constitutional provision nor the spirit of the Constitution. The court found persuasive the argument that the Constitution provides a foundation for the one-House veto by confiding all legislative power in Congress under article I, section 1, together with the necessary and proper clause. So long as executive functions are not assaulted and no violation of a specific constitutional provision occurs, the court stated, the necessary and proper clause authorizes Congress to choose its own method for checking executive action.

In examining the challenge based on bicameralism, the court focused on article I, section 1 of the Constitution. The court noted that this provision, which locates the source of Congress' lawmaking authority in two Houses, does not demand affirmative bicameral action every time Congress performs a legislative task. Indeed, the court pointed to several tasks which one House may validly undertake. In concluding that the veto in the Salary Act was properly exercisable by one House of Congress, the court asserted that a single House, by blocking the automatic effectiveness of the President's recommendation, was not making new law but was merely preserving the legal status quo. As such, the court stated, the action was not among those that required the concurrence of both Houses.

Similarly, the court found no intrusion on the President's veto power. Since the President would only propose that which he would later approve, the court reasoned, the Senate veto did not circumvent the President's authority to disapprove legislative

68. 556 F.2d at 1071.
69. See notes 6 and 64 supra.
70. 556 F.2d at 1061. See Dixon, supra note 3, at 476-81.
71. See note 6 supra.
72. 556 F.2d at 1062.
73. Id. The court, citing Cooper & Cooper, supra note 3, at 473-74, points out that many policy choices are made by one House of Congress, including the decision not to introduce a bill or to let a law lapse.
74. 556 F.2d at 1063. See also notes 155-62 infra and accompanying text.
75. The court stressed that under the Act one House could do no more than negate the President's proposal, thereby leaving the existing pay scale intact, and that levels proposed by the President could not be increased or decreased without further participation by him. The court also noted that the Statute's language presented a drafting, rather than a constitutional, problem when it referred to either House enacting legislation. The court construed "enacted legislation" to mean "passed a simple resolution" and declined to penalize Congress for poor drafting. 556 F.2d at 1057 n.12.
76. 556 F.2d at 1063.
acts. Moreover, the court stressed that the second presentment clause applied only to those legislative actions which may require the concurrence of both Houses. Having just concluded that the Senate veto did not require such concurrence, the court ruled that presentation to the President was unnecessary in this case.

In its analysis of separation of powers, the Atkins Court adopted the theory of blended powers rather than a rigid segregation of powers. The court’s test provided that unless Congress invaded a power of the President specifically granted in the Constitution, or failed to provide appropriate guidelines when delegating authority, a separation of powers problem did not arise. The court ruled that there was no disruption of executive power in this instance because the pay-setting function was historically legislative and did not involve enforcement of the law or the implementation of an ongoing executive program. The court also found that the legislative delegation to the executive did not convert the power granted into an executive one, but rather, that the President in exercising the delegated function acted as an agent of the legislature. In addition, the court held that because no enumerated executive power was at issue in this case, the Senate veto did not intrude on the executive duty to execute the laws faithfully. Absent a specific constitutional violation, therefore, the court deemed the veto device a “fair substitute” for bicameral concurrence and an appropriate check on legislative and executive action.

Chadha v. Immigration and Naturalization Service

The Chadha case involved a student from Kenya who had entered the United States in 1966 holding a valid passport and visa. In 1972, Chadha’s visa expired and thereafter the Immigration and Naturalization Service (INS) ordered Chadha to show cause why

77. Id. The court stated that the language of the Constitution’s presentment clause simply did not apply to this situation because the recommendation initiated from the executive branch. See Dixon, supra note 3, at 481-86, for support for the “reverse legislation theory.”
78. See note 7 supra, and text accompanying notes 44 through 53 supra.
79. 556 F.2d at 1065.
80. Id. at 1066-68.
81. Id. at 1068.
82. Id.
83. Id.
84. Id. at 1069.
85. Id. at 1071. See notes 148-49 infra and accompanying text.
86. 634 F.2d 408, 411.
he should not be deported.87 At his hearing before the special inquiry officer, Chadha acknowledged he was deportable but asked the officer to suspend deportation under section 244(a)(1) of the Immigration and Nationality Act (INA).88 The officer found that Chadha had met all of the Act's requirements and granted a suspension of deportation, pending adverse congressional action.89

That action came in the form of a House veto86 exercised under section 244 (c)(2) of the Act.91 By disapproving the suspension order, one House of Congress effectively overruled the administrative

87. Id.
88. 8 U.S.C. § 1254(a)(1) (1976) 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.
89. 634 F.2d at 411. See note 88 supra for a list of the Act’s requirements. When the special inquiry officer grants a suspension of deportation he does so under the authority of the Attorney General.
91. The House acted under INA § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976):
   (2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—
   if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress 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.
   (3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—
   if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.
officer's decision. Accordingly, Chadha's reconvened agency hearing ended in a final order of deportation.\(^9\) When an appeal to the Board of Immigration Appeals proved fruitless, Chadha took his case to federal court.\(^9\) As in \textit{Atkins}, the executive entity involved in \textit{Chadha} conceded that the challenged section was unconstitutional, leaving the Senate and House to defend the constitutionality of the veto.\(^4\)

The \textit{Chadha} court held that the one-House veto exercised under the \textit{INA} was unconstitutional in that it violated the separation of powers doctrine.\(^9\) The test used was whether one branch's assumption of power essential to the operation of a coordinate branch unnecessarily disrupted that branch's performance of its duties on an extended basis.\(^9\) In its analysis, the court characterized the deportation process as an ongoing program in which the

\begin{enumerate}
  \item[92.] 634 F.2d at 411.
  \item[93.] Jurisdiction was predicated on \textit{INA} § 106(a), 8 U.S.C. § 1105a(a) (1976). The court noted that Chadha questioned the constitutionality of § 244(c)(2) of the \textit{INA} both at his deportation hearing and before the Board of Immigration Appeals. In both instances the administrative quasi-judicial bodies concluded they lacked jurisdiction to decide the issue. The \textit{Chadha} court concluded that this was immaterial to its own jurisdiction, since the adjudication of constitutional issues has always been the primary responsibility of the courts. Moreover, the court's jurisdiction in this case was based on a specific grant in \textit{INA} § 106(a), 8 U.S.C. § 1105a(a). \textit{See also Note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 Harv. L. Rev. 1682 (1977).}
  \item[94.] 634 F.2d at 411. The entity involved in \textit{Atkins} was the Justice Department. In \textit{Chadha} it was the Immigration & Naturalization Service.
  \item[95.] The Senate and House first contended that since Chadha had conceded his deportability, he was not challenging a final order issued at an administrative proceeding and thus, his action did not come within the statute's grant of jurisdiction to the court. The court disposed of this argument by following its own precedent in \textit{Waziri v. INS}, 392 F.2d 55, 56-57 (9th Cir. 1968), which held that § 106(a) included the power to review logical predicates to deportation orders. The \textit{Chadha} court found the one-House veto to be integrally related to Chadha's deportation order and, therefore, within the ambit of judicial review under § 106(a).
  \item[96.] \textit{Id.} at 425. In formulating its separation of powers standard the court drew faithfully from prior Supreme Court decisions. In \textit{Nixon v. Administrator of General Services}, 433 U.S. 425 (1977), the Court stated:

  \textit{[I]n determining whether the Act disrupts the proper balance between coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . . 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.}

executive and judicial branches each perform requisite functions. The court found that the executive agency function was to apply the statutory criteria set out in section 244 of the INA to individual cases. The hearing officer's decision to suspend deportation consisted of a legal determination informed by evidence and grounded in administrative precedent and practice. The judicial function was to decide whether the agency had applied the criteria correctly in each case and to enforce procedural safeguards guaranteed under the Act. Inherent in this dual system, the court asserted, was the assurance that aliens would receive fair and consistent treatment under the law. The court found, however, that the veto provision in the INA established a third level of review in Congress which enabled a single House to overturn a decision made by the other branches, thereby undermining the integrity of those branches, and nullifying the protection built into the system for the individual.

The court found this action repugnant to the primary purpose of separation of powers, which was to check overreaching by one

---

97. 634 F.2d at 426 and 429.
99. 634 F.2d at 426. If the alien proves that he meets the statutory requirements, he must then demonstrate that the equities of his situation require that he be granted relief. This part of the decision rests solely within the discretion of the Attorney General. The court emphasized that both substantive and discretionary aspects of the decision were subject to judicial review. The court concluded that although the final decision to suspend deportation was discretionary, the safeguards inherent in both administrative and judicial proceedings assured a fair treatment of aliens. Basically, the court stated an abuse in discretion would be found if a decision "were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis . . . ." Id. at 429. See generally, Gordon & Rosenfield, supra note 96.
100. 634 F.2d at 430. See L. Jaffe, Judicial Control of Administrative Action, 320-94, 546-553 (1965); and McGowan, supra note 3, at 1160-61.
101. 634 F.2d at 429.
102. Id. at 430-32. It should be noted that, in this instance, the House acted before any judicial decision in the case had been rendered. The court, however, is addressing the fact that the veto provision was not restricted to overriding only administrative determinations. Nothing prevented the Congress from vetoing a final order that had been approved in the courts. The court stated:

Adjudications they [aliens] have obtained in the Judicial branch may be set aside for any reason, or no reason at all, so that judicial decisions may be for naught. This effect, the potential nullification of judicial attempts to require uniform application of the statute by the Executive, has an indirect effect upon all aliens who must rely on an administrative application of the statute in the first instance.

Id. at 431.
By having the capacity to override a judicial decision, the court stated, the veto disrupted the court’s essential duty to give articulated reasons for its decisions and to further the principle of stare decisis. In addition, the veto interfered with the court’s central role of deciding whether the Attorney General had misapplied the statute or had abused his discretion. This usurpation of an essential judicial function, the court held, defeated the judicial check on administrative irregularities and undermined the integrity of the judicial branch. The court used similar reasoning to find an intrusion on the agency’s quasi-judicial power to determine the outcome of individual cases requiring a discretionary ruling by the Attorney General. The court concluded that the overriding veto frustrated the executive duty to provide due process protection for aliens and undercut the regularity of administrative stare decisis.

In addition, the court found an even more egregious violation of separation of powers with respect to the doctrine’s second purpose, promotion of government efficiency. The court noted that central among the many duties of the executive branch was sound administration of the laws, through the continuous development of skill and expertise among its members. The legislative veto disrupted the executive process in this case by overturning an agency decision based on stated criteria without reformulating those criteria, and without explaining why the Attorney General erred in his interpretation of them or indicating how he may have abused his discretion. Such interference severely hampered agency efficiency since it left uncertain the law to be applied until after agency deliberation had ceased. Moreover, as an attempt by Congress to fill gaps in the statute’s criteria on a case-by-case basis, the court stated, the veto amounted to law enforcement which was clearly beyond the scope of legislative power. The court viewed the veto as an unnecessary intrusion upon executive and

103. 634 F.2d at 431.
104. Id.
105. Id. at 430-31.
106. Id. at 432.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id. at 436.
112. Id. at 431.
judicial power in any event, because it duplicated the review process already established and because the statute already contained criteria which the appropriate branches could ably apply.\textsuperscript{113}

Finally, without holding the one-House aspect of the veto unconstitutional, the court indicated that serious structural defects inhered in the provision.\textsuperscript{114} The court questioned the validity of one House reserving to itself the right to deny discretionary relief based on a separate set of standards,\textsuperscript{115} thereby negating the agency's delegated authority to decide the issue of deportability. The court denied that the necessary and proper clause invited Congress to exercise its power in this way, particularly where the exercise disrupted the operation of the other branches and where an individual's substantive rights were concerned.\textsuperscript{116} Moreover, the court stated that the general grant of power to legislate under article I did not permit law which altered individual substantive rights to be enacted by an executive recommendation followed by congressional inaction.\textsuperscript{117} On the contrary, the Constitution expressly required both Houses to act concurrently to effect such a change.\textsuperscript{118}

\textbf{TOWARD A PROPER JUDICIAL STANDARD OF REVIEW}

Although at first glance Atkins and Chadha appear inconsistent, the cases are distinguishable and can be reconciled in that together they form the foundation for a proper judicial approach to the veto dilemma. Each court identified several factors relevant to an appraisal of the veto vis-à-vis separation of powers and bicameralism, although the result of each appraisal differed dramatically. Equally

\textsuperscript{113} Id. at 432-33.
\textsuperscript{114} Id. at 436.
\textsuperscript{115} Id. at 436. The fact that Congress had the power to withhold discretionary relief from Chadha under a private bill, the court concluded, did not mean that the same power could have been exercised by Congress after the other branches had already exercised their delegated duties. 634 F.2d at 434. See, Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1684-88 (1966), suggesting that the private bill process, which deals only with the relationship between individuals and the government, may be necessary and proper to implement Congress' power to determine the naturalization laws. The note states that constitutional objections to this process would arise only if the bills were not presented to the President and signed by him or repassed over his veto.
\textsuperscript{116} See note 139 infra and accompanying text.
\textsuperscript{117} 634 F.2d 408, 435.
\textsuperscript{118} Citing U.S. Const., art. I, § 7, the court stated: "[i]t is most significant that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights." 634 F.2d at 434. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
important, each court acknowledged that the validity of the veto must be tested not in the abstract but in relation to all the facts and circumstances surrounding each exercise.\textsuperscript{119} Thus, while any future challenge to the one-House veto will necessitate fresh analysis in light of varying circumstances, the following factors should be among those considered by a reviewing court.

\textbf{Functions Involved and Extent of Disruption}

Both \textit{Atkins} and \textit{Chadha} correctly noted the importance of assessing the veto's effect on the specific government functions involved and the extent of disruption created in the coordinate branches.\textsuperscript{120} For example, the \textit{Atkins} court found that the pay-setting responsibility rested ultimately in Congress, and though Congress could delegate this task to the President, the task itself remained legislative in scope.\textsuperscript{121} That the function involved neither law enforcement nor any other continuing executive concern, nor the exercise of executive discretion, weighed heavily in the veto's favor.\textsuperscript{122} Thus, although the Senate veto nullified the President's recommendation, it did not intrude materially into the executive sphere.\textsuperscript{123} In contrast, the veto in \textit{Chadha} impinged on an administrative program of adjudications resulting in discretionary decisions made by an executive officer. Congressional interference with such a formalized, ongoing process incorporating agency and judicial review was likely to trigger heightened scrutiny by the court.\textsuperscript{124} The \textit{Chadha} court viewed the House veto as potentially altering the fundamental role of the agency and the federal courts from that of providing definitive results in individual cases to that of

\textsuperscript{119} 634 F.2d at 434; and 556 F.2d at 1059, 1067. Both \textit{Chadha} and \textit{Atkins} followed the lead of the D.C. Circuit in \textit{Clark v. Valeo}, 559 F.2d 642, 650 n.10 (D.C. Cir.) (per curiam), \textit{aff'd mem. sub nom., Clark v. Kimmitt}, 431 U.S. 950 (1977), which stated:

Clearly, the question of legislative review of Executive and administrative agency actions is a sweeping subject to be treated in a gingerly fashion by the courts. Review of various legislative review mechanisms ought at an absolute minimum be informed by experience and not depend solely on abstract analysis or speculation.

The court in \textit{Clark}, however, never ruled on the veto issue because the veto had not been exercised and was, therefore, not ripe for review.

\textsuperscript{120} 556 F.2d 1028, 1059; 634 F.2d 408, 425.

\textsuperscript{121} Id. 556 F.2d 1028, 1059-61.

\textsuperscript{122} Id. at 1065.

\textsuperscript{123} Id. at 1071.

\textsuperscript{124} This is based on the standard found in the separation of power cases in note 22 supra.
rendering nugatory advisory opinions. Such a disruption to the administrative review system could not be classified as less than extensive.

The decisions, therefore, are consistent to the extent they indicate that where the function involves an ongoing program of the executive branch, for example, any disruption would likely be greater than where the function involves a discrete executive act. This is because interference with the program could be "constant in its potentiality," while disapproval of a single executive action peculiarly legislative in scope represents an isolated, and therefore, minor intrusion. Where the veto of a particular act amounts to a total repeal of executive authority, however, the extent of disruption would be similarly great and a violation would be found more easily.

The Necessary and Proper Clause and Practical Alternatives to the Veto

The separation of powers cases demonstrate that although an intrusion on a coordinate branch disrupts an essential function of that branch a violation will not exist if the intrusion was necessary to meet a legitimate government objective. This qualification requires that the court balance competing government interests to determine whether the intrusion was justified. At least two factors should be considered at this stage of the court's analysis. The first is whether a particular exercise of the one-House veto comes within the scope of congressional power under the necessary and proper clause. The second is whether any practical alternatives

125. 634 F.2d 408, 436.
127. 634 F.2d at 432. See the court's discussion of a bipolar model of government action at id. at 425-26.
128. This characterization assumes that the veto of a discrete executive action is not an "item" veto, which selectively negates part of an executive proposal, for example, and leaves the rest intact. For a discussion of the constitutional problems attendant on the use of "item" vetoes, see Dixon, supra note 3, at 471.
129. This is because the veto would produce a de facto change in the law absent compliance with formal article I requirements. See text accompanying notes 154-76 infra.
130. See notes 29-30 supra and accompanying text.
132. 556 F.2d 1028, 1061. The Atkins court adopted the test based on the necessary and proper clause articulated in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) for determining the propriety of congressional action taken:
to the veto exist and are employable by Congress.\textsuperscript{133}

The \textit{Atkins} court premised its finding that the veto was intrusive but not unconstitutional on article I, section 1 and the necessary and proper clause.\textsuperscript{134} This clause, the court stated, authorized Congress not only to delegate broadly but to choose its own method of checking the delegation as well.\textsuperscript{135} Since Congress felt the need for a veto in this traditionally legislative matter, and since Congress exercised its best judgment in choosing the device, the Court found this particular veto necessary to implement an important congressional function, namely, setting salary levels for federal judges.\textsuperscript{136} The problem with this approach, as the dissent noted, is that it proves too much.\textsuperscript{137} Taken to its logical end, this view of the necessary and proper clause could be used to wipe away the bicameral requirement altogether so long as Congress believed the veto to be necessary to further its own purposes. The \textit{Atkins} majority, however, did not advocate such an expanded reading of its holding, but attempted to confine the decision's scope to the particular veto exercised under the Salary Act.\textsuperscript{138}

In \textit{Chadha} the court expressly rejected the argument that the scope of the necessary and proper clause reached so far as to permit one-House disapproval of discretionary decisions made by the executive on a case-by-case basis.\textsuperscript{139} The court did not question

---

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 consist with the letter and spirit of the constitution, are constitutional.

\textit{See also} Dixon, \textit{supra} note 3, at 476-81.

\begin{itemize}
  \item \textsuperscript{133} 634 F.2d 408, 432-33.
  \item \textsuperscript{134} "In particular we note that the necessary and proper clause, which has sanctioned the massive delegation of legislative functions over the past century, provides a firm grounding for this legislative veto.” 556 F.2d at 1071.
  \item \textsuperscript{135} 556 F.2d at 1061.
  \item \textsuperscript{136} \textit{Id.} at 1071. This is to say that Congress as a whole could authorize, under the necessary and proper clause, a single House to disapprove an executive measure.
  \item \textsuperscript{137} “This clause of the Constitution does not authorize Congress to ignore the bicameral provision of the Constitution, nor the necessity of submitting to the President every resolution to which the concurrence of both Houses are necessary . . .” 556 F.2d at 1081. (Skelton, Kashiwa and Kunzig, J.J., concurring in part and dissenting in part). \textit{See also} Dixon, \textit{supra} note 3, at 478-79.
  \item \textsuperscript{138} 556 F.2d at 1058-59, 1071.
  \item \textsuperscript{139} 634 F.2d 408, 433. The court concluded: “Plenary power for making laws does not import authority to revise particular administrative dispositions. This is a case in which the greater power definitely does not include the lesser, because the exercise of the lesser power here entails the unnecessary disruption of the operation of the other two branches.” 634 F.2d at 434. \textit{See also} Justice White’s dissenting opinion in \textit{Buckley v. Valeo}, 424 U.S. 1 (1976), in which he stated that while he “would not view the power of either House to
Congress' authority to regulate the naturalization process or to delegate under the necessary and proper clause, but found the method of check unnecessary to sound administration of the immigration laws. The problem with the veto in Chadha was that one House attempted to change the deportation rules without changing the law. If the objective of the House was to remove Chadha as an undesirable alien, serious bill of attainder and equal protection problems would arise, since Chadha had satisfied the statutory criteria for suspension of deportation. If the objective was to provide new or alternate guidelines for future executive or court review, the House failed to do so and, moreover, was precluded from so doing without resorting to a formal amendment. In sum, the necessary and proper clause did not legitimize the House action. On the contrary, use of the veto was unjustified because the statute already provided the procedure and the statutory criteria necessary to reach a fair result.

Although Chadha held this particular exercise of the veto unconstitutional, the court stressed that it was not opining on the validity of the veto in general. Rather, the court acknowledged that in some instances the absence of practical alternatives to the one-House veto may justify its use as a necessary means of furthering congressional concerns. One situation suggested by the court was where unforeseeable future events or the complexity of the subject matter relating to rulemaking would preclude articulation of specific criteria in the enabling statute. In such an instance, the veto may represent the only practical means for Congress to ensure that promulgated rules comport with stated policy objectives.

Possible alternatives to the Senate veto in Atkins, such as concurrent disapproval or enactment of another statute to override the President's proposal, were deemed unnecessary by the court. This conclusion was premised on the notion that the proposal did...
not become law until both Houses failed to disapprove it. Moreover, the redeeming feature of the salary-setting scheme under the Act was that it afforded the President an opportunity to participate initially in the legislative process so as to minimize the need for formal presentation to him later. The court found that this approach was a fair substitute for concurrent action since it satisfied the executive check on legislative power required by article I, section 7, 148 and accommodated the congressional check on executive action as well. 149 Using the "common sense" standard articulated by the Supreme Court in Hampton & Co. v. United States, 150 the court determined that the veto exercised under the Salary Act was justified as one of the inherent necessities of government coordination. 151

After analyzing the factors set out above, each court was able to assess the veto's validity with respect to separation of powers. Unless a violation was found as to that issue, there remained to evaluate the constitutionality of the veto as a means to achieve legislative ends short of formal enactment or amendment procedures. 152

**Effect on the Legal Status Quo**

If the separation of powers challenge is defeated, the issue becomes whether by exercising the veto one House of Congress has assumed a lawmaking role contrary to the procedural imperatives of bicameralism and presentation to the President. 153 Several authors have posed the question in terms of whether the exercise of the veto amounts to an act of legislation; that is, does it attempt to modify or repeal existing law, or stated differently, is it legislative

---

148. *Id.* at 1071.

149. *Id.* at 1071, n.38. The court explained that the President could limit the action which a single House could take by submitting no proposal at all. In this way both Houses of Congress would have to concur to pass a new statute in order to effect a change in the judges' salary levels.

150. 276 U.S. 394, 406 (1928). In upholding a congressional delegation in Hampton & Co., the Court stated that the three branches were coordinate parts of one government and that each branch "in the field of its duties" may invoke the action of the other two, so long as that action does not amount to "an assumption of the constitutional field of action" of another branch. The scope of permissible delegation, the Court stated, would be measured "according to common sense and the inherent necessities of the government coordination." *Id.*

151. 556 F.2d at 1071. See note 153 supra.

152. This is another way of approaching the problem related to bicameralism and the avoidance of the presidential veto. See generally Ginanne, *supra* note 3.

153. The Atkins court addresses this issue at 556 F.2d 1028, 1062-63; the discussion in Chadha appears at 634 F.2d 408, 434-35.
in character and effect. If not, then a veto by a single House would seem to be constitutionally harmless. If the veto does constitute an act of legislation, however, then clearly an article I, section 7 violation would result. Although this line of reasoning may be sound, a practical difficulty for the court arises in ascribing legislative character and effect, or, alternatively, in determining how much and what kind of a modification signals an attempt by one House to change the law.

The test employed by Atkins and Chadha to ascertain legislative effect focused on whether or not the veto produced a change in the legal status quo. This factor requires analysis of at least two considerations. The first is the veto's effect on the statute itself. The court must decide whether the various provisions of the statute, particularly the delegation provisions, remain intact after the veto's exercise, or whether the veto so severely limits executive action as to constitute a de facto repeal of the delegation. The second is the veto's effect on individual rights under the statute, as well as on any constitutional rights that may be affected, such as due process or equal protection under the law. As Atkins and Chadha correctly attest, a change in an individual's substantive rights can only be effected through the full legislative process. If action by a single House alters an individual's statutory or constitutional rights, therefore, such action will constitute an impermissible attempt to achieve a legislative result.

The Atkins court focused primarily on the veto's possible effect on the Salary Act and concluded that since the law remained unchanged one House had not attempted to legislate impermissibly. The court reasoned that the presidential proposal was only potential law, not law ab initio, which would take effect only if neither House disapproved. Under the statute one House could do no more than preserve the existing pay levels, and thereby, preserve the status quo. Since one House did not make or change law, the court held, resort to bicameral and presentation formalities

154. See Henry, supra note 3, at 734-48; and see generally, Ginanne, supra note 3.
155. See note 7 supra and text accompanying notes 32-43 supra.
156. 556 F.2d 1028, 1063; 634 F.2d 408, 434-35.
157. 556 F.2d at 1063.
158. 556 F.2d 1028, 1063; 634 F.2d 408, 434-35.
159. 556 F.2d at 1063; and 634 F.2d at 434-35. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See also Henry, supra note 3, at 752-56.
160. 556 F.2d at 1070-71.
161. Id. at 1065.
The question unresolved in *Atkins* was whether any change, however temporary, in the executive delegation produces a change in the legal status quo. It has been suggested that any withdrawal of executive authority alters the statutory delegation in a way that should be accomplished only through the full legislative process. Critics of this view might contend that so long as the delegation provision remains intact and so long as no unconstitutional conditions attach to the delegation, executive authority to act in the future is preserved. This being true, then the status quo of the delegation is unaffected. Notwithstanding this abstract ideal, the political reality suggests that a unicameral veto of an executive proposal would caution the President to secure congressional approval before resubmitting a new recommendation. In this way, the President's real authority under the statute is cast into doubt. Rather than acting as an independent contributor to the legislative process, the President could become a rubber stamp for congressional will, particularly when he is deprived of his own veto. Such a result would indicate that the status quo of the delegation had in fact changed, even while the provision remained in force.

In *Chadha* the court did not address the veto's effect on the INA itself. This would suggest that the court detected no change either in the statute or its delegation, but as in *Atkins*, the *Chadha* court avoided discussion of a possible alteration in executive authority, except as it related to the separation of powers analysis. Instead, the court determined that the law in question was Chadha's statutory right to relief from deportation based on certain stated criteria. The court, therefore, examined the status of Chadha's right before and after congressional review. Since the right to relief existed before the veto and disappeared afterward, it would seem that a change in the legal status quo had occurred. The court stopped short of holding the veto unconstitutional on

162. Id. at 1059-60.
164. Only *Atkins* discussed the concept of unconstitutional conditions as applied to legislative acts conferring benefits to people on the condition that they relinquish a constitutional right. The court found no instance involving separation of powers in which a legislative grant of authority was made subject to an unconstitutional condition. As the court noted, this problem ordinarily arises in first amendment cases. 556 F.2d 1028, 1068 n.34.
165. 634 F.2d 408, 435.
166. Id. at 432. See text accompanying notes 108-12 *supra*.
167. Id. at 435.
this ground, however, since its finding of a separation of powers violation sufficed to nullify the House action. Nevertheless, the court expressed its disregard for the veto mechanism in this setting, dubbing it a "species of nonlegislation" whose constitutional defects were aggravated by its unicameral structure.\(^{168}\)

A factor bearing considerable weight in the Atkins decision was the absence under the Salary Act veto of any effect on the rights of individuals, other than the federal judges whose salaries were at stake.\(^{169}\) As the court explained, the presidential proposal, even when it became law, did not affect the public in any direct way.\(^{170}\) The judges, undeniably, had a constitutional right during their tenure to compensation that could not be decreased directly by the other branches.\(^{171}\) The judges did not have a constitutional right, however, to receive a pay increase. The court stated that the article III compensation provision was not meant to alleviate indirect assaults on the judges' earnings.\(^{172}\) Thus, the court rejected the argument that because inflation had decreased the judges' purchasing power, the veto of the President's proposal actually worked to reduce their compensation in violation of article III, section 1.\(^{173}\) Instead, the court correctly ruled that since no individual substantive rights had been altered, the legal status quo remained unchanged.\(^{174}\)

The standard that emerges from the decisions suggests that a veto that so restrains executive action as to effectively repeal a delegation of authority may invite judicial reprisal as an attempt to sidestep the formal legislative process. As both decisions assert, a court would be inclined to find improper a one-House veto that altered individual substantive rights.\(^{175}\) Conversely, a court would be disinclined to strike down a veto that amounted to a partial or

\(^{168}\) Id. at 435-36.
\(^{169}\) 556 F.2d 1028, 1059-60.
\(^{170}\) Id. at 1059. No regulation or order issued from the President's proposal and no individual pre-existing rights were abridged.
\(^{171}\) U.S. Const. art. III, § 1 provides in part:

The Judges, both of the supreme and inferior Courts, shall hold their Offices during Good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

See also 556 F.2d at 1033.
\(^{172}\) Id. at 1051.
\(^{173}\) Id. at 1033, 1047-51.
\(^{174}\) Id. at 1063-64.
\(^{175}\) Id. at 1065; and 634 F.2d at 435. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
temporary withholding of delegated authority, particularly where individual substantive rights are not affected, and where the function at issue is peculiarly legislative in scope.\textsuperscript{176}

A Proposed Framework for Assessing the Constitutionality of the One-House Legislative Veto

The problem associated with formulating a uniform approach to the one-House veto is that the provision appears in a variety of statutes, the subject matter of which may differ greatly.\textsuperscript{177} As Atkins and Chadha aptly attest, the same form of veto may properly be adjudged constitutional in one statutory context and unconstitutional in another.\textsuperscript{178} Accordingly, the cases agree that the veto should not be evaluated in isolation, but rather, a proper approach should consider the totality of the facts and circumstances surrounding each exercise.\textsuperscript{179} In any challenge to a one-House veto, where the delegation in the enabling statute is otherwise valid and the veto violates no other specific constitutional provision, two principal issues arise. The first is whether a separation of powers problem exists; the second is whether the veto amounts to an act of legislation contrary to formal enactment requirements.\textsuperscript{180} A favorable resolution of one question does not afford the veto a safe harbor; rather, both constitutional objections must be overcome if the veto exercised under a particular statute is to remain viable.

In assessing whether a congressional intrusion on the coordinate branches amounts to a separation of powers violation, a court must first ascertain whether the function intruded upon is essential to the operation of a coordinate branch or central to its constitutional powers.\textsuperscript{181} As Atkins and Chadha indicate, if the executive or judicial function pertains to an ongoing program or process, any interference from Congress is apt to be disruptive.\textsuperscript{182} Conversely, if the executive or judicial function requires discrete action on a matter

\textsuperscript{176} 556 F.2d at 1065. See also Dixon, supra note 3, at 470.
\textsuperscript{178} See text accompanying notes 9-15 supra.
\textsuperscript{179} 556 F.2d 1028, 1059; 634 F.2d 408, 434.
\textsuperscript{180} See text accompanying notes 22-31 supra, for a discussion of the separation of powers doctrine; and see text accompanying notes 32-53 supra, for an explanation of the Constitution's enactment procedure.
\textsuperscript{181} See note 96 supra and the accompanying text for an articulation of the legal standard for violations of the separation of powers doctrine.
\textsuperscript{182} 556 F.2d at 1065; and 634 F.2d at 425. See also note 96 supra.
ordinarily within the scope of congressional authority and expertise, but Congress has for the sake of efficiency delegated such task to another branch, the function would not be central to the duties of the coordinate branch and the threat to separation of powers would be muted.\textsuperscript{183} It should be noted as well that where the separation of powers challenge is based on an express executive or judicial power, a violation will be found more readily than where the power improperly assumed by one branch is merely impliedly reserved to another.\textsuperscript{184} In fact, \textit{Chadha} represents the first time a federal court has found an unconstitutional intrusion by Congress on another branch absent a constitutional provision specifically granting the infringed power to the other branch.\textsuperscript{185}

Once an intrusion is detected and found to disrupt an essential function of a coordinate branch, the court must next balance competing interests to determine whether the intrusion was justified.\textsuperscript{186} Relevant to this appraisal is the permissible scope of the necessary and proper clause and the existence of practical alternatives to the veto.\textsuperscript{187} The question unreconciled by the cases is whether the necessary and proper clause provides a constitutional basis for the one-House veto in general. \textit{Chadha} suggests that it is unnecessary to find so broad a basis to sustain a particular exercise of the veto.\textsuperscript{188} So long as the veto is shown necessary in a given instance to implement a legitimate congressional objective, even assuming disruptive interference with another branch’s ongoing program, the one-House veto can survive a separation of powers attack.\textsuperscript{189} This is especially true when practical alternatives to the veto are either nonexistent or defy definition by Congress at the initial stage of legislation.\textsuperscript{190}

Where the veto provokes a disruptive and unnecessary intrusion on another branch in violation of the separation of powers doctrine, as in \textit{Chadha}, there is no need for a court to continue its scrutiny of the issues remaining. Where the challenge is defeated, however, the court must then address the veto’s effect on the legal status quo of the statute, the delegation under the statute, and the

\begin{footnotes}
\item 183. 634 F.2d at 424. \textit{See also} notes 126-28 \textit{supra} and accompanying text.
\item 184. 634 F.2d at 420.
\item 185. \textit{Id}.
\item 186. \textit{See note 96 \textit{supra}}.
\item 187. \textit{See discussion in text accompanying notes 130-51 \textit{supra}}.
\item 188. 634 F.2d at 432-33.
\item 189. \textit{Id} at 429.
\item 190. \textit{Id} at 432-33.
\end{footnotes}
individual rights involved to determine whether a change in any one element has occurred. If so, then action taken by only one House should fail as an impermissible act of legislation contrary to article I, section 7. If the legal status quo remains unchanged, however, then that particular exercise of the one-House veto would be constitutional. Relevant to this analysis as well is the role of the necessary and proper clause. Atkins asserts that the clause grants Congress the power to authorize a unicameral veto. As yet, no other federal court has advanced this proposition. Even assuming this asserted authority, however, the lesson of both Atkins and Chadha cautions that a court must still examine the operational effects of the veto. Thus, while a constitutional foundation may add to the structural legitimacy of the device, the ultimate measure of the veto's constitutionality must be judged according to the practical results arising from each exercise.

NECESSITY OF A CASE-BY-CASE APPROACH

Under the proposed framework, Atkins and Chadha reach appropriately contrary results. As shown, the cases are distinguishable under every factor presented for analysis and diverge in principle only in their assessments of the necessary and proper clause as the constitutional basis for the one-House veto. That two courts correctly rendered opposite opinions demonstrates the need for careful consideration of certain constant factors in light of all the facts and circumstances surrounding each exercise of the veto. Such an approach requires a fresh appraisal on a case-by-case basis, rather than a broad per se rule condoning or condemning the veto on its face.

The complexity of the legal issues involved, deriving chiefly from the divergent sources within the Constitution for attack, demands close examination. The separation of powers analysis, for instance, admits of no facile or automatic answers. The power disturbed must first be ascertained and then balanced against the needs of a coordinate branch. Tagging the power as legislative, executive, or judicial will serve no purpose other than prompting a quick and superficial resolution to a problem that requires more extensive scrutiny. In addition, the unicameral nature of the veto exacer-

191. See text accompanying notes 153-74 supra.
192. See text accompanying notes 134-38 supra.
193. See Rehnquist, Committee Veto: Fifty Years of Sparring Between the Executive and Legislature 9-10 (Speech Before the Section of Admin. Law of the Am. Bar Ass'n, Aug.
bates the problem of settling on a judicial approach, first, because of the dearth of precedential authority, and second, because the definitional task involved in this part of the analysis rivals that of pegging government powers into static slots. Thus, the correct approach must assess the effects of the veto as well as its form. 

Atkins and Chadha employed an appropriate test for detecting unconstitutional results by ascertaining any alteration in the legal position of the parties involved.

Given the numerous and diverse statutes in which the veto appears, the variety of facts and circumstances which may attend implementation of these statutes, and the variable legal positions arising from the veto’s use, the alternative to a case-by-case approach would preclude accurate and fair results. The danger inherent in applying any per se rule, that it may operate too broadly or too narrowly to the detriment of one party, is especially great in cases such as Chadha where the government action involves not just other branches but a private individual. Apart from a per se rule, an approach suggested elsewhere is to avoid a judicial resolution altogether, leaving the political branches free to insist on their own views as to the veto’s validity. Inasmuch as Chadha is now pending before the Supreme Court, it appears that this last suggestion may soon be mooted.

**Conclusion**

Atkins and Chadha have shed considerable light on the issues involved in evaluating the constitutionality of the one-House veto. Although their holdings differ, the decisions provide a rational and correct approach consisting of certain constant factors which should be analyzed on a case-by-case basis in order to avoid a rash and per se rule. An important variable remaining to be defined is the weight that will be accorded each factor in any given case. If any bright line has been suggested by the courts it is that in a constitutional contest between the one-House veto and the substantive rights of an individual, the latter should prevail.

JUNE K. GHEZZI
