

1982

Administrative Law - Constitutional Validity of the One-House Veto - Chadha v. Immigration and Naturalization Service

Rodney P. Lang

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Lang, Rodney P. (1982) "Administrative Law - Constitutional Validity of the One-House Veto - Chadha v. Immigration and Naturalization Service," *Land & Water Law Review*. Vol. 17 : Iss. 1 , pp. 241 - 256.
Available at: https://scholarship.law.uwyo.edu/land_water/vol17/iss1/10

This Note is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

CASE NOTES

ADMINISTRATIVE LAW—Constitutional Validity of the One-House Veto.
Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), prob. juris. noted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 80-1844)

On December 16, 1975, the United States House of Representatives disapproved the suspension of Jagdish Rai Chadha's deportation.¹ That action prompted a judicial review of the constitutionality of the one-house veto provision in the Immigration and Nationality Act² and a finding by the Ninth Circuit that the provision is unconstitutional.³ Under Section 244 of the I.N.A. the Attorney General has discretion to suspend deportation if the alien has been in the U.S. for over seven years, is of good moral character, and would suffer extreme hardship if deported. However, the Attorney General's suspension is subject to the legislative veto of either house of Congress.⁴

Chadha entered the United States as a non-immigrant student in 1966, and his visa expired in 1972. Deportation proceedings were begun against him in 1974. At the deportation hearing Chadha admitted his deportable status, but requested a suspension of deportation according to Section 244(a)(1) of the I.N.A.⁵ Finding the statutory suspension criteria met and exercising his administrative discretion, the hearing officer suspended Chadha's deportation. The House exercised the legislative veto and overruled the hearing officer, rejecting the suspension. The hearing officer then reconvened the deportation proceedings and issued a final order of deportation. Following an unsuccessful appeal to the Board of Immigration Appeals, Chadha appealed to the United States Court of Appeals, Ninth Circuit.⁶

Copyright© 1982 by the University of Wyoming.

1. 121 CONG. REC. 40,801 (1975).
2. 8 U.S.C. § 1254(c)(2) (1976). The one-house veto, as reserved in this Act, allows either the Senate or the House to pass a resolution stating that it does not approve of the suspension of deportation. If passed, the veto overrides a prior suspension decision made by the Attorney General, who must then deport the alien. [Immigration and Nationality Act is hereinafter cited in text as I.N.A.]
3. *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 411 (9th Cir. 1980) [hereinafter cited in text as *Chadha*].
4. 8 U.S.C. § 1254 (1976). The Act actually establishes criteria for two categories of aliens, with the first category being "deportable aliens except those in second category" and the second category being "deportable aliens whose violations are aggravated." GORDON & ROSENFIELD, 2 IMMIGRATION LAW AND PROCEDURE § 7.9b, at 7-135 to 7-137 (rev. ed. 1981). Chadha fell within the first category.
5. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 411.
6. *Id.* Judicial review of orders of deportation and exclusion is provided for in 8 U.S.C. § 1105a(a) (1976). In this case, the legislative veto was followed by a reconvened deportation proceeding and a final order of deportation, and was therefore held to be subject to judicial review.

On appeal, Chadha challenged the constitutionality of the one-house legislative veto of deportation suspension authorized by Section 244(c)(2) of the I.N.A.⁷ on the grounds that the veto violated the separation-of-powers doctrine.⁸ The Ninth Circuit resolved jurisdiction and justiciability questions in favor of Chadha and reached the merits of the case.⁹ The court held that the one-house veto provision in Section 244(c)(2) of the I.N.A. was a "Prohibited legislative intrusion upon the Executive and Judicial branches" and unconstitutional under the separation-of-powers doctrine.¹⁰

This Note first reviews the legislative veto mechanism, arguments concerning the constitutionality of that mechanism, and the composition and application of the separation-of-powers doctrine. Secondly, the *Chadha* decision and its implications are analyzed. It is suggested here that the method of analysis used by the *Chadha* court is a reflection of the separation-of-powers analysis presented by the United States Supreme Court in *Nixon v. Administrator of General Services*.¹¹ However, by going beyond *Nixon* in its careful analysis, the *Chadha* decision may serve as a paradigm for future application of the separation-of-powers doctrine to legislative veto measures.

BACKGROUND: THE LEGISLATIVE VETO

A legislative veto is power reserved in enabling legislation to the legislature to repeal or modify agency action¹² without

7. 8 U.S.C. § 1254(c)(1)(2) (1976) states, in part:

(c)(1) 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

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section-if . . . 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 If . . . neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

8. The case reached appeal in a rather unusual posture since the respondent, Immigration and Naturalization Service, agreed with the plaintiff that § 244(c)(2) was unconstitutional. The court, relying on past precedent, requested and received *amici curiae* briefs from the House of Representatives and the Senate. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 411.

9. For a brief overview of the jurisdiction and justiciability questions and a concise discussion of the political question in this case, see generally 22 HARV. INT'L. L.J. 423 (1981).

10. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 411-20.

11. 433 U.S. 425 (1977) [hereinafter cited in text as *Nixon*]. An issue in this case was whether the Presidential Recordings and Materials Preservation Act of 1974 which attempted to regulate the disposition of materials within the executive branch violated the separation-of-powers doctrine. The Court held that the Act did not violate the doctrine.

12. Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. LEGIS. 735 (1979).

following the constitutionally mandated formalities of statutory enactment.¹³ The legislative veto may take different forms including concurrent resolution, simple resolution, committee approval or disapproval, and even committee chairman approval or disapproval.¹⁴ It may vary according to the way it is expressed, i.e., negative or affirmative, and the majority required for its imposition—simple, absolute, or two-thirds.¹⁵

The legislative veto has been the subject of numerous law review articles,¹⁶ congressional hearings,¹⁷ and even statements by the executive branch.¹⁸ There is, however, little federal case law. Prior to the *Chadha* decision, only the Court of Claims in *Atkins v. United States* had ruled on the constitutionality of a legislative veto.¹⁹ In *Atkins*, the legislative veto in the Federal Salary Act was held constitutional.²⁰

At the state level, approximately thirty-four states have legislative review or veto legislation for administrative rules and regulations.²¹ State court decisions on the constitution-

13. U.S. Const. art. I, § 7.

14. Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 468 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953).

15. Cooper & Cooper, *supra* note 14, at 468-69.

16. For useful articles other than those cited in note 14 see generally Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the Independent Agencies*, 75 NW. U.L. REV. 1064 (1981); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?* 56 N.C. L. REV. 423 (1978); Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977).

17. See, e.g., *Regulatory Reform Act of 1979: Hearings on H.R. 3263 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. (1979-1980); *Regulatory Reform: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

18. See Cooper & Cooper, *supra* note 14, at 470 n.11.

19. 556 F.2d 1028 (Ct. Cl. 1977) (per curiam), cert. denied, 434 U.S. 1009 (1978) [hereinafter cited in text as *Atkins*].

20. *Id.* at 1070-71.

21. *Regulatory Reform*, *supra* note 17, pt. 2, at 122 (statement of Congressman Elliott N. Levitas).

Provision for legislative review in Wyoming is contained in the Administrative Regulation Review Act of 1977, WYO. STAT. § 28-9-101 to 108 (1977) [hereinafter cited as A.R.R.A.]. Two excellent articles presenting different viewpoints on the merits and constitutionality of this legislation are: Comment, *Wyoming's Administrative Regulation Review Act*, 14 LAND & WATER L. REV. 189 (1979), and Singer, *Administrative Regulation Review—Act II*, 15 LAND & WATER L. REV. 207 (1980).

This legislation differs from the *Chadha* legislation in several ways. First, the A.R.R.A. provides for review of agency rulemaking throughout the state government arena. Second, although Section 28-9-107(b) of the A.R.R.A. states that, "The legislature, each house voting separately, shall vote on the council's recommendations with respect to prohibiting the implementation or enforcement of any rule during the session . . .," this is not the same as a one-house veto. WYO. STAT. § 28-9-107(c) (1977) states, "If the legislature approves by legislative order a council recommendation to prohibit the im-

ality of the legislative veto have been rare. The most recent case is *State v. A.L.I.V.E. Voluntary*, in which the Alaska Supreme Court found Alaska's legislative veto unconstitutional.²² Only two other states have directly addressed the constitutionality of the legislative veto.²³

Opponents of the one-house legislative veto argue that article I, section 1, of the United States Constitution vests the legislative power of the United States in a Congress consisting of both a Senate and a House of Representatives, and not in one House alone. Additionally, they argue that article I, section 7²⁴ reserves to the President the power to veto every order, resolution or vote to which a concurrence of the Senate and House of Representatives is necessary. They also assert that article II, section 1 vests all executive power in the President and therefore, the legislative veto violates the principle of separation of powers.²⁵ Some commentators urge that all types of legislative vetoes are unconstitutional under article I, section 7²⁶ of the United States Constitution because a legislative veto passed by a majority of both Houses is itself a legislative act, and must therefore be subject to Presidential veto.²⁷ A third argument is that the legislative veto, depending upon its form, usurps judicial power vested in the courts of the United States and thereby violates article III of the Constitution.²⁸

Proponents of the legislative veto reason that the legislative power of Congress under article I, section 1 of the United States Constitution is very broad, with one of the primary limits being that executive functions and veto powers cannot be infringed. Further, under the "necessary and proper

plementation or enforcement of any rule, the rule shall not be implemented or enforced." Thus, both houses must vote, and their concurrence is necessary for passage. Third, the review takes the form of a legislative order and, according to the Singer article, by amendment of joint rules of the House and Senate, the order is sent to the Governor, as required by the Wyoming Constitution, for his signature or veto. Even though the substance of A.R.R.A. differs greatly from the statute in the *Chadha* case, the issues of constitutionality remain the same as attested by the two law review articles.

22. 606 P.2d 769, 770 (Alaska 1980).

23. *Id.* at 775. *But see id.* at 782 (Boochever, C. J., dissenting and Connor, J., joining). *See generally* Cooper & Cooper, *supra* note 14, at 470 n.9, for other state and federal court rulings on the compatibility of different legislative oversight measures with their respective constitutions.

24. U.S. CONST. art. I, § 7, cl. 3.

25. *Atkins v. United States*, *supra* note 19, at 1058.

26. U.S. CONST. art. I, § 7, cl. 2.

27. *Henry*, *supra* note 12, at 741-42; *Ginnane*, *supra* note 14, at 587.

28. *Nathanson*, *supra* note 16, at 1080-81.

clause” of article I, section 8,²⁹ Congress may delegate its powers and retain “checks” or control over the delegated powers.³⁰ Those supporting the constitutionality of legislative vetoes argue that article I, section 1 allows latitude and does not require bicameral action.³¹ Moreover, it is argued that the legislative veto is not new legislation. Instead, its authority is derived from the original act, a statute enacted by both Houses and signed by the President, or vetoed and overturned by a two-thirds vote.³²

SEPARATION OF POWERS

Although the separation-of-powers doctrine has been applied in recent Supreme Court decisions,³³ its precise components and application remain elusive. In its simplest form, the doctrine as interpreted by the Supreme Court has two components: 1) each branch of government has “power”, and 2) interference with the constitutional functioning of one arm of government by another may constitute a disruption in the proper balance between the branches.³⁴

The Supreme Court has rejected the simplistic notion of a complete division of authority among the three branches³⁵ and has recognized “the inherent necessities of the governmental co-ordination.”³⁶ With this recognition, the Court has also discarded a rigid textual definition of enumerated powers.³⁷ The Supreme Court has used a pragmatic and flexible interpretation of the separation-of-powers doctrine, basing its interpretation on the origins of the doctrine, recent decisions of the Court, and “the contemporary realities of our political system.”³⁸ Under one view of the separation-of-powers doc-

29. U.S. CONST. art. I, § 8, cl. 18.

30. *Atkins v. United States*, *supra* note 19, at 1061. This includes the argument that the legislative veto is a delegation of power from Congress back to itself. Henry, *supra* note 12, at 740.

31. *Atkins v. United States*, *supra* note 19, at 1062-63.

32. *Id.* at 1063.

33. *Nixon v. Administrator of General Services*, *supra* note 11, at 441-46; *Buckley v. Valeo*, 424 U.S. 1, 118-24 (1976) (per curiam); *United States v. Nixon*, 418 U.S. 683 (1974).

34. See *Nixon v. Administrator of General Services*, *supra* note 11, at 443.

35. *Id.*; *Buckley v. Valeo*, *supra* note 33, at 121; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

36. *Buckley v. Valeo*, *supra* note 33, at 121-22 (quoting Chief Justice Taft in *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)).

37. See *Youngstown Sheet & Tube Co. v. Sawyer*, *supra* note 35, at 640.

38. *Nixon v. Administrator of General Services*, *supra* note 11, at 441-42. The rationale which the Court gives for the creation of the doctrine of separation of powers is crucial to the Court's analysis and use of the doctrine. Chief Justice Burger, dissenting in *Nixon*, cited case history to illustrate that the doctrine developed so each branch would be free from coercive influence or control, direct or indirect, by other branches. *Id.* at 509. The

trine, the use of the legislative veto becomes an impermissible intrusion upon the executive or judicial functions instead of a legitimate exercise of legislative power granted to Congress by a statute.³⁹

The *Atkins* court was careful to stress that it considered the constitutionality of the one-house veto narrowly within the context of the Federal Salary Act, and not the veto in the abstract.⁴⁰ In *Atkins*, the Court of Claims rejected the plaintiffs' separation-of-powers arguments and found the one-house veto in the Federal Salary Act constitutional.⁴¹ The court stated that constitutional powers cannot be categorized or "neatly ascribed" to each of the three branches, and that the purpose of the separation-of-powers doctrine is to prevent concentration of power in any one branch.⁴²

The plaintiffs had three separation-of-powers objections in *Atkins*. First, once delegated by Congress, the legislative power to adjust salaries became executive power and Congress could only interfere with that power through a new statute. Second, the legislative veto abrogated the President's constitutional duty to faithfully execute the laws. Third, the legislative veto involved the Congress in day-to-day administration, thus turning legislators into administrators.⁴³ Plaintiffs' arguments were rejected as arising from a "rigid segregation of powers into executive and legislative, a categorization we deem unilluminating in determining whether the exercise of a power by a given branch is constitutional or not."⁴⁴

The Court of Claims reverted, however, to this criticized categorization when it stated that it does not matter if Congressional oversight is by statute or one-house veto "since the pay-setting function is basically legislative in character and embodies no substantial element of, or incursion into, the

majority cite Madison for the more flexible approach which does not include separate powers, absolutely independent in operation. The court in *Chadha*, as will be discussed later, specifically detailed a dual purpose contemplated in the origins of the doctrine—the prevention of tyranny and the promotion of government efficiency.

39. See Miller & Knapp, *supra* note 16, at 384.

40. *Atkins v. United States*, *supra* note 19, at 1058-59.

41. *Id.* at 1070-71.

42. *Id.* at 1066-67.

43. *Id.* at 1066.

44. *Id.* at 1067.

administration, enforcement, or execution of the laws".⁴⁵ Hence, a violation of the separation-of-powers doctrine did not exist. In response to plaintiffs' second argument, the *Atkins* court stated that enumerated article II powers were not involved. Instead, the Presidential powers exercised under the Federal Salary Act came from a Congressional delegation in accord with the "necessary and proper clause." Finally, the court rejected plaintiffs' argument that legislators became administrators because the legislative veto in the Salary Act was "a device used in aid of legislation on a matter historically within the legislative power" and did not enforce any law or appoint agents to enforce the law.⁴⁶ Thus, the *Atkins* court did not find traditional categorization easy to remove from the separation-of-powers analysis.

THE *Chadha* DECISION

The principle issue in *Chadha* was whether a statutory provision for one-house disapproval of a deportation suspension decision was invalid because it violated the separation-of-powers doctrine. Since the legislative veto is not a power specifically conferred by the Constitution, the court questioned whether the legislature was exercising a power "necessarily but implicitly conferred elsewhere by the nature of an institutional government."⁴⁷

The court initially reaffirmed the separation-of-powers doctrine as vital for constitutional governance and as neither doctrinaire nor rigid.⁴⁸ The purposes of the doctrine were noted as prevention of unnecessary and dangerous concentration of power in one branch and promotion of government efficiency.⁴⁹ Given these purposes, the court established a standard defining a constitutional violation of separation of powers as "an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the per-

45. *Id.* at 1068.

46. *Id.* at 1069-70.

47. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 421. The court began its discussion of the merits with a lengthy consideration of separation-of-powers principles. "This is necessary because no circuit or Supreme Court authority we have found holds that the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the power upon another branch with great specificity." *Id.* at 420 (footnotes omitted).

48. *Id.* at 421.

49. *Id.* at 423-24.

formance of its duties and is unnecessary to implement a legitimate policy of the Government.”⁵⁰ To this standard, the Ninth Circuit added the caveat that an exercise of functions central to another branch on a long-term and routine basis more easily establishes a violation of separation of powers.⁵¹

Prior to its analysis, the court examined in detail the operational framework of the statutory scheme for suspension of deportation. The statute established criteria for suspension, mandated discretionary administrative determinations, allowed individual adjudicative-type determinations, and provided for judicial review of substantive and procedural aspects of both the legal and discretionary phase of the suspension scheme. Finally, Section 244(c)(2) of the I.N.A. authorized Congressional review when suspension was affirmed.⁵²

With the background established, the court then characterized three functional impacts of the one-house veto on the statutory scheme and tested those impacts under the standard noted above.⁵³ First, when the veto is characterized as a corrective device to prevent misapplications of the statute, Congress, in exercising it, performed a role reserved for judicial or internal administrative determination. The duty of the judiciary under the statutory scheme was to provide judicial review of administrative applications of the statute. If Congress had final corrective power of statute misapplication, any prior judicial determinations could well be rendered advisory and nugatory. This interference with the central function of the judiciary was disruptive in two ways.⁵⁴ First, since a Congressional disapproval could set aside any judicial determination, individuals dependent upon administrative applications of the statute would be subject to a standardless application of the law. In effect, a judicial check on the executive would be weakened since the judiciary could no longer mandate uniform application of standards. Second, the judiciary's position of reviewing the actions of other branches would be weakened since its own decisions would be subject to review by

50. *Id.* at 425.

51. *Id.*

52. *Id.* at 425-29.

53. See text accompanying note 50 *supra*.

54. The court spoke specifically in terms of “vertical” and “horizontal” impacts. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 430-33. These will be discussed more fully in the critique.

the legislature. This interference was unnecessary since the judiciary was able to perceive and correct any misapplication of the statutory standards.⁵⁵

The second characterization of the functional impact of the one-house veto was that of a device for shared administration of the statute. Under this characterization, Congress, in its use of the veto, established statutory criteria on a case-by-case basis by summary reversal of administrative decisions. But these reversals occur without the assistance of executive expertise which has developed after long-term statute administration subject to judicial review. By diminishing the authority of the Executive Branch, undermining its powers, and defeating the purpose of efficient administration—"unambiguous assignment of responsibility to specific branches"—the interference was disruptive.⁵⁶ The court also noted that administrative procedures and safeguards which had been developed to protect individuals were negated, and concluded that this was disruptive and a frustration of the checking purpose of separation of powers. The interference was unnecessary since Congress could legislate more specific criteria for administrative decisions.⁵⁷

The third characterization of the functional impact was that of an exercise of reserved legislative power which defined substantive rights but did not qualify as a statutory amendment. Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."⁵⁸ However, a grant of power does not sustain an unconstitutional exercise of that power. In *Chadha*, the greater power of making all laws necessary and proper did not include the lesser power of a legislative veto of administrative and judicial decisions. An exercise of the lesser power was a

55. *Id.* at 429-31.

56. *Id.* at 432.

57. *Id.* at 432-33. Opponents of the legislative veto often point out that this device would not be needed if Congress would more carefully specify its delegations of power under statutes. Thus, in the Immigration and Nationality Act, the opponents would argue that suspension criteria *and* criteria for administrative discretion could be improved. The Immigration and Naturalization Service, however, cancelled a proposed rule to list the factors to be considered in the exercise of administrative discretion because "[i]t is impossible to foresee and enumerate all of the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion." 46 Fed. Reg. 9119 (1981). It is doubtful that Congress could "foresee and enumerate" any better than the Immigration and Naturalization Service.

58. U.S. CONST. art. I, § 8, cl. 18.

violation of separation of powers through an unnecessary disruption of the operation of the other two branches. Additionally, the power to make laws includes the constitutional restraint that both houses must concur for the enactment of a law which alters individuals' substantive rights. Since the statute concerned the rights of an alien to suspension of deportation, and Chadha's position prior to review was one of non-deportation, unicameral legislative action to change Chadha's substantive rights was unacceptable.⁵⁹ The court also noted, but did not address, the issue of unfair or discriminatory use of the legislative veto which poses bill of attainder and equal protection problems.⁶⁰

CRITIQUE OF THE DECISION

The decision of the Ninth Circuit in *Chadha v. Immigration and Naturalization Service* is important in three ways. First, it is the highest federal court decision on the constitutionality of a one-house legislative veto. Second, this is the first occasion where the Legislature was found to violate the separation-of-powers doctrine through an exercise of power not specifically conferred on any branch by the Constitution. Third, the decision clearly uses the separation-of-powers doctrine as it has evolved in Supreme Court decisions to determine the constitutionality of a legislative veto and establishes an excellent method of analysis to determine the constitutionality of legislative vetoes in similar contexts.⁶¹ Two commentaries on the potential impact of the Chadha decision are at odds. One states that few other legislative vetoes will be constitutionally threatened;⁶² the other sees more far-reaching effects.⁶³

In its application of the separation-of-powers doctrine to the constitutionality of the legislative veto, the *Chadha* court clearly acknowledged the Supreme Court's current, "more pragmatic, flexible approach" to the doctrine⁶⁴ by stating,

59. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 433-35.

60. *Id.* at 435.

61. Perhaps the real paradigm for future analysis of the constitutionality of legislative vetoes is contained in Miller and Knapp, *supra* note 16. Although the Miller and Knapp article was intended as an apology for the legislative veto, the proposed analysis contained therein bears a striking resemblance to that adopted by the *Chadha* court, including the emphasis on the purpose of governmental efficiency and the "horizontal" and "vertical" disruption approach. *Id.* at 388-90.

62. See note 9 *supra*.

63. *Ninth Circuit Invalidates Legislative Veto*, 7 AD. L. NEWS 3 (Spr. 1981) (ABA Administrative Law Section Newsletter).

64. See text accompanying notes 37 & 38 *supra*.

"[S]eparation of powers is not an inflexible rule, but one that governs a broad continuum of various admixtures of powers, some permissible."⁶⁵ Then, extrapolating from Supreme Court statements in *Nixon*,⁶⁶ the *Chadha* court clearly stated its standard governing a violation of separation of powers by a one-house veto.⁶⁷ However, the Ninth Circuit extended previous Supreme Court statements on the purpose of the separation-of-powers doctrine which focused on the prevention of concentration of power dangerous to liberty,⁶⁸ and added the promotion of governmental efficiency as a purpose of the doctrine.⁶⁹

This additional purpose may have a subtle effect on the standard for the determination of a violation of separation of powers, when a key element of that standard is the "assumption by one branch of powers that are *central* or *essential* to the operation of a coordinate branch."⁷⁰ One could hypothesize that whether a power is central or essential is affected by the purpose for the doctrine of separation of powers. Execution of some executive power may be central and essential to safeguard against concentrations of power in the legislature, i.e., the use of the executive veto power. Execution of other executive power may only be essential or central to functions promoting governmental efficiency, i.e., uniform application of standards in rules. In this manner, the *Chadha* standard may be more inclusive than the traditional Supreme Court standard based on the purpose of preventing a concentration of power in any one branch.

In dicta, the *Chadha* court added to its standard the caveat on long-term interference, "If an exercise of functions which lie at the center of another branch is attempted on a long-term and routine basis, a violation of the constitutional rule requiring separation of powers is more easily established."⁷¹ The court never again referred to this "long-term and routine

65. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 425.

66. *Nixon v. Administrator of General Services*, *supra* note 11, at 443.

67. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 425. See also text accompanying note 50 *supra*.

68. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); *Buckley v. Valeo*, *supra* note 33, at 121-22. The often-cited purpose is the prevention of concentration of power dangerous to liberty.

69. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 423-24.

70. *Id.* at 425, 429 (emphasis added).

71. *Id.* at 425.

basis" criterion, except for inclusion in a restatement of the standard.⁷² What constitutes "long-term and routine basis" is never defined, and why a one-time use or a continuing use of a legislative veto would make a difference is unclear. As articulated, this caveat adds nothing to the test previously formulated by the Supreme Court.⁷³

The Ninth Circuit contributes to an improved analysis of a "judicially correctable violation of the separation of powers rule" through its emphasis on the precise character of the legislative veto.⁷⁴ As the Supreme Court has noted, "[T]he proper inquiry focuses on the *extent* to which it [the Act] 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. . . ."⁷⁵ In applying this test, the *Chadha* court evaluated the legislative veto by examining "the impact of the disapproval on the scheme in functional terms."⁷⁶ By "the scheme," the court referred to the statutory scheme.⁷⁷ This may be a logical inconsistency in the court's analysis. One could question whether Congress can possibly "interfere" with a statutory system which it created, especially since Congress allowed for the "interference."

The court evidently terms a "characterization of functional impact" as "the purpose and effect of the legislative intervention."⁷⁸ Thus, the court must discern the Congressional purpose in creating the one-house veto in any particular statutory scheme and the effect of that veto, when exercised, upon the functions of other branches within the scheme. The three characterizations of functional impacts in *Chadha*—correction of misapplication, co-administration, and residual legislative power short of full statutory power⁷⁹—are particularly useful and move the analysis toward "the contemporary realities of our political system."⁸⁰

72. *Id.* at 429.

73. *Nixon v. Administrator of General Services*, *supra* note 11, at 443.

74. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 429.

75. *Nixon v. Administrator of General Services*, *supra* note 11, at 443 (citation omitted) (emphasis added).

76. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 429.

77. *See id.* at 433.

78. *Id.* at 431.

79. *Id.* at 429.

80. *See Nixon v. Administrator of General Services*, *supra* note 11, at 441.

Finally, the *Chadha* decision has added to traditional separation-of-powers analysis by recognizing that disruptions may take both a vertical and horizontal form. A vertical disruption impacts upon the functioning of the branch and its relations to individuals over whom it asserts power. A horizontal disruption impacts upon the functioning of the branch in relation to the other branches of government.⁸¹

RELIANCE ON PURPOSE AND THE RULEMAKING/ADJUDICATION DICHOTOMY

The weakest aspect of the *Chadha* court's reasoning involved the functional impact of co-administration of the statute. At this point, the court's interest in the additional purpose for the doctrine of separation of powers—governmental efficiency—becomes apparent. Also, in addressing the functional impact of co-administration the court alluded to the dichotomy of prospective rulemaking versus adjudication pursuant to the rule or statute.⁸²

The starting point of the analysis is the court's reaction to Congress sharing in administration and supplementation of the statute by adding more precise criteria on a case-by-case basis. This was found to be a disruption of the central functions of the Executive Branch. Horizontal disruption occurred because the summary reversal came after the executive rendered a reasoned decision, which was overturned "without an indication of a need to change the standards or general rules to be applied."⁸³ The purpose of efficient administration was defeated. The court indicated that if the legislative veto was combined with an explanation of why the veto power was exercised and with suggested changes in standards, a constitutional violation might not exist.

It is submitted here that such an approach would surely continue, if not increase, inefficiencies in governmental administration. Congress would still be involved in a case-by-case establishment of substantive law, with no particular encouragement for clarity in the original statutory criteria.

81. *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 430-33.

82. *See id.* at 431-33.

83. *Id.* at 432.

The *Chadha* court expressed a significant limitation on its decision when it stated:

Although the practicality of alternatives to legislative disapproval in other situations raises difficult questions, we are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.⁸⁴

The court is apparently saying that a legislative veto of an adjudicative decision based on the application of a rule or statute may be susceptible to a separation-of-powers analysis but that a legislative veto of a proposed rule may not be susceptible to such analysis. If the distinction rests upon the ability of Congress to amend enabling legislation, there remains the question of whether Congress can more readily state criteria used in adjudicative decisions than it can articulate criteria for rulemaking.⁸⁵

On the other hand, if the primary argument for the distinction is centered on the quasi-legislative nature of rulemaking, and if a purpose of the separation-of-powers doctrine is to encourage governmental efficiency, one must wonder how "efficiency" might differ between rulemaking and adjudication. Effort, skills and expertise go into the promulgation of rules to achieve perceived statutory intent. Agencies are aware that their rulemaking is subject to judicial review and ultimate rejection on the grounds that such rules are not in accord with the statutory intent.⁸⁶ Congress always retains the option of negating improper rules through amended statutory criteria.⁸⁷ The imposition of a legislative veto after a lengthy agency rule promulgation effort may not contribute to efficient use of governmental resources since effective rule review measures are already allocated in the system.

84. *Id.* at 432-33 (footnotes omitted).

85. See note 57 *supra*.

86. See *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 431 n.32.

87. See *Miller & Knapp*, *supra* note 16, at 376 (citing DAVIS, ADMINISTRATIVE LAW TREATISE § 6.08, at 387 (1958)).

An additional argument for a distinction between rulemaking and adjudication vetoes may be that adjudication involves due process considerations. A legislative veto of an adjudicative decision may very well upset these due process guarantees. A legislative veto may be made with no regard for procedural safeguards such as notice and an opportunity for a fair hearing. Typically, due process is not involved in rulemaking.⁸⁸ However, similar considerations of procedure (such as notice to interested parties of proposed rules and the opportunity for the same parties to offer input in the rulemaking process) usually are legislative requirements for rulemaking.⁸⁹

Chadha AND THE U.S. SUPREME COURT

Sound reasoning was applied by the *Chadha* court to the disruption of judicial functions through the exercise of a legislative veto to correct misapplications of the statute. The Supreme Court should affirm the Ninth Circuit's finding of unconstitutionality, primarily based on the fact that the legislative veto interferes with the adjudicative functions of the judiciary and thus violates the separation-of-powers doctrine. The specter of a one-house veto rendering merely advisory a United States Supreme Court decision is unacceptable.⁹⁰

CONCLUSION

The Ninth Circuit held unconstitutional as a violation of separation-of-powers a statutory provision of a one-house legislative veto of suspension of deportation. In reaching its conclusion, the court relied upon the Supreme Court's "more pragmatic and flexible approach" to the separation-of-powers doctrine. Although the Ninth Circuit applied the Supreme Court's standard for a violation of separation of powers, it expanded upon the impact of this standard by adding the "governmental efficiency" purpose to the reasons for the doctrine of separation of powers.

The court placed much emphasis on the precise character of a legislative veto within a statutory scheme and the impact of the legislative veto upon that statutory scheme. The idea

88. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

89. 5 U.S.C. § 553 (1976).

90. See *Chadha v. Immigration and Naturalization Service*, *supra* note 3, at 430.

that Congress can “interfere” in a statutory system it created seems logically inconsistent. However, when Congressional “interference” involves a denial of due process, as in an adjudicative determination of an individual’s rights, a finding of a violation of separation of powers is justified. The court further contributed to a separation-of-powers analysis by recognizing that disruptions in the functioning of other branches may take both a horizontal and vertical form.

The Ninth Circuit correctly limited its holding to vetoes of an adjudicative nature. The court suggested that a legislative veto might be permissible in other instances, such as rulemaking, where it is difficult for Congress to specify criteria in the governing statute. However, in the *Chadha* case the court faced a clear interference with the adjudicative functions of the judicial branch and the application of a legislative veto which created severe consequences for a specific individual. Therefore, the Supreme Court should affirm the Ninth Circuit’s holding.

The decision’s contribution and greatest impact may be its thoughtful separation-of-powers analysis. The analysis clearly moved away from a simple categorization of powers and toward a recognition of political realities in the allocation of power. In so doing, the court would apparently agree with Justice Frankfurter’s reflection that “the separation-of-powers principle is a political maxim, not a technical rule of law.”⁹¹

RODNEY P. LANG

91. *Atkins v. United States*, *supra* note 19, at 1066 (citing FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 77 (1930)).