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THE CONSTITUTIONALITY OF THE LEGISLATIVE VETO

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.¹

Although far from the constitutionally formative era in which James Madison penned these words, modern courts still grapple with the constitutional questions raised in delineations of governmental powers. Preserving the division of powers within the federal structure requires flexibility to accommodate changing conditions,² but also rigidity to maintain the integrity of the individual branches.³ Legislative vetoes present the most recent challenge to this constitutional balance between pragmatism and theory. A legislative veto is a statutory rider to a delegation of administrative authority that reserves to Congress the power to void an administrative decision by various means that fall short of the normal statutory amendment process of passage by both houses of Congress and presidential approval.⁴ The types of legislative veto⁵ include: congressional disapproval by a one-house vote;⁶ approval by a one-house vote;⁷ disapproval by a concurrent resolution of both houses;⁸ approval by a concurrent resolution of both houses;⁹ dis-

1. THE FEDERALIST No. 37 (J. Madison) at 229 (Modern Library College ed. 1937).

2. See *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

3. See THE FEDERALIST No. 51 (A. Hamilton or J. Madison), *supra* note 1, at 338.

4. See J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 204 (1964).

5. For a partial compilation of legislative veto provisions see Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1089-94 apps. A & B (1975) [hereinafter cited as *Congress Steps Out*].

6. See, e.g., 26 U.S.C. §§ 9009(c), 9039(c) (1976) (providing congressional review of proposed regulations by the Federal Election Commission).

7. This provision has never been employed. J. BOLTON, THE LEGISLATIVE VETO 2 n.6 (1977).

8. See, e.g., 19 U.S.C. § 1981(a)(2) (1976) (disapproval of a presidential rejection of a

approval or approval by committee action;¹⁰ and selective veto, approving part and disapproving part of the administrative action.¹¹

In *Chadha v. Immigration & Naturalization Service (INS)*,¹² the United States Court of Appeals for the Ninth Circuit recently held unconstitutional a one-house disapproval provision in the Immigration and Nationality Act of 1967 (INA).¹³ Recently, legislative vetoes have been challenged on constitutional grounds, but prior to *Chadha* only one court had reached the merits of the issue.¹⁴ In *Atkins v. United States*,¹⁵ the Court of Claims held a leg-

tariff duty hike).

9. See, e.g., 23 U.S.C. § 104(b)(5) (Supp. III 1979) (approval of funds for the federal interstate highway system).

10. See, e.g., Post Office Department Appropriation Act, Pub. L. No. 91-422, 84 Stat. 876 (1970) (appropriation not renewed) (approval by the House and Senate Committees on Public Works of funds for new postal facilities).

11. See, e.g., 2 U.S.C. § 359 (Supp. III 1979) (permitting one house of Congress to allow some proposed pay increases while prohibiting other increases).

12. 634 F.2d 408 (9th Cir. 1980).

13. The INA provides:

In the case of an alien [whose deportation proceedings have been suspended by the Attorney General] 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 or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

Immigration and Nationality Act, § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976).

14. *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977) (per curiam) (en banc), cert. denied, 434 U.S. 1009 (1978). Legislative veto cases in which the merits were not reached include: *Buckley v. Valeo*, 424 U.S. 1 (1976) (law found unconstitutional on other grounds); *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (per curiam) (en banc), *aff'd sub nom.*, *Clark v. Kimmitt*, 431 U.S. 950 (1977) (lack of ripeness); *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 420 F. Supp. 162 (S.D. Ala. 1976), remanded, 578 F.2d 1149 (5th Cir. 1978), cert. denied, 444 U.S. 879 (1979) (lack of standing). Two dissenting opinions, however, have addressed the merits of the constitutionality of the legislative veto. See *Buckley v. Valeo*, 424 U.S. at 283-86 (White, J., concurring in part and dissenting in part) (would hold veto provision constitutional); *Clark v. Valeo*, 559 F.2d at 685-90 (MacKinnon, J., dissenting) (would hold veto unconstitutional). Some suggest that by allowing Congress to require that rules proposed by the Supreme Court be laid before Congress for possible disapproval by statute, the Court in *Sibbach v. Wilson*, 312 U.S. 1 (1941), affirmed the use of legislative vetoes. *Atkins v. United States*, 556 F.2d at 1060 & n.21. The Court in *Sibbach*, however, merely reaffirmed the principle that Congress may regulate the practice and procedure of the federal courts by the complete statutory process. 312 U.S. at 9-10. Therefore, the Court did not address the question of the constitutional validity of congressional control by something less than that procedure.

islative veto provision constitutional. Thus, the court in *Chadha* seemingly disagreed with the court in *Atkins*. This Comment will examine the court's reasoning in *Chadha*, distinguish the results of *Chadha* and *Atkins*, and propose a rule to determine generally the constitutionality of legislative veto provisions.

THE CONTROVERSY SURROUNDING LEGISLATIVE VEToes

The issue of the constitutionality of the legislative veto has been argued extensively in academic circles.¹⁶ Supporters of the legislative veto contend that the broad congressional power granted in the necessary and proper clause of the United States Constitution¹⁷ warrants its use.¹⁸ This power allows extensive legislative action as long as the action is directed toward a legitimate constitutional end.¹⁹ Pursuant to the power to regulate commerce with foreign nations²⁰ and the power to regulate naturalization,²¹ Congress has plenary control over the admission and deportation of aliens.²² Thus, proponents argue that any procedure enacted by Congress to regulate naturalization or commerce with foreign nations is valid. Proponents also argue that any original legislation containing a veto provision was passed by both houses and was subject to presidential veto, thereby satisfying the constitutional requirements of bicameral passage²³ and presentation to the Presi-

15. 556 F.2d 1028 (Ct. Cl. 1977) (per curiam) (en banc), *cert. denied*, 434 U.S. 1009 (1978).

16. See generally Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. LEGIS. 735 (1979); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); *Congress Steps Out*, *supra* note 5.

17. The necessary and proper clause vests Congress with the power "[t]o 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." U.S. CONST. art. I, § 8, cl. 18.

18. See 556 F.2d at 1061.

19. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

20. U.S. CONST. art. I, § 8, cl. 3.

21. *Id.* cl. 4.

22. See *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972).

23. Bicameralism is the division of a legislative body into two chambers. BLACK'S LAW DICTIONARY 147 (5th ed. 1979). Because the Constitution demands that passage of a law be by both chambers of Congress, U.S. CONST. art. I, § 7, cl. 2, this Comment uses "bicameralism" to mean the requisite agreement of both houses of Congress.

dent for possible veto.²⁴ Finally, proponents maintain that many actions of Congress are exempt from bicameralism,²⁵ so the bicameral requirement should be construed liberally when considering the legislative veto.²⁶

Opponents of the legislative veto cite numerous constitutional failings of the provisions. First, they argue that the veto violates the presentation for veto requirement of the Constitution²⁷ by allowing action with the force of law to take effect without submitting it to the President.²⁸ Second, by superseding administrative decisions without using the typical statutory amendment process, the legislative veto prevents the President from executing the laws.²⁹ Third, the one-house veto violates the bicameral requirement by allowing action with the force of law to take effect by a vote of only one house.³⁰ Finally, the legislative veto unconstitutionally delegates to Congress authority it could not otherwise assume.³¹

Augmenting the constitutional arguments are the pragmatic policy considerations of daily governmental operations. In recent years the control of administrative agencies that have been delegated broad regulatory powers has grown increasingly difficult.³² These agencies issue regulations faster than Congress can use the statutory amendment process to correct abuses of regulatory authority.³³ The legislative veto therefore insures prompt Congressional supervision of the delegation of power³⁴ and increases con-

24. 556 F.2d at 1065. The presentation for veto requirement demands that "[e]very Order, Resolution, or Vote" passed by both houses, except adjournments, be submitted to the president for possible veto, and if vetoed, the bill may be enacted as law only by repassage by a two-thirds vote of both houses. U.S. CONST. art. I, § 7, cl. 3.

25. The Constitution, for example, grants individual authority for impeachments to the Senate. U.S. CONST. art. I, § 3, cl. 6.

26. 556 F.2d at 1062.

27. See note 24 *supra*.

28. J. BOLTON, *supra* note 7, at 31.

29. *Id.* The Constitution requires that the President "shall take Care that the Laws be faithfully executed" U.S. CONST. art. II, § 3.

30. See Henry, *supra* note 16, at 735, 741.

31. *Id.*

32. See SENATE COMMITTEE ON GOVERNMENT AFFAIRS, 95TH CONG., 1ST SESS., 2 STUDY ON FEDERAL REGULATIONS 116 (Comm. Print 1977).

33. *Id.*

34. *Id.* at 117.

gressional accountability to the public for administrative rulemaking.³⁵

Serious problems, however, accompany the perceived benefits of the veto. The veto delays finality in the regulatory process and creates uncertainty in regulated industries.³⁶ Legislative veto also invites special interest groups to pressure Congress to remove burdensome regulations³⁷ and encourages agencies to transfer decisionmaking from the rulemaking process to the adjudicatory process, which increases delay in the regulatory process.³⁸ Finally, by forcing constant review of administrative action, the legislative veto increases the workload of Congress while it decreases the likelihood of alternate solutions to the regulatory problem, such as improved drafting of laws.³⁹

CHADHA V. IMMIGRATION AND NATURALIZATION SERVICE

Jagdish Rai Chadha entered the United States as a non-immigrant student in 1966.⁴⁰ Chadha's visa expired in 1972, and in 1974 the INS initiated deportation proceedings against him.⁴¹ Pursuant to a provision in the INA that authorized suspension of a deportation order when the deportation would cause the alien severe hardship,⁴² the INS suspended Chadha's deportation.⁴³ The INS then reported the suspension order to Congress pursuant to section 244(c) of the INA, which allowed disapproval of such a suspension by a resolution of one house of Congress.⁴⁴ On December 16, 1975, the House of Representatives passed House Resolution 926, which

35. *Id.*

36. *Id.* at 118-19.

37. *Id.* at 119.

38. *Id.* Because the adjudicatory process must adhere to more rigid due process requirements than the rulemaking process, an adjudicatory process usually takes longer to complete than a rulemaking process.

39. *Id.* at 120-22.

40. *Chadha v. Immigration & Nat. Serv.*, 634 F.2d at 411.

41. *Id.*

42. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a)(1) (1976).

43. 634 F.2d at 411. When deportation proceedings are suspended, the Attorney General, in his discretion, may "adjust the status [of the alien] to that of an alien lawfully admitted for permanent residence." Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a) (1976).

44. Immigration and Nationality Act, § 244(c), 8 U.S.C. § 1254(c) (1976).

disapproved the suspension of Chadha's deportation order.⁴⁵ After the INS ordered Chadha's deportation,⁴⁶ he appealed unsuccessfully to the Board of Immigration Appeals.⁴⁷ He then petitioned the Court of Appeals for the Ninth Circuit, contending that the legislative veto provision of the INA, section 244(c)(2), unconstitutionally violated the separation of powers doctrine.⁴⁸

Before determining the constitutionality of the legislative veto provision of the INA, the court in *Chadha* reviewed the INS's procedure for suspending deportation orders.⁴⁹ The court found that to qualify for a suspension the alien must satisfy explicit statutory prerequisites, including a seven-year residency and good moral behavior.⁵⁰ The alien then must obtain the approval of the Attorney General.⁵¹ The court concluded that section 244 of the INA established criteria that applied in an "individual adjudicatory-type" procedure and that even though the Attorney General's determination was discretionary, procedural safeguards, enforced by judicial review, guaranteed fair and consistent treatment of aliens.⁵²

To determine the constitutionality of congressional review of the suspension process, the court applied the test for weighing violations of the separation of powers doctrine. The test defines a constitutional violation as "an assumption by one branch of powers that are central to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the government."⁵³ The court then proposed

45. H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40800 (1975).

46. In his discretion, the Attorney General may allow the alien to leave voluntarily and at his own expense if the alien shows that "he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure." Immigration and Nationality Act, § 244(e), 8 U.S.C. § 1254(e) (Supp. III 1979).

47. 634 F.2d at 411.

48. *Id.*

49. *Id.* at 425-29.

50. *Id.* at 426. To qualify for a suspension order, a deportee must meet the requirements of § 244(a) of the INA. 8 U.S.C. § 1254(a) (1976).

51. 634 F.2d at 427. The Attorney General, in his discretion, may grant or deny the suspension of deportation. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a) (1976).

52. 634 F.2d at 429.

53. *Id.* at 425. The court in *Chadha* drew the separation of powers test from *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). *Nixon* was one of several "Water-

three possible functions of the legislative veto: congressional correction of executive or judicial misapplication of the statute; joint congressional and executive administration of the statute; or retention of legislative authority to define substantive rights under the law.⁵⁴ After applying the separation of powers test to each of these functions, the court held the functions constitutionally impermissible when congressionally assumed through the legislative veto.⁵⁵

Judicial Infringement

If, in adopting the legislative veto provision, Congress meant to correct misapplications of the statute by the other branches of government, the court reasoned that Congress violated the separation of powers doctrine by unnecessarily usurping a judicial function.⁵⁶ The disruption occurred in two ways. First, Congress disrupted the judiciary's relationship with the petitioner by denying him articulated reasons and *stare decisis* in the interpretation of the INA. With no regard for due process and without following full statutory procedures, Congress, by assuming the adjudicative function of review, made any judicial review of procedural abuse advisory and subject to congressional reversal.⁵⁷ Second, by usurping the essential judicial function of administrative review, Congress eliminated any meaningful role for the courts in assessing administrative application of the statute.⁵⁸ Basically, courts ought to say what the law is, while Congress ought to make the law.⁵⁹ Finally,

gate"-related cases that considered the separation of powers doctrine. *See also* *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). By allowing one branch of government to impose on another and rejecting the defense of executive privilege, the courts, in the interest of momentary necessity, may have sabotaged the separation of powers doctrine. Allowing inter-branch infringements because of an "overriding need" to promote objectives within the constitutional authority of Congress, 433 U.S. at 443, expands an exception to the doctrine that previously had been limited to military privilege and state secrets, *see United States v. Reynolds*, 345 U.S. 1, 6-7 (1953), or economic crisis, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring). Such vague language may encourage numerous infringements of separation of powers under the guise of governmental necessity.

54. 634 F.2d at 429.

55. *Id.* at 429-35.

56. *Id.* at 429-30.

57. *Id.* at 430-31.

58. *Id.* at 431.

59. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

the court deemed this violation of separation of powers unnecessary because the courts were capable of assuring due process and of properly supervising application of the statute. If Congress disagreed, it could use the constitutional process of statutory amendment.⁶⁰

Executive Infringement

The court also concluded that, if Congress intended to share the administration of suspensions of deportations, usurpation of an executive function violated the Constitution.⁶¹ This infringement also occurred in two ways. First, the subordination of a fully reviewed executive decision undercut the executive power to carry out the law in an individual case pursuant to that branch's constitutional mandate. The veto created ambiguity in the statutory standards to be applied in granting suspensions, and it negated the effectiveness of long-evolved administrative expertise in making such determinations, thus causing inefficient administration of the law.⁶² Second, the veto separated the alien from established administrative procedural safeguards and replaced them with the uncertainty of congressional whim.⁶³ Again, the court held this infringement unnecessary⁶⁴

Bicameral Violation

Finally, if Congress proposed to retain legislative authority over the grant of suspensions of deportation, the court held the legislative veto unconstitutional for lack of bicameralism.⁶⁵ Bicameralism, as applied in the Constitution, is a powerful internal check on Congress that prevents legislative usurpation of non-legislative functions.⁶⁶ The court reasoned that the broad necessary and proper clause of article I of the Constitution was insufficient to overcome this basic legislative requirement.⁶⁷ Having delegated the

60. 634 F.2d at 431.

61. *Id.* at 431-32.

62. *Id.* at 432.

63. *Id.*

64. *Id.* at 432-33.

65. *Id.* at 433-34; *see* note 23 *supra*.

66. *See* THE FEDERALIST No. 62 (A. Hamilton or J. Madison), *supra* note 1, at 400.

67. 634 F.2d at 433-34.

decisionmaking authority to suspend deportation orders, Congress may not eliminate the right of nondeportation conferred by the executive branch by a legislative device lesser than originally was required to pass the law.⁶⁸ A single house of Congress cannot exercise more power than is conferred on the whole body by the Constitution.⁶⁹

Because Congress can form clear deportation and suspension of deportation criteria for the executive and judicial branches to apply, the court held the legislative veto provision, section 244(a) of the INA, unconstitutional.⁷⁰ If the veto survived, the executive branch would become "a sort of referee" whose decisions, even after judicial review and approval, could be overturned by Congress.⁷¹ In addition, the court emphasized that the executive branch could not execute the laws⁷² because the law in a given case would remain tentative until Congress acted.⁷³

ATKINS V. UNITED STATES

Although the court in *Chadha* held the one-house veto provision of the INA unconstitutional, it did not hold that all such legislative vetoes were invalid.⁷⁴ The Court of Claims, in *Atkins v. United States*,⁷⁵ also considered a legislative veto provision and held a one-house disapproval provision in the Federal Salary Act of 1967⁷⁶ constitutional.⁷⁷ Thus, the general validity of the legislative veto is in dispute pending a definitive Supreme Court ruling on the matter.⁷⁸ Irreconcilable as *Chadha* and *Atkins* seem, however, sev-

68. *Id.* at 434-35.

69. *See* *Kilbourn v. Thompson*, 103 U.S. 168, 182 (1880).

70. 634 F.2d at 435.

71. *Id.* at 435-36.

72. *See* note 29 *supra*.

73. 634 F.2d at 436.

74. *Id.* at 433.

75. 556 F.2d 1028 (Ct. Cl. 1977).

76. Federal Salary Act of 1967, § 225(i)(1)(B), 2 U.S.C. § 359(1)(B) (1976) (amended 1977). Prior to the decision in *Atkins* Congress removed the one-house veto provision and replaced it with a veto provision requiring resolution of both houses. *See* Federal Salary Act of 1967, Pub. L. No. 95-19, 91 Stat. 45 (1977) (codified at 2 U.S.C. § 359 (Supp. III 1979)). The court in *Atkins* held this to be inconsequential to the disposition of the case. 556 F.2d at 1059 n.16.

77. 556 F.2d at 1070-71.

78. The Reagan Administration has vowed to press the Supreme Court for a definitive

eral important distinctions exist between the functions and effects of the veto provisions that the cases involved.

Plaintiffs in *Atkins*, 140 federal judges, sued the Government to recover additional compensation they alleged was due them under the Constitution.⁷⁹ The Constitution prohibits diminution of judicial salaries by either the executive or the legislative branches during a judge's term in office.⁸⁰ During the period between 1969 and 1975, however, the real dollar value of plaintiffs' salaries decreased due to inflation.⁸¹ Pursuant to the Federal Salary Act of 1967, the President in 1973 recommended a seven and one-half percent annual increase in the salaries of federal judges.⁸² In accordance with the one-house disapproval provision of the Act,⁸³ the Senate vetoed the increase by passing a resolution disapproving the recommendation.⁸⁴ Plaintiffs then alleged that the legislative veto unconstitutionally usurped the executive power reserved to the President in article II, section 1 of the Constitution,⁸⁵ but the court held that the veto provision did not violate the separation of powers doctrine and thus was constitutional.⁸⁶

In finding the legislative veto provision constitutional, the court in *Atkins* relied on the broad power⁸⁷ granted Congress by the necessary and proper clause of the Constitution.⁸⁸ Further, the court noted unique aspects of the Federal Salary Act that made the legislative veto provision constitutional. First, article I, section 1 of the Constitution, which places legislative power in Congress, does not require affirmative bicameral action every time a legislative

ruling on the constitutionality of legislative vetoes in the expected appeal of the *Chadha* decision to that court. *Legislative Vetoes Face Legal Attack*, N.Y. Times, March 19, 1981 § A, at 17, col. 1.

79. 556 F.2d at 1030.

80. U.S. CONST. art III, § 1.

81. 556 F.2d at 1033.

82. *Id.*

83. The provision provides that "recommendations of the President shall become effective but only to the extent that neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations." Federal Salary Act of 1967, § 225(i)(1)(B), 2 U.S.C. § 359(1)(B) (1976) (amended 1977).

84. 556 F.2d at 1033.

85. *Id.* at 1034.

86. *Id.* at 1070-71.

87. See note 17 *supra*.

88. 556 F.2d at 1061.

power is exercised.⁸⁹ Because the matter of salaries is traditionally within the province of the legislative branch,⁹⁰ and because the presidential recommendations affect only those whose salaries are established by Congress,⁹¹ the court reasoned the legislative action did not require the affirmative concurrence of both houses.⁹² Second, the President's recommendations have no force of law. Therefore, the one-house veto merely rejects a proposal; the veto does not alter existing law, but merely preserves the status quo.⁹³ In its determination, however, the court explicitly limited its ruling to the question of the constitutionality of the legislative veto provision involved in the case and did not address the broader question of the constitutionality of legislative vetoes in general.⁹⁴

COMPARISON OF CHADHA AND ATKINS

The legislative veto provisions challenged in *Chadha* and *Atkins* are distinguishable primarily because the deportation proceeding affected an adjudicative function of administration, while the salary recommendation affected a rulemaking function.⁹⁵ These separate administrative functions require varying degrees of due process and formality in their procedures. Adjudication requires stringent due process and formality, whereas rulemaking requires less stringent due process and permits greater informality.⁹⁶ Furthermore, rulemaking is a general determination that affects a broadly identifiable class⁹⁷ and prescribes future conduct.⁹⁸ Adjudi-

89. *Id.* at 1062.

90. *Id.* at 1063.

91. *Id.* at 1059-60.

92. *Id.* at 1063.

93. *Id.*

94. *Id.* at 1059.

95. The procedures required for rulemaking and adjudication are found in the Administrative Procedure Act (APA), §§ 4, 5, 5 U.S.C. §§ 553, 554 (1976 & Supp. III 1979). Deportation proceedings are exempt from the APA. See *Marcello v. Bonds*, 349 U.S. 302, 305-11 (1955). This fact, however, does not affect the application of the adjudication-rulemaking distinction to *Chadha* because enactment of the APA merely codified the distinctions between rulemaking and adjudication. B. SCHWARTZ, ADMINISTRATIVE LAW 143-44 (1976). Thus, the administrative procedure used in deportation proceedings is no less adjudicatory because of this exemption.

96. B. SCHWARTZ, *supra* note 95, at 143-44.

97. See, e.g., *American Airlines, Inc. v. CAB*, 359 F.2d 624, 636 (D.C. Cir.) (Burger, J., dissenting), *cert. denied*, 385 U.S. 843 (1966).

cation, on the other hand, is a specific determination that affects particular individuals⁹⁹ and determines liabilities and rights based on present or past facts.¹⁰⁰ The administrative determination in *Chadha* affected only the alien, Chadha, in an action that required stringent due process in determining whether to suspend his deportation. The procedure involved clearly was adjudicative. Conversely, the determination in *Atkins* affected the future salaries of a broad class of federal employees and clearly was a rulemaking function.

The importance of the adjudication-rulemaking distinction lies in the similarity of each of these administrative functions to the types of legislation containing the legislative veto provisions. Rulemaking is inherently a legislative function¹⁰¹ and therefore lies within the scope of the constitutional powers of Congress. Thus, a legislative veto that supersedes a rulemaking function, such as was present in *Atkins*, should have a presumption of constitutionality, which can be overcome only by showing a serious breach of another branch's constitutional integrity. Adjudication, on the other hand, is essentially a judicial function¹⁰² and therefore does not lie within the constitutional authority of Congress. Thus, a legislative veto that reviews an adjudicative function, as did the provision in *Chadha*, should carry a presumption of unconstitutionality because Congress infringes upon an essential power of the judicial branch.

The two cases may be distinguished by the disparate degree of administrative finality entailed in each of the statutory delegations of authority. A conclusive administrative decision generally is unappealable and establishes the involved parties' administrative status.¹⁰³ A decision by the Attorney General on whether to grant suspension of a deportation order has been held administratively

98. See, e.g., *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908).

99. B. SCHWARTZ, *supra* note 95, at 144.

100. *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908).

101. B. SCHWARTZ, *supra* note 95, at 143.

102. *Id.*

103. M. FORKOSCH, *ADMINISTRATIVE LAW* § 299 (1956). Although a final determination generally is unappealable when a rulemaking decision is involved, judicial review of due process considerations is not precluded when an individual liberty is denied or altered. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

final.¹⁰⁴ Thus, the administrative decision placed Chadha in a final, determinative status of nondeportation.¹⁰⁵ The statutory delegation in *Atkins*, however, entailed no such administrative finality. Because of the historic and intrinsic congressional interest in federal salary levels¹⁰⁶ and the apparent congressional intent to reserve to itself final authority to set pay levels,¹⁰⁷ the presidential salary recommendations were not administratively final until the statutory time period for congressional action had run.¹⁰⁸ Thus, the delegation of authority in *Atkins* lacked the force of administrative finality that was present in the delegation in *Chadha*. Veto of the salary recommendation did not alter an administratively conferred final status, but instead maintained the status quo.

Finally, the two cases are distinguishable because *Chadha* dealt with the deprivation of an individual liberty, while *Atkins* merely concerned a regulation of a property right. Although suspension of deportation has been held to be an act of grace and not a right,¹⁰⁹ the court in *Chadha* reasoned that Chadha possessed such a right.¹¹⁰ Before Congress acted, Chadha occupied the status of a nondeportable alien.¹¹¹ When Congress altered this administratively final status, Congress deprived Chadha of an established individual liberty that should have been deprived only by an enactment made pursuant to the complete legislative process.¹¹² Although the judges in *Atkins* possessed a constitutionally mandated right,¹¹³ Congress deprived the judges of a mere property

104. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

105. 634 F.2d at 435.

106. 556 F.2d at 1059.

107. *Id.* See also *Pressler v. Simon*, 428 F. Supp. 302, (D.D.C. 1976), *vacated sub nom. Pressler v. Blumenthal*, 431 U.S. 169 (1977), *aff'd*, 434 U.S. 1028 (1978).

108. 556 F.2d at 1063.

109. *Jay v. Boyd*, 351 U.S. 345, 354 (1956). *Jay* does not apply to *Chadha* because *Jay* concerned a plaintiff who had been denied suspension of deportation, while Chadha had been granted a suspension under the administrative procedure. Even though the court in *Jay* held that deportable aliens have no right to suspension, once the Attorney General grants suspension of a deportation order, the suspension confers a right on the alien and Congress evokes a tangible loss when it revokes that right.

110. 634 F.2d at 434-45.

111. *Id.* at 435.

112. *Id.* at 434-35.

113. 556 F.2d at 1059-60.

right, not an individual liberty¹¹⁴ Courts have held that deprivation of a property right warrants much less due process protection than deprivation of an individual liberty right.¹¹⁵

The presence of an individual right in *Chadha* and the lack of such a right in *Atkins* closely relates to the distinction between administrative adjudication and rulemaking.¹¹⁶ The deprivation of an individual liberty requires stringent due process procedures and indicates an adjudicatory function.¹¹⁷ For deprivations of lesser rights, however, due process requirements are not as strict, thus indicating a rulemaking function.¹¹⁸

CONCLUSION

Although the two courts reached facially opposite conclusions, deeper analysis shows the results to be distinguishable. The reasoning that may be drawn from the cases is not that the legislative veto is unredeemably unconstitutional, or that a legislative veto is always a legitimate means to a constitutional end.¹¹⁹ Rather, the rule that evolves recognizes a gradation of constitutionality based on the nature of the law to which the veto is attached. A law that has a rulemaking function lies close to the heart of congressional power, and thus the veto provision within it will have a strong presumption of validity. At this end of the constitutional spectrum the congressional panacea of the necessary and proper clause generally will sustain a legislative veto provision. Conversely, a law with an adjudicative function lies far from congressional authority and near the protective power of the judiciary. The legislative veto in such law must be presumed invalid as infringing upon a function central to the judicial branch. These presumptions are enhanced or diluted according to the degree of administrative finality

114. *Id.*

115. *See, e.g., St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring).

116. *See* notes 95-100 & accompanying text *supra*.

117. *See* note 96 & accompanying text *supra*.

118. *Id.*

119. Some dissenting opinions dealing with the merits of the legislative veto have argued forcefully for its total invalidity. *See Clark v. Valeo*, 559 F.2d 642, 681 n.4 (D.C. Cir.) (per curiam) (en banc) (MacKinnon, J., dissenting), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977); 556 F.2d at 1075 (Skeltion, J., concurring and dissenting).

delegated by the law and the existence or nonexistence of a deprivation of an individual liberty right.

Because the analysis of constitutionality can be done only on a case-by-case basis, the generalizations that arise from the *Chadha* and *Atkins* decisions may lose their validity in subsequent litigation of legislative vetoes when different constitutional considerations appear. Thus, because the great majority of legislative veto provisions are attached to delegations of rulemaking authority,¹²⁰ the composite rule of *Chadha* and *Atkins* would attach a presumption of constitutionality to such legislative vetoes.¹²¹ Other factors, however, weaken this stance. Some legislative vetoes with rulemaking functions infringe on constitutional areas uninvolved in *Chadha* and *Atkins*. These possibly unconstitutional vetoes include impositions on the acknowledged executive power in foreign affairs¹²² and on some disputed areas of authority between the executive and Congress.¹²³

Further, legislative vetoes other than the one-house provisions involved in *Chadha* and *Atkins* have distinct constitutional problems. For example, committee vetoes are considered highly suspect methods of controlling regulation.¹²⁴ Also, concurrent resolution vetoes may be invalid because of the explicit constitutional requirement that every bill passed by both houses be presented to the President.¹²⁵ Concurrent resolution vetoes may too closely approximate statutory enactments to bypass this essential check.¹²⁶

120. See J. BOLTON, *supra* note 7, at 1.

121. Although the Reagan Administration is concerned about some legislative vetoes, it may support vetoes that place congressional control on independent agencies with no direct responsibility to the President. *Legislative Vetoes Face Legal Attack*, *supra* note 78.

122. *E.g.*, Foreign Assistance Act of 1961, § 903, 22 U.S.C. § 2443(b) (1976) (repealed 1978) (concurrent resolution of both houses disapproving sale of military equipment to foreign governments).

123. *E.g.*, Impoundment Control Act of 1974, § 1013, 31 U.S.C. § 1403(b) (1976) (disapproval by simple one house resolution of president's proposed deferral of authorized funds).

124. See *Montgomery v. Ellis*, 364 F. Supp. 517, 532 n.7 (N.D. Ala. 1973).

Delegating to a committee the power to administer a statute on a case-by-case basis might lead to a single member of Congress wielding that authority. Such an assumption of power would violate the established law prohibiting the endowment of executive powers upon a legislative office. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 606-07 (1953).

125. U.S. CONST. art. I, § 7, cl. 2.

126. See, *Buckley v. Valeo*, 424 U.S. 1, 285-86 (1976) (White, J., concurring in part and dissenting in part).

Despite these possible variations on the analysis of *Chadha* and *Atkins*, the basic presumptions drawn from the cases remain valid. Legislative vetoes are neither completely constitutional nor completely unconstitutional. Furthermore, the constitutionality of legislative vetoes depends upon which governmental function the law to which the veto is attached assumes. Finality of the administrative decision involved and the deprivation of a liberty right also are important determining factors. Because only the courts in *Chadha* and *Atkins* reached the merits of the constitutionality of the legislative veto provisions, the factors that distinguish the cases serve as important indications for future determinations of the constitutionality of legislative vetoes.

D. B. H.