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Fred L. Rush Jr.*

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Abstract

In *Immigration and Naturalization Service v. Chadha,'* decided June 23, 1983, the United States Supreme Court held unconstitutional an exercise by Congress of a legislative veto provision under section 244(c)(2) of the Immigration and Nationality Act

KEYWORDS: Chadha, immigration, naturalization

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I. Introduction

In *Immigration and Naturalization Service v. Chadha*,[1] decided June 23, 1983, the United States Supreme Court held unconstitutional an exercise by Congress of a legislative veto provision under section 244(c)(2) of the Immigration and Nationality Act.[2] The ramifications of the Court's decision, affirming the Court of Appeals for the Ninth Circuit,[3] are broad in scope, affecting both the theoretical implications of the doctrine of separation of powers and its practical application to a wide range of federal statutes.[4] Consequently, the Court's ruling in *Chadha* has received public attention usually afforded only to Supreme Court decisions concerning first or fourteenth amendment rights.[5]

The scope of this comment will be threefold. First, it will examine generally the roots of the decision in *Chadha* by focusing on the doctrine of separation of powers. The philosophical basis for the doctrine will be shown as it affected the Framers' vision finally set out in the United States Constitution. The structure of the Constitution will be investigated, to better glean specific instances, as well as general principles, of the doctrine. Case law prior to *Chadha* will also be discussed to better understand the Supreme Court's past interpretation of the doctrine leading up to the *Chadha* case. Second, the *Chadha* case itself will be treated, focusing separately on the majority, concurring, and dissenting opinions and the relative merits of each position. Finally, the

1. ___ U.S. ___, 103 S. Ct. 2764 (1983) (the decision was 7-2; Burger, C.J. writing for the majority, Powell, J. concurring, and White and Rehnquist, JJ. dissenting in separate opinions).

2. 8 U.S.C. § 1254(c)(2) (1976). *See infra* note 73.

3. Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980).

4. Justice White states "[t]oday the Court. . .sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'" Chadha, ___ U.S. at ___, 103 S. Ct. at 2792 (White, J. dissenting). For an exhaustive list of statutes so affected see *id.* at ___, 103 S. Ct. at 2811-16 app. 1.

5. *See* N.Y. Times, June 24, 1983, § 1, at 1, col. 5; N.Y. Times, June 25, 1983, § 1, at 9, col. 4; N.Y. Times, June 26, 1983, § 4, at 1, col. 5; Wash. Post, June 24, 1983, at A4, col. 1.

"aftermath" of *Chadha* will be discussed: its effect on statutory law in general, questions of severability, and the possible contours of a legislative response to the case.

II. Separation of Powers Doctrine

A. Philosophical Basis

Since the writings of Plato,[6] the idea that coordinate branches of government should be separate as to their essential functions and powers has been axiomatic to various theories of benign government. Aristotle first authored that which may be seen as a treatise on the doctrine of separation of powers.[7] Yet, it was not until after the Enlightenment that the doctrine gained force and proved a ground for heated debate. Locke discussed the doctrine at length. He rested his arguments for separation of powers on the need for a balance of powers, not only to check the executive and legislative branches,[8] but also to provide a buffer against monarchial tyranny.[9] However, it was in 1748 when Charles de Montesquieu published his treatise, *The Spirit of the Laws*,[10] that the doctrine of separation of powers was first articulated in the form later adopted by the Framers of the United States Constitution.

Montesquieu begins his treatment of separation of powers by identifying three types of power constituitive of government in general: the legislative, the executive, in terms of matter of civil law.[11] This tripar-

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6. PLATO, LAWS in THE COLLECTED DIALOGUES 1360 *passim* (E. Hamilton ed. and trans. 1961). Plato's ideas on the separation of powers are in no sense crystallized in the *Laws*. Part of this confusion can be attributed to the constant repartée between the principals in the dialogue, true to the Socratic concepts of *logos* and *dialektikon*.

7. ARISTOTLE, POLITICS 156-63 (H. Rackham trans. 1932). Along with this general exposé, Aristotle further divides into three elements that which the good politician must consider in framing a constitution: the deliberative element, the administrative element, and the judicial element. *Id.* at 189. *See also* ARISTOTLE, NICHOMACHEAN ETHICS 158-61 (M. Ostwald trans. 1962). For a broad overview of Aristotle's place in the philosophical development of the doctrine of separation of powers see generally M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 21-22 (1967).

8. J. LOCKE, TWO TREATISES OF GOVERNMENT 243-46, 356, 370, 382-84, 386, 392 (P. Laslett ed. 1970).

9. *Id.* at 382.

10. C. MONTESQUIEU, DE L'ESPRIT DES LOIX (J. Gressaye ed. 1950).

11. 2 *id.* at 63: ("Il y a dans chaque État trois sortees de pouvoirs: la puissance legislative, la puissance executrice des choses qui dependent du droit des gens, et la

tite scheme closely follows that proposed by Locke, a fact not the least startling since Montesquieu models his utopian form of constitutional government on the English constitution.[12] Indeed, the entire section of *The Spirit of the Laws* dealing with the separation of powers is subtitled "On the English Constitution."[13] Montesquieu then elucidates his notion of the third power of government and ascribes to it the power of judgment,[14] thus closely paralleling the modern notion of the judiciary. He goes on the point out that these three powers should be exercised separately by branches of government entrusted to each, lest tyranny result.[15] The political liberty of all subjects of government would be compromised if one hand should wield two or more powers concurrently.[16]

Interpretation of Montesquieu's theory led to two widely divergent schools. The first school states that Montesquieu's exposition of the doctrine of separation of powers can best be seen as an advocacy for a "pure" doctrine of separation of powers:

> [A] "pure doctrine" of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislative, the executive, and the judiciary. To each of these three branches there is a corresponding indentifiable function of government. . .Each branch of the government must be *confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches.*[17]

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puissance executrice de celles qui dependent du droit civil.").

12. *See* M. VILE, *supra* note 7, at 86. The English judiciary had strong feelings embracing the separation of powers. Blackstone states:

> In all tyrannical governments the supreme magistracy, or the right of *making* and *enforcing* the laws, is vested in one and the same man. . . .But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it's own independence, and therewith of the liberty of the subject.

2 W. BLACKSTONE, COMMENTARIES *146. For a complete background on constitutional law in England, see generally H. GREAVES, THE BRITISH CONSTITUTION (1958).

13. C. MONTESQUIEU, *supra* note 10, at 63.

14. *Id.* ("la puissance de juger. . .").

15. *Id.* at 63-64.

16. *Id.* at 64.

17. M. VILE, *supra* note 7, at 13 (emphasis added).

Thus, the 'pure' doctrine would opt for complete autonomy of the separate branches of government. It would constitute "a thoroughgoing separation of agencies, functions, and persons."[18] Indeed, it has been argued that Montesquieu's treatment of separation of powers cannot, by definition, be seen to admit of any mixing of function.[19]

A second school argues, however, that Montesquieu's theory can be interpreted as allowing for a *partial* separation of powers. This would result in a system of checks and balances between branches to ensure the non-encroachment of one branch upon another's exercise of its essential functions.[20] The argument here is that without the strong need for independence of branches, due to the fact that the representative branches would cease to be coordinate in nature:[21] one branch,, if subordinate to another, could not *a priori* check another's abuse of a power vested to a third branch.

It is difficult to ascertain with exactitude Montesquieu's actual position relative to the two schools.[22] However, it is readily apparent which school of thought was adopted by the Framers of the United States Constitution.

B. The Framers' Vision

It is clear that there was a general consensus that Montesquieu's ideas were to be interpreted, for the purpose of drafting the Constitution, as advocating a mixed form of partial separation of powers.[23] This

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18. *Id.* at 85.

19. *See* W. Struck, *Montesquieu als Politiker*, 298 HISTORISCHE STUDIEN 1, 68-69 (1933). *But see* 2 C. MONTESQUIEU, *supra* note 10, at 72-73, where it is stated that there must be three exceptions to the non-unification of the legislative and the judicial powers: "(1) In cases of trial of nobles, trial should not be held in a common court, but rather by peers in the legislature. (2) In cases of impeachment. (3) For the purposes of mitigating criminal sentences." *Id.*

20. *See* M. VILE, *supra* note 7, at 85-86.

21. *Id.* at 95.

22. *See* Hazo, *Montisquieu and the Separation of Powers*, 54 A.B.A. J. 665, 668 (1968).

23. This is not to say that there was no diversity at all on this issue. During the "newspaper debates" on the drafting of the Constitution there were dissenting voices disfavoring the doctrine. *See* Centinel I, Philadelphia Independent Gazetteer, Oct. 5, 1787 *reprinted* in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION at 330-31 (M. Jensen ed. 1976). However, upon the taking of actual vote during the structured debates on the adoption of the Constitution, the tripartite structure was passed unanimously in the affirmative. *See* 1 J. ELLIOT, DEBATES ON THE ADOP-

uniformity of thought as to the *horizontal* aspect of separation of powers, concerning separation of the executive, legislative, and judicial functions, traversed the political rift dividing the Federalists and the non-Federalists concerning the *vertical* aspect of the doctrine, concerning the sparation of federal as opposed to state powers. Even Jefferson, firmly a non-Federalist, gave his stamp of approval to the separation of branches of government.[24]

Of course, the incorporation of the separation of powers into the Framers' vision of the Constitution must be set upon a backdrop of the Articles of Confederation, a decidedly nonfederalist document. To those living under the Articles "[the] union was merely a means to their end, the independence of the several states. . .centralization was to be opposed."[25] Indeed, the non-Federalist sentiments backing the Articles were "antagonistic to any government with pretensions toward widespread dominion."[26] Thus, any federal structure superimposed on the several states must be controlled. Although such control is afforded by an adoption of the vertical doctrine of separation of powers alloting to the states certain sovereign rights, such protection is also given through implementation of the horizontal doctrine. Through the horizontal doctrine, in its mixed form, each branch provides protection aganist encroachment by coordinant branches. This translates into greater protection of individual citizens when confronted with the federal system.[27] Thus for example, the peoples' will, as represented in the legislative branch, could not be foiled by an executive override which would invade the essential function of the legislature.

James Madison wrote, concerning the idea of partial horizontal separation of powers:

> From these facts by which Montesquieu was guided it may clearly

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TION OF THE FEDERAL CONSTITUTION 183 (1836).

See generally Diamond, *The Zenith of Separation of Powers Theory: The Federal Convention of 1787*, 8 PUBLIUS 45 (No. 3 1978) (issue analysis of the debates of 1787); Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. REV. 151 (1978) (a rethinking of the Madisonian viewpoint as relates to the *Federalist* and the Federal Convention).

24. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) in T. JEFFERSON, SELECTED WRITINGS 68 (H. Mansfield ed. 1979).

25. M. JENSEN, THE ARTICLES OF CONFEDERATION 161 (1940). *See also* U.S. ART. OF CONFED. art. II.

26. M. JENSEN, *supra*, at 161.

27. *See* M. FARRAND, THE FRAMING OF THE CONSTITUTION 48-50 (1913).

> be inferred, that in saying 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, [the English constitution], can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.[28]

This view was reiterated by Madison in debate during the Constitutional Convention of 1787, where he emphasized the need for separation on a partial basis between the executive and judicial branches.[29] The means by which this separation should be instituted "consists in giving those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[30] In this way the checks and balances of power will check ambition against ambition.[31]

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28. THE FEDERALIST No. 47, at 245 (J. Madison) (G. Wills ed. 1982). *See also* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 393 (5th ed. 1905):

> But when we speak of a separation of the three great departments of government, and maintain that the separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.

Id.

29. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 34-35 (M. Farrand ed. 1911) (debate of Tuesday, July 17, 1787). Here Madison argues for the full collateral nature of the judiciary in the scheme of government. There are suggestions that this full treatment of the nature of the judiciary is the great American innvation on Montesquieu's initial theory. *See* W. GWYN, THE MEANING OF THE SEPARATION OF POWERS 125 (Tulane Studies in Political Science No. 9, 1965). The judiciary had a special place in the separation of power since "[t]he aid of the judges as council of revision would double the advantages and diminish the dangers of his [the executive's position." 1 F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 343 (1901). *See also* THE FEDERAL CONVENTION AND FORMATION OF THE UNION OF THE AMERICAN STATES lxxxiv (W. Solberg ed. 1958) (introduction by W. Solberg).

30. THE FEDERALIST No. 51, at 262 (J. Madison) (G. Wills ed. 1982).

31. *Id.*

C. The Constitutional Text and pre-*Chadha* Interpretation

Cases concerning the separation of powers are few in relation to other areas of constitutional interpretation. The cases deal with a wide variety of governmental powers. Additionally, cases concerning separation of powers arise in a decidedly intense political setting, due to the primordial nature of the doctrine in the constitutional scheme. Factually, the cases concern seizure by the executive of steel production,[32] claims of executive privilege in the Senate "Watergate" investigation,[33] the nature of the executive's position as Commander in Chief of the armed forces,[34] and, of course, the propriety of the legislative veto.[35] Therefore, the constitutional principles of separation of powers are at times best described as obscure.

The Supreme Court has, since its inception, maintained Madison's view of partial horizontal separation of powers. Justice Brandeis explicitly stated in *Myers v. United States*:

> The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial.[36]

Justice Brandeis also pointed out that the "[c]hecks and balances were established in order that this should be 'a government of laws and not men.' "[37] This language finds further support in *Buckley v. Valeo* where the Court states, "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[38] This, however, is exactly the problematic aspect of adjudications on separation of powers; namely, how much encroachment is constitutional? To state this query conversely: what is an essential function of a given branch for purposes of determining the constitutionality of the acts of a coordinate branch?

In general, there are two ways to violate the separation of powers.

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32. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).
33. United States v. Nixon, 418 U.S. 683 (1974).
34. Myers v. United States, 272 U.S. 52 (1926).
35. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983).
36. 272 U.S. at 291 (Brandeis, J. dissenting).
37. *Id.* at 292.
38. 424 U.S. 1, 121 (1976).

First, one branch may interfere with another branch's assigned function. Second, one branch may assume a function entrusted to another branch.[39] When a constitutional violation takes place in the first instance, it is usually due to an unconstitutional claim of privilege, in an attempt to exclude a member of one branch from a process associated with an essential function of another branch. Thus, the Court held as unconstitutional, as violation of separation of powers, a claim by President Nixon to "an absolute privilege of confidentiality for all Presidential communications."[40] The failure to produce documents upon the issuance of a subpoena *duces tecum* for judicial consideration interfered with the judicial branch's primary function: "to say what the law is."[41] The Court stated that since "the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."[42] It is interesting to note that the claim of Presidential privilege itself was based on an absolute view of separation of powers.[43] However, the need for partial separation was again reaffirmed.[44] The Court revisited this problem in *Nixon v. Administrator of General Services*.[45] After his resignation from the Presidency, Nixon had executed an agreement with the Administrator of General Services which limited access to certain documents accumulated during his term of office. After five years of limited access, the agreement stipulated that the documents could be destroyed at Nixon's behest. Congress passed a bill signed into law by President Ford which directed the Administrator to take custody of the documents. On appeal, Nixon argued that the act was unconstitutional as violation of separation of powers.[46] The Court rejected this contention stating that "the proper inquiry focuses on the

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39. *See* Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 384-85 (1976). Justice Powell also points out this distinction in *Chadha*, ___ U.S. ___, 103 S. Ct. at 2790 (Powell, J. concurring). *See infra* note 130.

40. *Nixon*, 418 U.S. at 703.

41. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

42. *Nixon*, 418 U.S. at 707.

43. *Id.* at 706.

44. The judiciary, early in its history, had held that a subpoena may issue to the President to both compel his attendance as a witness to trial and to produce any paper which a party to the suite has a right to avail himself or for purposes of testimony. *See* United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C. J., presiding).

45. 433 U.S. 425 (1977).

46. *Id.* at 441.

extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned function,"[47] thereby rejecting any pure doctrine of separation of powers.

Separation of powers may also be constitutionally violated when one branch assumes a function constitutionally entrusted to a coordinate branch. Early in its history the Court addressed legislative encroachment in uncertain terms:

> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.[48]

However, in latter cases the degree of constitutionally permissible infringement by the legislature upon other branches was further refined. In *J. W. Hampton, Jr., & Co. v. United States*,[49] the Court held constitutional a delegation of quasi-legislative power to the President, which allowed the President to increase or decrease import and export duties.[50] The Court distinguished between an unconstitutional delegation of law making ability to the executive and a constitutional conference of discretion to the executive as to the execution of the law.[51] It further held:

> Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of regulations.[52]

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47. *Id.* at 443.

48. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

49. 276 U.S. 394 (1928).

50. *Id.* at 411.

51. *Id.* at 407. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-19 (1936) where the Court upheld a delegation of legislative power to the President. The Court stated that the contention of invalid delegation was irrelevant in the area of foreign affairs where the executive has full plenary authority.

52. *J.W. Hampton, Jr. and Co.*, 276 U.S. at 406.

In *Springer v. Government of the Phillippine Islands*,[53] decided the same year as *Hampton*, it was held that the legislature had unconstitutionally assumed an executive function when it appointed corporate directors of the government held National Coal Company. The Court stated that the legislature had exercised an appointment power wholly within the province of the executive branch.[54] Thus, "[t]he appointment of managers. . .of property or a business is essentially an executive act which the legislature is without capacity to perform. . . ."[55]

Legislative usurpation of a judicial function was the issue in *United States v. Brown*.[56] The respondent was convicted under an act of Congress which made it a crime for a member of the American Communist Party to hold a position on the executive board of a labor organization. The Court first stated that the bill of attainder clause[57] was intended to implement the doctrine of separation of powers by prohibiting a legislative exercise of judicial power.[58] The clause should be liberally construed in order to prevent legislative punishment[59] and a denial of an individual's constitutional rights.[60]

Executive incursions into coordinate branches' constitutionally prescribed functions have met with less equivocation on the part of the Supreme Court. In *Little v. Barreme* (the *"Flying Fish"* Case)[61] the President's seizure of ships on the open seas, without legislative authority, was seen to be an unconstitutional fashioning of law by the executive.[62] It is difficult to say with precision why intrusions by the executive were initially dealt with on more firm ground than the legislative instrusions. Perhaps acts by the executive were *sui generis* more suspect by the Court due to the spectre of the British monarchy still present in the minds of many. Another explanation might also be that the President, by virtue of his singular position in the infant executive department, brought close scrutiny of his every act to bear upon his office.

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53. 277 U.S. 189 (1928).
54. *Id.* at 202. *See* U.S. CONST. art II, § 2, cl. 2.
55. *Springer*, 277 U.S. at 203.
56. 381 U.S. 437 (1965) (per curiam).
57. U.S. CONST. art. I, § 9, cl. 3.
58. *Brown*, 381 U.S. at 442-46.
59. *Id.* at 447-49. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 491-99 (1978).
60. The individual rights of freedom of speech and belief and the right to due process under the laws were at issue in *Brown*.
61. 6 U.S. (2 Cranch) 170 (1804).
62. *Id.* at 177.

Clearly, the most representative case of the executive overreaching is *Youngstown Sheet and Tube Co. v. Sawyer* (the *"Steel Seizure"* case).[63] President Truman had commandeered the nations' steel mills without statutory authority, to avert a national strike of steelworkers. The President claimed authority for his actions from the aggregate powers vested in the executive branch under Article II of the Constitution and particularly under the President's powers as Commander in Chief of the Armed Forces.[64] Both of these arguments were rejected by the Supreme Court.[65] It was clear that the "military powers of the Commander in Chief were not to supersede representative government of internal affairs."[66]

It is very rare indeed for the court to call the judiciary into question on a violation of separation of powers. This may be due to the unique position the judiciary enjoys vis-à-vis the doctrine. Although a third branch of government, set out separately in article III of the Constitution, and thus subject to the same constraints under the doctrine as the executive and the legislature, the judiciary is the branch which enforces the constitutional mandates of the doctrine. It thus is preeminent among the branches as arbiter of the doctrine. Indeed, the judiciary, for the purposes of separation of powers, must determine the limits of

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63. 343 U.S. 579 (1952). For an informative study of the political climate and inside story of the *Steel Seizure Case*, see generally A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE: YOUNGSTOWN STEEL AND TUBE CO. V. SAWYER (1958).

64. U.S. CONST. art. II, § 2, cl. 1.

65. Youngstown Sheet and Tube Co., 343 U.S. at 587-89; *cf.* United States v. Russell, 80 U.S. (13 Wall.) 623 (1872) (where the Court upheld a seizure of private vessels in order to transport military supplies, during the time of war. This was justified due to the direct emergency at hand, even though there was no statute in force). *Id.* at 629.

In dicta in *Youngstown Sheet and Tube Co.*, Justice Jackson proposes that there is substantial dimunition in the "war powers" of the executive where there is merely a conflict and not a *de jure* war:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

343 U.S. at 642 (Jackson, J. concurring).

66. Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141, 167 (1952). *But cf.* Corwin, *The Steel Seizure Case: A Judicial Brick Without a Straw*, 53 COLUM. L. REV. 53, 61-62 (1953) which argues that the President's power under the suspect executive order is the same kind of power that *de facto* exists in exigent national circumstances.

its own power. The very equilibrium of the doctrine depends on the courts.[67] One case where the Court called the judiciary into question was *In re Debs*.[68] There, the Court upheld a lower court of equity's issuance of an injunction without express statutory authority. Although the injunction was upheld and did not encroach upon the legislative lawmaking function, modern commentary points out that *Debs* "might be viewed as a case in which both the Court and the executive usurped the legislative function of Congress."[69]

Thus it may be said, as an overview of Supreme Court decisions treating separation of powers, that there exist no clear lines of demarcation concerning that which constitutes a violation of the doctrine. This is a field of constitutional decisionmaking where very broad, yet primordial, principles are applied on a case-by-case basis, each subsequent case further elucidating the meaning of separation of powers. In *Chadha*, the Supreme Court once again faced the task of interpreting this difficult doctrine.

III. *Immigration and Naturalization Service v. Chadha*

A. The Facts of *Chadha*

Jagdish Rai Chadha was admitted to the United States on a non-immigrant student visa in 1966. He is an East Indian, born in Kenya and the possessor of a British passport. His student visa expired on June 30, 1972. The District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported. This occurred on October 11, 1973. Pursuant to statute[70] a deportation hearing was held on January 11,1974 before an immigration judge. Chadha admitted his deportable status, but the hearing was adjourned in order to allow him to file an application for suspension of deportation under statute.[71]

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67. *See* Fellman, *The Separation of Powers and the Judiciary*, 12 REV. OF POL. 357, 376 (1976).

68. 158 U.S. 564 (1895).

69. Levi, *supra* note 39, at 382.

70. Immigration and Nationality Act, § 242(b), 8 U.S.C. § 1252(b) (1976).

71. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a) (1) provides in relevant part:

> (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

The deportation hearing was continued after Chadha had submitted his application for suspension. On June 25, 1974, on the basis of a character investigation by the Immigration and Naturalization Service and supporting afidavits, the immigration judge ordered Chadha's deportation suspended and submitted a report of suspension to Congress.[72] Congress had the power by statute to veto such a suspension.[73] Congress did not exercise this veto power until the first session of the Ninety-Fourth Congress. On December 12, 1975 a resolution was introduced into the House of Representatives opposing the suspension of deportation of Chadha and five other aliens.[74] The resolution was

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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.

72. Immigration and Nationality Act, § 244(c)(1), 8 U.S.C. § 1254(c) (1) provides in relevant part:

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

73. Immigration and Nationality Act, § 244(c)(2), 8 U.S.C. § 1254(c) (2) provides in relevant part:

> (2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or 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.

74. H.R. Rep. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40247 (1975). The resolution was passed onto the House Committee on the Judiciary for consideration. It is fairly clear that the Committee's consideration was perfunctory at best, as is attested to by Representative's Eilberg's simplistic rationale for the revocation of Chadha's suspension of deportation:

> It was the feeling of the committee, after reviewing 340 cases, that the

passed without debate or a recorded vote. It was neither presented to the Senate nor to the President, as is constitutionally mandated for legislation.

In the wake of this resolution, deportation proceedings were reopened. The immigration judge held that he had no authority to rule on the constitutionality of the House's actions. On November 8, 1976, Chadha was ordered deported. Chadha appealed to the Board of Immigration Appeals which summarily affirmed the lower administrative court. Chadha then sought judicial review, under statute, of the administrative appeal court's decision. He filed a petition for review in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service agreed with Chadha's position and joined with him in arguing for the unconstitutionality of the House's actions. The court of appeals invited both the Senate and the House of Representatives to file briefs *amicus curiae.*

The court of appeals held that the House was in violation of the doctrine of separation of powers in its exercise of the legislative veto.[75] The House and Senate then filed motions to intervene and petitions for rehearing. The court of appeals granted the motions to intervene but denied rehearing. Later motions for rehearing en banc were also denied. Certiorari was granted by the United States Supreme Court as to the appeal taken by the House of Representatives.[76] Oral arguments were had on February 22, 1982. The case was reargued October 7, 1982. The Court filed its final decision June 23, 1983.[77]

> aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship; and that it is the opinion of the committee that their deportation should not be suspended. I should emphasize that this is a disapproval resolution and unless it is adopted in this session of Congress permanent residence will be granted to those aliens named in the resolution.

121 CONG. REC. 40800 (1975) (statement of Rep. Eilberg).

75. *Chadha*, 634 F.2d at 436. The case was originally argued before and submitted to a panel consisting of circuit judges Ely, Carter and Kennedy on April 10, 1978. It was then reassigned to a panel consisting of circuit judges Ely, Kennedy and Hug on August 13, 1980.

76. 454 U.S. 821 (1981). Judgment as to jurisdiction over the Immigration and Naturalization Service was postponed until the merits.

77. Counsel present in the case were as follows: Alan B. Morrison for Chadha, the Solicitor General Rex Lee for the Immigration and Naturalization Service, Eugene Greesman for the House of Representatives, and Michael Davidson for the Senate. Briefs *amicus curiae* were filed by the American Bar Association and the Counsel on Administrative Law of the Federal Bar Association.

B. The Majority Opinion

1. *Threshold Issues*

Before embarking upon the constitutional inquiry concerning the legislative veto provision in the Act, the Court addressed several threshold issues challenging the justiciability and the jurisdiction of the case.

First, the Court considered a challenge to its appellate jurisdiction.[78] The Court reasoned that the Supreme Court was a proper forum for the purposes of 28 U.S.C. § 1252, that the proceeding below was a civil suit pursuant to the statute, and that the appellant in this case was aggrieved by the proceeding below within the meaning of section 1252.[79] Even though the Immigration and Naturalization Service together with Chadha sought the invalidation of the House's action, the Service was aggrieved because it was bound by statute to execute an order of Congress which might be held unconstitutional.[80] Thus, appellate jurisdiction was found to have been properly taken.

The Court next turned to the issue of severability. The Court soundly rejected the contention that section 244(c)(2) was not severable from the remainder of the Immigration and Nationality Act. The Court noted that if the subsection was not severable, the entire statute would be unconstitutional. Chadha would, therefore, be deported since the Attorney General would have no power to suspend deportation.[81]. However, the Court took notice that the Act employs a self-executing severability clause[82] which renders any portion of the Act held unconstitutional void and severed from the remainder of the Act.[83] Furthermore, the legislative history of the Act demonstrated that it was intended by its drafters to facilitate severability.[84] Finally, it was stated that, as a general rule, a provision is presumed severable if the remainder of the statute after severability would be operative as law.[85] Thus "section 244(c)(2) survives as a workable administrative mechanism

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78. The Supreme Court exercised jurisdiction pursuant to 28 U.S.C. § 1252 (1976). *See supra* note 76 and accompanying text.

79. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2773. *See supra* note 78.

80. *Id.*

81. *Id.* at ___, 103 S. Ct. at 2774.

82. *Id.*

83. Immigration and Nationality Act, § 406, 8 U.S.C. § 1101 (1976).

84. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2775.

85. *Id.*

without the one-House veto."[86] Chadha also had standing to appeal. The Court rejected the position that Chadha lacked injury in fact and merely represented the interests of the executive branch. The injury was possible deportation; an injury which would be redressed if the legislative veto were to be held unconstitutional.[87]

Likewise, the Court rejected the argument that it should avoid the constitutional issue in the case on the grounds that Chadha had alternative statutory relief available to redress his injuries. Although Chadha married a citizen of the United States during the pending appeal and might have been accorded resident status as an immediate relative,[88] such classification was speculative at best.[89] Equally speculative was the possibility that Chadha may have been granted asylum by the Attorney General if he was unable to return to his homeland for fear of persecution.[90] Thus, Chadha had no substantive alternative relief available to him which might have precluded the Court from consideration of the constitutional aspects of the case.

The Court also refuted a challenge to the jurisdiction of the court of appeals under the Act.[91] It was claimed by the House of Representatives that 8 U.S.C. § 1105(a) could not sustain jurisdiction since Chadha was not challenging the deportation determination but rather the constitutionality of the legislative veto provision. Nevertheless, it was held that since Chadha's status as deportable was de facto dependent upon the constitutionality of the Act, he was challenging the deportation determination itself.[92] The relief he sought was directly inconsistent with the deportation order.[93] Therefore, jurisdiction was properly taken in the court of appeals.

Next the Court focused on the contention that the case did not constitute a genuine controversy under the "case or controversy" clause

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86. *Id.* at ___, 103 S. Ct. at 2776.

87. *Id.*

88. Immigration and Nationality Act, §§ 201(b), 204, 245, 8 U.S.C. §§ 1151(b), 1154, 1255 (1976).

89. *Chadha,* ___ U.S. at ___, 103 S. Ct. at 2777.

90. *Id.* at ___, 103 S. Ct. at 2776. The Court here refers to the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

91. The court of appeals took jurisdiction under section 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a) (1976). *See Chadha,* 634 F.2d at 411-12; *see also* Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963).

92. *Chadha,* ___ U.S. at ___, 103 S. Ct. at 2778.

93. *Id.*

of the Constitution.[94] It was argued that this question was moot since the House and the Senate intervened in the action.[95] However, the Court continued to point out that even "prior to Congress' intervention, there was adequate article III adverseness even though the only parties were the Immigration and Naturalization Service and Chadha."[96] Resting on the same rationale employed to dispell the challenge to its appellate jurisdiction, the Court held that, notwithstanding the fact that Chadha and the Immigration and Naturalization Service both saw the legislative veto as unconstitutional, Chadha would still have been deported by the Service. This provided the requisite adverseness.

2. *Political Question Doctrine*

The justiciability of the case was also brought into question under the political question doctrine. The gravamen of the contention was that the "naturalization"[97] and the "necessary and proper"[98] clauses conferred upon Congress unbridled power over the disposition of aliens. Thus any adjudication in the case would amount to a decision of a nonjusticiable political question.

The Court rebutted this argument by indicating that "[t]he plenary authority of Congress over aliens. . .is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."[99] *Baker v. Carr* states that a political question may arise when there is "a textually demonstrable constitutional commitment of the issue to coordinate political department. . . ."[100] If it were to be held that means of implementing a plenary authoriity was beyond judicial scrutiny under the political question doctrine, then it would follow that "virtually every challenge to the constitutionality of a statute would be a political question."[101] This conclusion is untenable since it would wrest constitutional decisionmaking from the judiciary, impeding, if not totally disrupting, its primary article III function.[102]

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94. U.S. CONST. art. III, § 2.
95. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2778.
96. *Id.*
97. U.S. CONST. art. I, § 8, cl. 4.
98. U.S. CONST. art. I, § 8, cl. 18.
99. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2779.
100. 369 U.S. 186, 217 (1962).
101. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2779.
102. *Id.*

3. *The Constitutionality of the Legislative Veto*[103]

Chief Justice Burger, writing for the majority, began with the pre-

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103. The topic of the constitutionality of the legislative veto had received much attention prior to the Supreme Court's decision on the case. For an in-depth analysis of the court of appeals' decision in *Chadha* see Comment, *Limiting the Legislative Veto: Chadha v. Immigration and Naturalization Service,* 81 COLUM. L. REV. 1721 (1981).

Most scholarly opinion before the determination of the case argued for the unconstitutionality of the legislative veto. *See, e.g.*, Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?* 56 N.C.L. REV. 423 (1978); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power,* 68 VA. L. REV. 253 (1982); Stewart, *Constitutionality of the Legislative Veto,* 13 HARV. J. LEGIS. 593 (1976); Kahn, *In Perpetual Tension: Executive-Legislative Relations and the Case of the Legislative Veto,* 11 PRES. STUD. Q. 271 (1981); Committee on Federal Legislation of the Association of the Bar of the City of New York, *The Legislative Veto Symposium,* 28 AD. L. REV. 575 (1976); *accord* Keefe, *Can a Legislative Veto Be a Bill of Attainder,* 68 A.B.A. J. 103 (1982); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies,* 75 NW. U.L. REV. 1064 (1981); Cooper and Hurley, *The Legislative Veto: A Policy Analysis,* 10 CONGRESS & THE PRESIDENCY 1 (1983); *But see* Javits and Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis,* 52 N.Y.U.L. REV. 455 (1977); Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives,* 52 IND. L. REV. 323 (1977); Schwartz, *The Legislative Veto and the Constitution—A Reexamination,* 46 GEO. WASH. L. REV. 351 (1978); Bruff and Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes,* 90 HARV. L. REV. 1369 (1977); *cf.* Fisher, *A Political Context for Legislative Vetoes,* 93 POL. SCI. Q. 241 (1978) (viewing the legislative veto as a useful prudential device). *See generally* S. BERBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER (1975) (demonstrating the general pros and cons of the legislative veto as it concerns delegation of Congressional powers).

Many "general" periodicals also noted the prospective battle on the horizon. Uniformly, they view the legislative veto as constitutionally improper. *See* Witter, *The Legislative Veto: A Fight on the Horizon,* BUREAUCRAT, Summer 1980, at 31; Miller, *The Legislative Veto,* PROGRESSIVE, May 1978, at 12; Shapiro, *Legislative Veto: Latest Power Fight,* U.S. NEWS & WORLD REP., Dec. 13, 1982, at 88; Green and Zwenig, *The Legislative Veto Is Bad Law,* 227 NATION 434 (1978).

It is also interesting to note that prior to *Chadha*, Presidential disapproval of the legislative veto process transgressed party lines. President Carter voiced strong disapproval of the veto. President's Message to Congress Transmitting His Views on the Use of the "Legislative Veto," H.R. DOC. NO. 357, 95th Cong., 2d Sess. (1978). President Reagan also criticized the veto as unconstitutional concerning various bills before him for consideration. Statement on Signing the Union Station Redevelopment Act of 1981, 1981 PUB. PAPERS 1207 (1981); Amendments to the Tribally Controlled Community Colleges Assistance Act of 1978, 19 WEEKLY COMP. PRES. DOC. 7 (1983); Amendments to the Education Consolidation and Improvement Act of 1981, 19 WEEKLY

sumption of validity of the challenged legislative veto provision. The only inquiry which the Court was concerned with was the constitutional basis of the statute, not its wisdom.[104] The Chief Justice, however, offset this token bow to judicial restraint with the statement that mere utilitarian virtues will not shield the statute from constitutional scrutiny. Indeed, "[c]onvenience and efficiency are not the primary objectives-or the hallmarks-of democratic government. . . ."[105] This statement serves two functions. First, it posits a constitutional truism. Second, it anticipates and undermines Justice White's characterization of the legislative veto as a useful mechanism.[106]

The Chief Justice then turned to a discussion of the "presentment" clauses[107] of the Constitution. It was the Framers' intent that the presentment clauses provide the necessary safeguards to protect the separation of powers. Both the presentment to the President and the Presidential veto were considered integral to the entire fabric of the Constitution.[108] The powers given to Congress were "to be most carefully circumscribed."[109] This was to protect the public from any oppressive legislation which might be passed under the guise of a "private bill." This danger is one of contemporary concern, given the various political sentiments which might prompt self-interest legislation not calculated to evince the will of the people in general. The Chief Justice also pointed out that the presentment clauses insure a national view-

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COMP. PRES. DOC. 38 (1983).

104. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2770.

105. *Id.* at 2781.

106. *Id.* at 2785 (White, J. dissenting). This, as is seen later, is a vast oversimplification of Justice White's position in his dissent, amounting to the commission of a "straw man" fallacy.

107. U.S. CONST. art. I, § 7, cl. 2, 3 provide in relevant part:

> Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States. . . . 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 presented in the Case of a Bill.

Id.

108. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2782.

109. *Id.*

point in the legislative process.[110] Although the legislature is the elected body representative of the aggregate of the people, so too is the President elected. There may be some situations in which the people's will is better represented by him. It is in this capacity as the executive representative of the people that his veto has full significance. It manifests a check for the people on improvident legislative measures, just as the two thirds veto override of Congress operates as a cross-check for the people against ill-advised executive denials of the legislative will.

Having dealt with the presentment clauses, Chief Justice Burger turned to the issue of bicameralism.[111] He stated that a primary purpose of bicameralism is to protect against hatily considered legislation. The requirement of passage by both Houses of the legislature makes mandatory careful and full consideration of any proposed law before it cvould take effect.[112] Nonadherence to the bicameralism principle could erupt into a legislative tyranny. At first blush, this view seems plausible. However, upon perusal of the Chief Justice's bicameral argument, it becomes apparent that his conclusion rests upon an ill reasoned interpretation of the purposes of bicameralism. Certainly the primary purpose of the bicameral requirement was to assuage the lesser populated states as to their representation in the legislature. By providing for the Senate, the Framers called for equal representation by state, regardless of the relative population of the states. This was not the case with the representation of the House of Representatives, allotted solely on the basis of population. This protected individual state identity-if not, in a sense state sovereignty-in the congress. Thus, any legislation to be put into effect must both pass a vote by the representatives of the numbers of people and by the representatives, irrespective of the numbers, of the several states. This is not to say that the Chief Justice's reasoning is without merit. Close scrutiny of proposed laws is an important incident to bicameralism. However, it is misleading to place this rationale upon the Framers as an exclusive one.

The majority then turned to the analysis of the constitutionality of

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110. *Id.* at 2782-83.

111. U.S. CONST. art. I, § 1 provides that "[a]ll legislative powers herein agranted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 7, cl. 2 also insures bicameralism. *See supra* note 107.

112. *Chadha,* ___ U.S. at ___, 103 S. Ct. at 2783. *See also* Brief for Appellee at 57, Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983); Brief for Appellant at 29, Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983).

section 244(c)(2) under the presentment causes, bicameralism, and the separation of powers. Chief Justice Burger stated that "[a]lthough not 'hermetically" sealed from one another, . . .the powers delegated to the three branches are functionally indentifiable."[113] When a branch acts, there is a presumption that it acts constitutionally within its sphere of delegated powers.[114] However, in order that the acts of the House may be held to the letter of the presentment clauses and bicameralism, it must be established that the House acted in a *legislative* manner. The Chief Justice held that there can be no doubt that the House of Representatives acts were legislative in nature. The House sought to alter the legal rights of Chadha, the Attorney General, and administrative officials in general. This alteration could only have been achieved by legislation, since there is no plenary authority under the Constitution for such acts by the House.[115] The intent of Congress in authorizing the one-house legislative veto also demonstrates its legislative veto also demonstrates its legislative nature:

> After long experience with the clumsy, time consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I.[116]

Thus, given the legislative character of its acts, the House has invaded the executive's constitutionally delegated powers by circumventing the presentment clauses and bicameralism. There are four situations in which one house may act without presentment and these situations are expressly set out in the Constitution: 1) the House of Representatives may initiate impeachment proceedings,[117] 2) the Senate may conduct trials of impeachment and convict pursuant to those

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113. *Chadha,* ___ U.S. at ___, 103 S. Ct. at 2784.

114. *Id.*

115. *Id.* at 2784-85.

116. *Id.* at 2786. *See also* Transcript of Oral Argument at 13-15, Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983) (argued Feb. 22, 1982) where Mr. Gressman, counsel for the House of Representatives, is questioned in hypothetical form about such a delegation and its legislative character.

117. *Chadha,* ___ U.S. at ___, 103 S. Ct. at 2786. *See* U.S. CONST. art. I, § 2, cl. 6.

proceedings,[118] 3) the Senate has final approvement power over presidential appointments,[119] and 4) the Senate may ratify presidentially-negotiated treaties.[120] In the face of these express exceptions to presentment and bicameralism, it is apparent that the Framers intended that these be special instances and that no implied powers along these lines should be recognized.[121] The constitutional tapestry is woven with the inviolable thread of separation of powers which was "intended to erect enduring checks on each Branch."[122]

The House of Representatives argued, however, that the affirmance of the court of appeals would have the effect of sanctioning lawmaking by the Attorney General, which in turn would amount to a circumvention of the bicameral process.[123] The Chief Justice cogently pointed out that even though agency activity may be viewed as quasi-legislative, bicameral checks on this activity are not constitutionally mandated since executive acts within the administrative activity are limited in scope by statutory enactments of Congress, pursuant to article I, sections 1 and 7. Therefore, the Attorney General acts presumptively in an executive capacity, although delegated by Congress certain quasi-legislative responsibilities; a capacity which does not receive constitutional scrutiny under bicameralism or under the presentment clauses.[124]

Thus, the majority in *Chadha* held section 244(c)(2) unconstitutional in violation of separation of powers os set forth in the presentment clauses and the mandate for bicameralism, affirming the judgment below in the court of appeals.[125]

C. Justice Powell's Concurrence

Justice Powell, concurring in the judgment of the majority, would

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118. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2786. *See* U.S. CONST. art. I, § 3, cl. 5.

119. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2786. *See* U.S. CONST. art. II, § 2, cl. 2.

120. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2786. *See* U.S. CONST. art. II, § 2, cl. 2.

121. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2787.

122. *Id.*

123. Brief for Petitioner, U.S. House of Representatives at 40, Immigration and Naturalization Service v. Chadha, ___ U.S. ___ 103 S. Ct. 2764 (1983).

124. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2785 n.16.

125. *Id.* at 2788.

hold the legislative veto as applied in this case unconstitutional as a violation of separation of powers on different grounds from the majority. Justice Powell rightly noted the breadth of the majority's holding; it "will invalidate every use of the legislative veto."[126] In a plea for judicial restraint, Justice Powell stated that the holding of the Court "should be no more extensive than necessary to decide this case."[127] Congress evidently viewed the legislative veto as an essential check on its delegation of power to the executive in the form of administrative agencies. Due to the nature of the legislature as a coordinate branch of government, due respect should be accorded its judgments, inasmuch as the constitution will countenance such respect. Thus, Justice Powell would hold that Congress has assumed a judicial posture in violation of separation of powers in its use of the legislative veto in this case. He would not reach the overly broad questions of validity under the presentment clauses and bicameralism.[128] However, Justice Powell's opinion must not be easily dismissed as a limited holding, merely deferential to a coordinate branch of government. The opinion is tightly reasoned, and provides a more secure rationale for *Chadha* than the majority furnishes.

Justice Powell begins his analysis by establishing the Framers' attention to the necessity of the separation of the legislative and judicial branches. Such intent may be seen in the text of the Constitution in the bill of attainder clause, which must be read as an implementation of the separation of powers doctrine.[129] The doctrine may be violated in two ways. First, a branch may interfere with another branch's constitutionally delegated function. Second, a branch may actually assume a function delegated to a coordinate branch unconstitutionally. This case is of the second genre.[130]

That the House usurped a judicial function in *Chadha* is clear. First, they had not enacted a general rule, rather they had specifically determined the status of Chadha's individual rights.[131] Second, even if the House's actions were not to be seen as providing a *de novo* adjudi-

126. *Id.* (Powell, J. concurring).

127. *Id.* at 2789.

128. *Id.* at 2792.

129. *Id.* at 2789-90. *See* U.S. CONST. art. I, § 9, cl. 3. Although Justice Powell does not assert that the legislative veto is a bill of attainder per se, such a position has been advanced. *See* Keefe, *supra* note 103, at 103.

130. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2790 (Powell, J. concurring). *See supra* note 39.

131. *Id.* at ___, 103 S. Ct. at 2791.

cation, they have taken on the color of an appellate tribunal.[132] This has dangerous implications for Chadha's rights. Congress, unlike the courts, is not bound constitutionally by substantive rules of due process, nor "procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal. . . ."[133] This danger was further compounded in this case where the House abandoned even its own normal procedures for considering resolutions due to time constraints.[134] Indeed, "[t]he only effective constraint on congress' power is political."[135] This hardly provides a procedural safeguard against an abuse of a person's individual rights. Further, although Congress "is most accountable politically when it prescribes rules of general applicability,"[136] here it prescribed a special rule determinative of Chadha's individual rights. Thus, there is no shred of political accountability here.[137]

Justice Powell also successfully rebutted the majority's criticism of his position that Congress had assumed a judicial function. Chief Justice Burger states that Justice Powell's position cannot be maintained because the determination of the Immigration and Naturalization Service presented an nonjusticiable issue, unreviewable by a court on appeal.[138] Justice Powell aptly reasoned in retort that "reviewability" is not coextensive with "adjudication." Although procedurally a court of appeals may not review a substantive decision by the Attorney General in such a case, this does not diminish the judicial character of Congress' acts.[139]

The strength of Justice Powell's opinion can best be seen in the light of *Consumer Energy Comm'n of America v. FERC*,[140] summarily affirmed by the Court subsequent to *Chadha*. In *FERC*, a legislative veto in a natural gas pricing rule promulgated by the Federal Regulatory Commission was held unconstitutional. However, in *FERC* the

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132. *Id.*

133. *Id.* at ___, 103 S. Ct. at 2792.

134. *Id.* at ___, 103 S. Ct. at 2791 n.6. Congress had the Attorney General's report on the suspension of Chadha's deportation for a year and a half. However, there was no action taken until three days prior to the running of the statute of limitations period. Thus, the resolution was neither circulated nor effectively debated.

135. *Id.* at ___, 103 S. Ct. at 2792.

136. *Id.*

137. *Id.*

138. *Id.* at ___, 103 S. Ct. at 2787 n.21 (majority opinion).

139. *Id.* at ___, 103 S. Ct. at 2791 n.8 (Powell, J. concurring).

140. ___ U.S. ___, 103 S. Ct. 3556 (1983). The lower court's opinion may be found at 673 F.2d 425 (D.C. Cir. 1982).

veto was a two-House veto. This vitiates the force and applicability of one prong of the majority's holding in *Chadha*.

Thus, Justice Powell was not willing to declare, as the majority did, the unconstitutionality of every legislative veto provision. These provisions are extant in numerous enactments of Congress and may present differing degrees of intrusiveness, some of which may be unconstitutional, others which may not.[141]

D. Justice White's Dissent

Justice White strenuously dissented from the majority's holding. He joined Justice Powell in a plea for judicial restraint, although Justice White would not hold the legislative veto in this case unconstitutional. Initially, Justice White recognized the utility of the legislative veto as evidenced by its historical application.[142] In his view Congress faces a dilemma in the absence of the legislative veto. Either the legislature must refrain from delegating authority to the executive or it must allow the adminstrative agencies unbridled lawmaking power.[143] He then attacked the majority's heavy reliance on the Framers' intent in deciding the constitutional question. The complexities of modern government are well beyond those which confronted the Framers.[144] However, not willing to rely solely upon this utilitarian argument, Justice White proceeded to the conclusion that the legislative veto in *Chadha* does not violate the doctrine of separation of powers.

Justice White argued that only bills and equivalent enactments of Congress should be required to pass muster under the presentment clauses and the requirement of bicameralism. The legislative veto does not rise to the dignity of a bill because "[t]he power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration."[145] The legislative veto no more gives Congress lawmaking ability through one house than the presidential veto gives such power to the executive.[146] The presentment clauses only apply to actions for which concurrence of the two houses is "nec-

141. *See Chadha*, ___ U.S. at ___, 103 S. Ct. 2792-2816 *passim* (White, J. dissenting).

142. *Id.* at ___, 103 S. Ct. at 2793-96.

143. *Id.* at ___, 103 S. Ct. at 2793.

144. *Id.* at ___, 103 S. Ct. at 2798.

145. *Id.* at ___, 103 S. Ct. at 2799.

146. *Id.*

essary."[147] It is not clear that this mandate covers the legislative veto in this instance. Legislative authority is delegated to agencies as a matter of course. Justice White argued that the Congress must have an effective means to check the power of such agencies which is thus delegated.[148] Paradoxically, the majority held that the independent agencies may indulge in making "rules" with the force of law, whereas the legislature, the branch constitutionally entrusted with lawmaking authority, may not check such power in the agencies.[149]

Justice White also urged that there is a de facto concurrence of opinion on the part of both houses and the President. The Attorney General manifests the President's approval in submitting a report to Congress recommending suspension of deportation. The House and Senate may tacitly approve this recommendation by their silence. If either the Senate, the President, or the House of Representatives disagrees, then Chadha's status is maintained deportable.[150] The suspension order does not in and of itself maintain Chadha as nondeportable, it merely defers deportation.[151] Thus, there has been a concurrence of the three interested entities before a change of Chadha's status.

Justice White's argument is suspect on three points. First, there has not been a concurrence of the House and Senate in this case. The House of Representatives acted on its own in its veto. Second, the concept of tacit approval by either the Senate of the House's action or by both houses of the Attorney General's suspension of deportation is highly debatable. It is more likely that silence on the part of either house manifests nescience or apathy rather than considered approval. Third, the contention that Chadha's status is not altered from that of a deportable alien to that of a nondeportable alien by the Attorney General's suspension of deportation begs the question. Concurrence of opinion on the part of the two houses and the executive are necessary to establish the status of Chadha.

Justice White's arguments against the necessity of presentment and bicameralism for the validity of the legislative veto further draw light upon the insufficiencies in the majority's opinion, lending transitively more force to Justice Powell's concurrence. Justice White attempts to draw Justice Powell's opinion into question by asserting that

147. U.S. CONST. art. I, § 7, cl. 3.
148. *Chadha*, ___ U.S. at ___, 103 S. Ct. at 2802 (White, J. dissenting).
149. *Id.* at ___, 103 S. Ct. at 2804.
150. *Id.* at ___, 103 S. Ct. at 2806.
151. *Id.* at ___, 103 S. Ct. at 2807.

Congress has not exercised a judicial function, since a *refusal* of suspension by the Attorney General is judicially reviewable.[152] However, this argument is ill-founded. In *Chadha,* it is the reviewability of *granting* of suspension of deportation that is the question. The problem is that Congress has put itself into that reviewing posture.

Therefore, even though Justice White would not hold that all legislative vetoes are constitutional, he would hold that in *Chadha* the veto did not violate the separation of powers. Indeed, the veto provides "a necessary check on the unavoidably expanding power of the agencies. . .as they engage in exercising authority delegated by Congress."[153]

E. Justice Rehnquist's Dissent

Justice Rehnquist declined to reach the merits of the case. He opined that section 244(c)(2) was not severable from the remainder of the statute. Stating that a severability clause was not dispositive on the issue of severability in general, he argued that the intention of Congress discloses the section's inherent unseverability. Congress never intended that a class of persons in Chadha's position would be able to take advantage of a suspension of deportation.[154] Thus the statute is only severable if Congress would have intended that the Attorney General be able to suspend deportations without the section in question. To hold otherwise would be to expand the statute beyond its own bounds.[155] However, the majority's tripartite test for severability entirely undercuts this offering.[156] Justice White joined in the dissent.

IV. After the Fall: What May Congress Do?

It is evident from the Court's decisions subsequent to *Chadha* that the breadth of the majority's holding will reach all legislative veto provisions in other statutes.[157] The central issue now is: how may Congress constitutionally implement alternative schemes for checking powers delegated to the administrative agencies?

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152. *Id.* at ___, 103 S. Ct. at 2810.
153. *Id.*
154. *Id.* at ___, 103 S. Ct. at 2816 (Rehnquist and White, JJ. dissenting).
155. *Id.*
156. *Id.* at ___, 103 S. Ct. at 2774-76 (majority opinion). *See supra* p. 22.
157. *See FERC,* ___ U.S. ___, 103 S. Ct. 3556; Consumers Union v. FTC, ___ U.S. ___, 103 S. Ct. 3556 (1983) *aff'g* 691 F.2d 575 (1982) (en banc).

One issue left open by *Chadha* is severability. Although the legislative veto provision in *Chadha* was deemed severable, such may not be the case in all statutes, depending on explicit statutory language and legislative history. A constitutional attack on a non-severable legislative veto provision would result in the unconstitutionality of the otherwise valid remainder of the statute in question. Thus Congress may step back and allow the judiciary to invalidate legislative veto provisions on constitutional grounds, on a case-by-case basis. The main drawback with this "wait and see" scheme is that the courts will have to determine in each case the severable or non-severable nature of each veto provision, hardly an efficient or uniform method of settling the dispute at hand. It seems clear that the first step in a resolution of Congress' dilemma must be to excise all legislative veto provisions from statutory law. Having done this, Congress has numerous options at its disposal to replace the checks on the administrative agencies previously afforded by the legislative veto.

Although some doomsayers have proposed that all rulemaking capacities of agencies should be eliminated or that there be a constitutional amendment to validate the legislative veto,[158] there exist more prudent measures available to Congress. Congress may choose to delegate with greater specificity to the agencies.[159] With greater restrictions accompanying delegation to the agencies, Congress would retain a check on agency overstepping without putting itself in the unconstitutional role of an appellate body. This would result in extremely complicated statutory law making in many ways resembling code enactment.[160] It would require a virtual overhaul of well over one hundred statutory provisions. A more expeditious alternative along these same lines simply would be to revoke much of the authority already residing in the agencies. More than likely, a combination of these two approaches would prove most effective.

Congress may also opt for a more formal scheme to check agency power. One such scheme might be a "delayed effectiveness" provision allowing Congress a period of time to enact legislation to annul or oth-

158. *See* Smith and Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1261, 1262 (1983).

159. Congress has already taken steps in this direction by imposing new restrictions on the Consumer Product Safety Commission. *See* H.R. 2668, 98th Cong., 1st Sess., 129 CONG. REC. H4759 (daily ed. June 29, 1983).

160. *How Congress May Replace the Legislative Veto*, BUS. WK., July 11, 1983, at 29.

erwise affect a newly enacted regulatory rule[161] The problem with this approach is that such a provision would seem to be subject to bicameralism and presentment criteria, as was the case with the legislative veto.[162]

Congress may also resort to a more coercive measure. It may curtail agency power by declining to authorize funds for activities it deems undesirable.[163] This approach may be lacking since it would foster "special interest" lobbying concerning funds allotted to specific agencies. It may be argued that this is already a common practice regarding agency funding; however, it is clear that this common practice would be escalated if such withholding of funds became "formalized" as a Congressional check against the executive agencies.

V. Conclusion

The Supreme Court's ruling in *Chadha* has vast implications on the relationship between the executive and legislative branches. It denudes as unconstitutional a longstanding legislative mechanism for checking agency abuse of delegated rulemaking power, making it necessary for Congress to adopt alternative schemes to accomplish this goal. The range of statutes so affected is broad; so broad that the Court invalidated more legislation in *Chadha* than was invalidated cumulatively in the entire history of the court.[164]

There are reservations concerning the breadth and logic of the majority's holding. Justice Powell's well reasoned concurring opinion provides a better rationale for the unconstitutionality of the legislative veto and demonstrates a properly narrow holding on facts of the case, a holding which would not unadvisedly call to task all legislative veto provisions.

Regardless of the wisdom of the majority's holding, *Chadha* stands as the most recent pronouncement on the doctrine of separation of powers, a doctrine which commands a central position in the development of constitutional interpretation. From its inception in Greek philosophy, through its crucial formulation by Montesquieu and ultimately to its uneven treatment in the Supreme court, the doctrine has remained at

161. Smith and Struve, *supra* note 158, at 1261.
162. *Id.*
163. *Id.* at 1262.
164. Chadha, ___ U.S. at ___, 103 S. Ct. at 2810-11 (White, J. dissenting).

the vortex of political controversy. *Chadha* is no exception to this observation.

Fred L. Rush, Jr.