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LEGISLATIVE DELEGATION OF POWERS: A HOBSON'S CHOICE?

RODOLPHE J.A. DE SEIFE*

I. INTRODUCTION

The day after the *Chadha* decision was handed down,¹ one of my friends, a constitutional lawyer of repute, stated flatly that *Chadha* was potentially one of the major Supreme Court decisions of the Twentieth Century: I believe that this is an overstatement of the historic significance of that case.

At first blush one might readily agree with Justice White's assessment of the apparent impact of the *Chadha* decision.² The sweeping statement by the majority as to the unconstitutionality of the legislative veto is, on its face, an unusual departure from the Supreme Court's normal reluctance to squarely face a constitutional issue,³ and when it does so, to then limit the reach of its decision to the narrowest area possible.⁴ In that

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1. The decision was issued on June 23, 1983. *Immigration and Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983).

2. "Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'" *Id.* at 2793 (White, J., dissenting). See also Mark S. Pulliam, Esq., in his book review in 69 ABAJ. 1724 ("(T)he invalidation of legislative vetoes will have an enormous impact on the political aspect of regulation. . .").

3. "When faced with problems of whether particular issues are properly presented for adjudication, courts frequently allude to judicial restraints as a reason for hesitation about passing on the merits." Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*. 93 Harv. L. Rev. 297, 302 (1979).

4. [The Supreme Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of con-

context the *Chadha* decision does exceed in its generality anything the Court has done in its history, including its historic decision in the "Steel Seizure" case.⁵

However, a closer scrutiny of the majority opinion in *Chadha*, read in the context of the concurring opinion and the two dissents, leads one to conclude that, hopefully, *Chadha*'s importance may have been greatly exaggerated by some and that its effect may well be limited not only by a legislature more cautious in delegating its powers in the future⁶, but also by the Court itself, depending on its desire to do so.⁷ An indication in that positive direction is not apparent at this date.⁸

In the final analysis, if the Constitution has endured for over two hundred years it is in large part due to the essentially pragmatic approach of the American judiciary towards constitutional interpretation.⁹ It is a bit late in the day for the Supreme Court to become a "strict constructionist"¹⁰ and to revert to a doctrine

stitutional law broader than is required by the precise facts to which it is to be applied.

Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). See also *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

5. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952).

6. "[A] legislative rule may rest upon an implied or an unclear grant of power as well as upon an express and clear grant of power." K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 5.03, at 299 (1958). It seems to me that by simply using clear and unambiguous language, Congress can effectively limit the power delegated to the various agencies.

7. The Court has, on occasion, been willing to retreat from a previous position. In *White Motor Co. v. United States*, 372 U.S. 253 (1963), the Supreme Court held that vertical territorial and customer restrictions were not "per se" illegal. Four years later, without reversing *White Motor*, the Supreme Court held in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967), that vertical territorial and customer restraints in re-sale transactions were "per se" illegal. Ten years later, changing directions again, the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977) said, "the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*."

8. See, e.g., *Process Gas Consumers Group v. Consumer Energy Council of America*, 103 S. Ct. 3556 (1983), *aff'g.* *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982); *United States Senate v. FTC*, 103 S. Ct. 3556 (1983), *aff'g.* *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc).

Following the Supreme Court's lead, lower federal courts have followed suit in other cases involving the legislative veto mechanism. E.g. *Mohammed Ali Ghoelian v. I.N.S.* slip op. (6th Cir. Sept. 14, 1983); *LeBlanc v. I.N.S.*, 715 F.2d 685, 688 n.2 (1st Cir. 1983).

9. "Under such circumstances we think it is not forbidden by the Constitution that there be a pragmatic test of matters which even the most expert could not know in advance." *Market St. Ry. Co. v. Railroad Comm'n.*, 324 U.S. 548, 569 (1945).

10. Strict construction of a statute means simply that it must be confined to such subjects or applications as are obviously within its terms

of separation of powers which, if it is as the Court perceives it, is nearly two hundred years old.¹¹ For this Supreme Court to state that a theoretical doctrine never immutably incorporated in the Constitution rules us from the graves of our country's Founders some two centuries later, after numerous rulings altering the original document beyond a shape recognizable to its original signers, is surprising. To proceed, by the stroke of a pen, to impair or destroy the political working apparatus set up by the twentieth century congress in over two hundred statutes,¹² with the consent and the approval of the Executive,¹³ is a bit much to peacably digest.¹⁴

My somewhat pessimistic assessment is that if something is not done to limit the *Chadha* decision to the facts in that case, it may well have a most deleterious effect on modern American democratic government. It may far exceed any constitutional damage that the Supreme Court apparently perceived in finding the offending legislative veto clause, in the Immigration and Nationality Act, unconstitutional merely because Congress tried to retain a modicum of supervision over the implementation of the

and purposes. (citation omitted) It does not require such an unreasonably technical construction that the words used cannot be given their fair and sensible meaning in accord with the obvious intent of the legislature.

City of Elmhurst v. Buettgen, 394 Ill. 248, 253, 68 N.E.2d 278, 283 (1946).

11. *Chadha*, 103 S. Ct. at 2781. The Court refers to its decision in *Buckley v. Valeo*:

We have recently noted that '[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.'

103 S. Ct. at 2781, *citing* *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

12. For a partial list of statutes authorizing congressional oversight, see *Watson, Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1089 (1975).

13. Of particular interest, at this time, are the following statutes: "War Powers Resolution," Pub. L. No. 93-148, § 5(c), 87 Stat. 555, 556-57 (1973) (where non-statutory hostile actions, may order removal of troops by concurrent resolution of Congress); and "Atomic Weapons and Special Nuclear Materials Rewards Act" Pub. L. No. 93-377, § 2, 88 Stat. 472, 474 *codified at* 42 U.S.C. § 2201(v) (1976) (disapprove proposed distribution of nuclear material to foreign nation by concurrent resolution by Congress); and Act of Oct. 26, 1974 to amend the Atomic Energy Act of 1954, Pub. L. No. 93-485, 88 Stat. 1460, *codified at* 42 U.S.C. § 2153(d) (1976) (approval of proposed agreement for nuclear cooperation unless waived by Joint Committee resolution); and "Act of Dec. 27, 1974", Pub. L. No. 93-552, § 613, 88 Stat. 1745, 1766 (simple resolution by either House to disapprove military building project). See *Chadha*, 103 S. Ct. at 2811-16 (White, J., dissenting, Appendix 1) (listing of statutes with provisions authorizing Congressional review).

14. The Court should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N.Y. & Phila. S.S. Co. v. Commissioner of Emigration*, 113 U.S. 33, 39 (1885).

law by its delegate, the Attorney General—an arrangement which had worked for several decades. Time will tell us who is right.

The purpose of this article is to show how the Supreme Court itself might want to expressly limit the effect of the *Chadha* bombshell. Also, should it not choose to do so, what Congress can do about retaining some of its power before it is delegated to an executive branch with an ever growing hunger for concentrated clout.¹⁵

II. THE CHADHA DECISION

1. The Facts

The facts in this case are not an aide in making good law. Mr. Jagdish Rai Chadha is an alien who was admitted in 1966 to the United States on a student visa and, like so many foreign students from the Third World, apparently decided to overstay his legal stay which expired on June 30, 1972; he stayed because the United States had more appeal and more economic opportunities than the country from which he came.¹⁶ A little over a year later the law caught up with him, and the Immigration and Naturalization Service issued a show-cause order on October 11, 1973, as to why he should not be deported.¹⁷ Having applied for suspension of his deportation, and being lucky enough to appear before an apparently sympathetic immigration judge,¹⁸ he had his impending deportation suspended on June 25, 1974, pursuant to section 244(a) (1) of the Immigration and Naturalization Act.¹⁹ The Attorney General adopted the immigration judge's deci-

15. See de Seife, *The Exhaustion of the Exhaustion of Remedies: Increasing the Powers of the President Under the Guise of Administrative Law Reform*, 14 VAL. U.L. REV. 427 (1980). See also Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 AD. L. REV. 667 (1980).

16. "Chadha is an East Indian who was born in Kenya and holds a British passport." *Chadha*, 103 S. Ct. at 2770.

17. *Chadha v. Immigration and Naturalization Serv.*, 634 F.2d 408, 411 (9th Cir. 1980).

18. This authority was exercised pursuant to section 11, 5 U.S.C. § 3105 (1982), of the Administrative Procedure Act, which provides for hearing examiners to conduct hearings with agencies. In 1972, by Civil Service Commission promulgation, the title of "hearing examiner" was changed to "Administrative Law Judge." 37 Fed. Reg. 16,787 (1972). Congress obliquely approved what was a bold, if essentially unauthorized action (at least by statute) in 1978. 92 Stat. 183 (1978). In fact, however, the so-called "immigration judges" are not "administrative law judges", but rather *special inquiry judges* who have neither the independence nor the status of A.P.A. administrative law judges. 66 Stat. 209, § 242(b) (1952), 8 U.S.C. 1252(b) (1982); 8 C.F.R. § 242.8 (1983).

19. 8 U.S.C. § 1254(a)(1) (1982).

sion²⁰ and reported the order suspending the deportation to Congress as required by section 244(c)(1).²¹

The Supreme Court's majority opinion in *Chadha* points out that, absent congressional action, Chadha's deportation proceedings would have been cancelled the day after December 19, 1975, the last day on which Congress could exercise the veto authority reserved to it under section 244(c)(2), and his status would have been adjusted to that of a permanent resident alien.²² It was not until December 12, 1975, one week before the last day on which Congress could act, that the Chairman of the Judiciary Subcommittee on Immigration and Citizenship and International Law introduced a resolution vetoing "the granting of permanent residence in the United States to [six] aliens, including Chadha."²³ The House Committee on the Judiciary discharged the resolution from further discussion and forwarded it to the House of Representatives for a vote on December 16, 1975.²⁴ The resolution was passed.

Therefore, a year and a half after the Attorney General's Report was submitted, the House of Representatives by virtue of section 244(c)(2) passed a resolution vetoing the suspension of Chadha's deportation order,²⁵ after which the immigration judge had no choice but to reopen the deportation proceedings. At that hearing, Chadha attacked the constitutionality of the section of the statute²⁶ giving Congress the right to overview the Attorney General's action,²⁷ an argument that the immigration judge felt, correctly, unqualified to pass upon. On November 8, 1976, the judge ordered Chadha's deportation. Chadha then appealed to the Board of Immigration Appeals which similarly dis-

20. Pursuant to the provisions of 8 C.F.R. §§ 242.2, 103.5 (1983).

21. 8 U.S.C. § 1254(c)(1) (1982).

22. *See*, 8 U.S.C. § 1254(d) (1982).

23. *Chadha*, 103 S. Ct. at 2771, the court refers to H.R. Res. 926, 94th Cong., 1st Sess.; 121 Cong. Rec. 40,247 (1975).

24. *Chadha*, 103 S. Ct. at 2771. The court refers to 121 Cong. Rec. 40,800.

25. The House passed the resolution without any debate or recorded vote. *Chadha*, 103 S. Ct. at 2771.

26. 8 U.S.C. § 1254(c)(2) (1982).

27. (2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

8 U.S.C. § 1254(c)(2) (1982).

missed his argument. He then filed for a review of the deportation order with the U.S. Court of Appeals for the Ninth Circuit.²⁸ He was joined by the Immigration and Naturalization Service²⁹ in his argument that section 244(c)(2) was unconstitutional. The Court then requested *amici curiae* briefs from both the House of Representatives and the Senate. Chadha won in the Court of Appeals³⁰ on December 22, 1980, nearly three years later. Motions for rehearing and rehearing en banc were denied on March 25, 1981. The case was appealed to the Supreme Court by the Department of Justice primarily to decide this issue once and for all.³¹ The Supreme Court, not unexpectedly one feels, granted *certiorari*. Then, after hearing arguments in the October 1981 Term, the Court ordered reargument during the 1983 term—an unusual departure from normal procedure.³² The Court finally announced its decision on June 13, 1983, eleven years after Chadha's presence in the United States had become illegal and seventeen years after his entry.

2. The Main Issue

The main issue under consideration here, as stated by the Chief Justice,³³ is whether section 244(c)(2) of the Immigration and Nationality Act,³⁴ which authorizes one house of Congress to invalidate, by resolution, the decision of the Executive Branch (acting pursuant to authority delegated by Congress to the Attorney General of the United States) allowing a particular deportable alien to remain in the United States, is constitu-

28. Pursuant to 8 U.S.C. § 1105(a)(5) (1982).

29. *Chadha*, 634 F.2d at 411.

30. *Id.* at 408-36.

31. The Court of Appeals requested *amici curiae* briefs from both the House of Representatives and the Senate, basing this request on *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n. 9 (1968), and *Atkins v. United States*, 556 F.2d 1028, 1058 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). *Chadha*, 634 F.2d at 411. Not content with the outcome in the Ninth Circuit which vindicated its position, the Department of Justice, an arm of the Executive Branch, undoubtedly felt that tactically the time had come to bring this test before a Supreme Court more closely in tune with the Executive's position in the long tug-of-war with Congress over the finality of the power delegated by Congress in immigration cases. The sweep of the Supreme Court's majority opinion would appear to be an unexpected bonus for the Executive in other areas of its activities as well.

32. *Cert. granted* in Nos. 80-2170 and 80-2171 *House of Rep. v. Chadha* and *Congress v. Chadha*. Reargument ordered, 102 S. Ct. 3507 (1982) (Brennan, J. and Blackmun, Jr. dissenting).

33. *Chadha*, 103 S. Ct. at 2769-70. The Court disposes, rather cavalierly, of seven sub-issues not directly relevant to the discussion in this article.

34. 8 U.S.C. § 1254(c)(2) (1982).

tional?³⁵ (*i.e.* does the legislative veto conform to the intent of the Founding Fathers to maintain the separation of powers envisaged by the Constitution?)

Responding in the negative, the majority opinion, delivered by the Chief Justice, in which Justices Brennan, Marshall, Blackmun, Stevens and O'Connor joined, affirmed the lower court's decision.³⁶ Justice Powell filed an opinion concurring in the judgment, but not in the majority's rationale.³⁷ Justice White filed a dissenting opinion³⁸ and Justice Rehnquist filed his own dissenting opinion in which Justice White joined.³⁹

4. *The Court's Decision—Main Issue*

A. *Majority*

As was noted on the main issue being discussed here, the Court held that the congressional veto provision in section 24(c)(2) of the Immigration and Naturalization Act was unconstitutional since it constituted legislation which did not follow the constitutional mandate of the presentation clause.

The rationale for the majority opinion is as follows:

1. Article I, section 1⁴⁰ of the Constitution requires that all legislative powers be vested in a Congress consisting of a Senate and a House of Representatives, and section 7 requires that every bill passed by the House and the Senate, before becoming law, be presented to the President, and if it is vetoed, to be repassed by two-thirds of the Senate and House.⁴¹ This repre-

35. *Chadha*, 103 S. Ct. at 2769-70. The Court's language itself in framing this issue indicates the quasi-judicial nature of the Attorney General's action under the Statute.

36. *Chadha*, 103 S. Ct. at 2788. This is a most interesting majority: one might speculate that Justice Marshall, Blackmun and Brennan agreed in the result but it is surprising to find them silent on the official rationale. In other situations the majority might well have consisted of a 3-2-1-1 plurality (the Chief Justice and Justice Stevens and O'Connor, Justice Brennan and Blackmun, Justice Marshall and Justice Powell).

37. *Id.* at 2788-92 (Powell, J., concurring).

38. *Id.* at 2792-2816 (White, J., dissenting).

39. *Id.* at 2816-17 (Rehnquist, J., dissenting).

40. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST., art. I, § 1.

41. 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.

U.S. CONST., art. I, § 7, cl. 2.

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

sents the Framers' decision that the legislative power of the federal government should be exercised in accord with a very precise procedure which is an integral part of the constitutional design for the separation of powers.⁴²

2. The action taken by the House pursuant to section 244(c)(2) was essentially legislative in purpose and effect.⁴³ It was thus subject to the procedural requirements of article I, section 7 for *legislative action*: Passage by a majority of both houses and presentation to the President. The one house veto operates to overrule the attorney general and mandates Chadha's deportation. The veto's legislative character is confirmed by the character of the congressional action it supplants; *i.e.*, absent the veto provision of section 244(c)(2), neither the House nor the Senate, or both acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined that the alien should remain in the United States. Without a veto provision, this could have been achieved only by legislation requiring deportation.⁴⁴ A veto by one house under section 244(c)(2) cannot be justified as an attempt at amending the standards set out in section 244(a)(1), or as a repeal of section 244 as it applies to *Chadha*.

The nature of the decision implemented by the one house veto further manifests its legislative character. Congress must abide by its delegation of authority to the Attorney General until that delegation is legislatively altered or revoked.⁴⁵ In addition, the veto's legislative character is confirmed by the fact that when the Framers intended to authorize either house of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action under the Constitution.⁴⁶

B. *The Concurring Opinion*

Justice Powell concurred in the result, but would not have reached the issues decided by the majority. Justice Powell

the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.
U.S. CONST., art. I, § 7, cl. 3.

42. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

43. *Chadha*, 103 S. Ct. at 2784; the Court refers to S. Rep. No. 1335, 54th Cong., 2nd Sess., 8 (1897).

44. This is highly debatable as having all the earmarks of a "bill of attainder."

45. *Javits and Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455, 461-62 (1977).

46. *See*, U.S. CONST., art. I, § 2, cl. 6; art. I, § 3, cl. 5; art. II, § 2, cl. 2.

would have decided the case on a narrower ground, namely, when Congress finds that a particular person "does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers."⁴⁷ Having reached that decision, Justice Powell would not go on to determine the "broader question whether legislative vetoes are invalid under the presentment clauses."⁴⁸

Justice Powell's decision, while reaching the same result as the majority, would have spared a lot of commentator's ink and would not have assumed the monstrous proportions attributed to the majority opinion by Justice White.⁴⁹ Justice Powell demonstrates again that he is not only an outstanding legal draftsman, but that his opinions reflect quality legal thought with solid scholarly underpinnings, and are in the historic tradition of the Supreme Court's decision-making in cases involving constitutional issues⁵⁰—a tradition that the majority opinion in *Chadha* may well have shattered.

C. The Dissents

1. Justice White's dissenting opinion bemoans the fact that the majority decision, in addition to invalidating section 244(c)(2) of the Immigration and Nationality Act, also "sounds the death knell for nearly two hundred other statutory provisions in which Congress has reserved a 'legislative veto.'"⁵¹ He then agrees that the court should have followed the Powell decision, in basing its decision on the narrower ground of separation of powers and not reaching the other issues. Of particular and vital concern today is the constitutional validity of the congressional power of review in matters involving legislative delegations under the War Powers Act⁵² and various agency

47. *Chadha*, 103 S. Ct. at 2789 (Powell, J., concurring).

48. *Id.* See U.S. CONST., art. I, § 7, cl. 2.

49. *Chadha*, 103 S. Ct. 2792-2816, (White, J., dissenting). This case should provide fodder for a whole generation of young law faculty members writing law review articles under the gun of the "publish or perish" rule.

50. See Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 253-56 (1982).

51. *Chadha*, 103 S. Ct. at 2792.

52. War Powers Resolution, 50 U.S.C. § 1541 (1976). It would be interesting to apply the *Chadha* decision to the War Powers Resolution, which was enacted over a presidential veto and which has not been seriously challenged by the former or present occupants of the White House. To what extent would the events of Lebanon not be subject to congressional review and when is war "War", and what about international "police action"? Are these expeditions really within the unchecked constitutional province of the executive? Where in the Constitution does this executive power to engage American forces abroad exist? Congress, by no stretch of the imagina-

rulemaking acts as they apply to independent agencies.⁵³

Justice White's dissent is also based on the pragmatic idea that the legislative veto has, over the last fifty years, become one of the major means by which Congress retains and insures the accountability of executive and independent agencies to which it delegates some of its powers. And, as he states, "without a legislative veto Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies,"⁵⁴ a role that obviously under our Constitution cannot be chosen by the legislative branch of the government. The dissent ends with a statement that:

even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state. Today's decision strikes down in one fell swoop provisions and more laws enacted by Congress than the court has cumulatively invalidated in its history. I fear it will now be more difficult to insure that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people.⁵⁵

2. Justice Rehnquist's dissent is based on the fact that section 244(c)(2) cannot be severed from the rest of the statute under the severability clause. His argument is that this section is severable only if Congress would have intended to permit the Attorney General to suspend deportations without it. The legislative history of section 244, according to Justice Rehnquist, makes it obvious that the Congress was unwilling to give the executive branch permission to suspend deportation on its own. Over the years, Congress consistently rejected requests from the executive for complete discretion in this area. Congress always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1958 Act,⁵⁶ or by one house veto as in the present Act. Congress has never indicated that it would be

tion, can delegate its "war" powers to the Executive; so where does that leave us? All these troubling questions will lead to confrontation between the co-equal branches of our government instead of providing a co-ordinated effort to work for a common goal if the reach of the *Chadha* decision is not checked.

53. *E.g.*, Congressional Budget and Impoundment Control Acts of 1974, 31 U.S.C. § 1403 (1976).

54. *Chadha*, 103 S. Ct. 2793.

55. *Id.* at 2810-11, *quoting*, *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting).

56. Act of July 1, 1948, ch. 783, 62 Stat. 1206 (1948).

willing to permit suspensions of deportation unless it could retain some sort of veto.⁵⁷

III. A PRIMER OF ADMINISTRATIVE/CONSTITUTIONAL LAW CONCEPTS

A. *Some Basic Definitions—Plain Language Meaning Facilitates Correct Legal Analysis*

The permanence of the American constitutional system is largely due to the fact that the Supreme Court has, over the years, injected meaning into language that otherwise would have been rapidly dated. A "strict" construction might render unacceptable the document by which the people of the United States created its system of government in times that were radically different from today's "Star Wars".⁵⁸ This flexibility is different from changing the plain meaning of words and the contemporaneous concepts they express.

The time may have come to critically challenge the Supreme Court's propensity to use words loosely in order to fit its conclusions and periodically modify the theories underlying the power of Congress to delegate its authority. This challenge is particularly appropriate when the balance of power envisaged by the Framers of the Constitution is consistently tilted in favor of one branch of government.

It seems to me that it is about time to clean up our thinking by cleaning up our language: words do have a specific meaning, and it is not necessarily the meaning dictated by changed conditions.

57. *Chadha*, 103 S. Ct. at 2817. In a speech before the American Bar Association, Justice Rehnquist stated: "I subscribe, unreservedly to the notion that this particular type of provision [legislative veto] is a violation of the constitutional principles of the separation of powers." Address by Justice Rehnquist, American Bar Association Section on Administrative Law in Dallas, Texas (August 12, 1969). This, of course, was written while he was heading the Office of Legal Counsel and not yet on the Supreme Court. (Justice Rehnquist was confirmed by the Senate on December 10, 1971).

58. For example, in construing the Separation of Powers doctrine Professors Frankfurter and Landis have noted that:

As a principle of statesmanship the practical demands of government preclude its [the Separation of Powers doctrine] doctrinaire application. . . . [It is] a "political doctrine," and not a technical rule of law. Nor has it been treated by the Supreme Court as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction.

Frankfurter & Landis, *Power of Congress over Procedure in Criminal Attempts in "Inferior" Federal Courts—A study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012-14 (1924).

For instance, the mere fact that the Supreme Court in *Chadha* says that the decision by the Attorney General is legislative in nature, and that it therefore takes legislation to overturn it, does not necessarily make it so, any more than declaring that "day" is "night" or "may" means "shall."

Let us look at six words and their basic definitions and look at the implications if the courts were to use more frequently and consistently, the plain language rule in statutory construction.

1. *Legislation*, in the common understanding of the word, is an action by a body of individuals possessing the power to enforce it, which affects a large number of people that fall within certain predetermined classifications. It is both broad in scope and perspective:⁵⁹ *i.e.*, rules apply to the conduct of a broad spectrum of individuals.

2. *Adjudication* is a decision by an impartial institution, empowered to do so, which involves a relatively small number of people within a very narrow classification and may well be, and often is retroactive in its effect:⁶⁰ *i.e.* the application of a rule to particularized situations involves adjudication.

3. "*Independent*" *v.* "*Executive Agencies*"

It is elementary to remember that so-called "independent" agencies are creatures of Congress,⁶¹ whereas the executive agencies are properly under the direct control of the Executive.⁶²

59. " 'Legislative power,' as distinguished from 'executive power,' is authority to make laws, but not to enforce them or appoint agents charged with duty of such enforcement. The latter are executive functions." *Municipality of St. Thomas & St. John v. Gordon*, 78 F. Supp. 440, 443 (D. V.I. 1948).

60. "Legislative power" prescribes rules of action while "judicial power" determines whether such rules have been transgressed by ascertaining existing facts. *In re Manufacturer's Freight Forwarding Co.*, 294 Mich. 57, 59, 292 N.W. 678, 680 (1940). "Legislative power is the power to enact laws or to declare what the law shall be. [citation omitted] Judicial power is the power which adjudicates upon the rights of citizens, and to that end construes and applies the law." *Mitchell v. Lowden*, 288 Ill. 327, 341, 123 N.E. 566, 572 (1919), *overruled*, *Stofer v. Motor Vehicle Casualty Co.*, 68 Ill. 2d 361, 369 N.E.2d 875 (1977).

61. "Only two Executive Branch offices, therefore, [the Presidency and Vice Presidency] are creatures of the Constitution; all other departments and agencies, from the State Department to the General Services Administration, are creatures of the Congress and owe their very existence to the Legislative Branch." *Nixon v. Administrator of General Services*, 433 U.S. 425, 508 (1977) (Burger, C.J., dissenting).

62. That is why a reorganization of executive agencies by the President should not and probably cannot, constitutionally, include the reorganization of independent agencies unless such power is delegated by the Congress.

4. "Private legislation" v. "public legislation"⁶³

Historically, Congress has passed private laws,⁶⁴ the constitutionality of which has, on occasion, been tested.⁶⁵ "Public" legislation can be distinguished from adjudication if one looks at the prospective effect test.⁶⁶ How one can distinguish "private" legislation from adjudication, if the former's reach is retroactive, is difficult to comprehend,⁶⁷ except in the semantic "Alice in Wonderland" atmosphere in which our judicial system sometimes operates.⁶⁸

Legislative action which affects an individual, particularly in the area of criminal law, would be a bill of attainder which is *per se* unconstitutional. It might thus be argued that the exclusion of an individual from American soil is quasi-criminal in its effect and, therefore, the legislative veto in the Immigration and Naturalization Act is tantamount to a bill of attainder.

While it may be somewhat simplistic, it is generally correct to state that when Congress creates an agency, it delegates to it legislative power ("rulemaking" with which are intertwined the other two powers provided for under our constitutional scheme, namely, the adjudicatory and executive powers) to implement legislation by "filling in the details" through the rulemaking device and seeing to it that the law is executed in accordance with the congressional mandate. It would seem obvious that while the Attorney General has been delegated "legislative" authority by the Congress to issue rules in connection with the Immigration and Naturalization Act, the application of these particular rules to any individual comes within his implied "adjudicatory" powers. This is why hearings are involved in each individual case, as was the case with *Chadha*. It could therefore be just as easily and more cogently argued that to deprive *Chadha* of the adjudicatory process, at that stage, would have amounted to an unconstitutional denial under the due process clause.

63. Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

64. *Id.* at 1685-86.

65. *Id.* at 1684-88.

66. See *supra* note 60.

67. Note, *supra* note 63, at 1686-88.

68. See, e.g., *Cleveland v. United States*, 329 U.S. 14, *reh'g denied*, 329 U.S. 830 (1946) (where the Supreme Court interpreted 18 U.S.C. § 398, which provided that it was an offense to transport any woman in interstate commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose," to include the practice of polygamy engaged in by Mormons. Clearly, Congress did not intend this statute to include polygamy when it enacted the law).

Either way, *Chadha* should be limited in its application to the facts in *Chadha*, or in similar cases involving similar statutory provision and procedures.

B. *The Separation of Powers Doctrine*

The imprints of French thinkers on the American Framers of the Constitution is undeniable⁶⁹ and would indicate that, contrary to the majority of current American thinking, the Founders, e.g., Jefferson, Franklin, were quite Gallic in their approach to legislative drafting. Gallic thought favors having a few rules which can then be interpreted in a flexible manner to adjust to situations as they occur, rather than to have inflexible rules which get to be more and more difficult to implement because of changes in conditions.⁷⁰

There are aspects of the separation of powers doctrine which have been scrupulously maintained since the very beginning of constitutional interpretation.⁷¹

On the one hand, the most prudent approach is to state that Congress cannot constitutionally interfere in the adjudicatory and executive aspects of either the independent or the executive agencies' powers, except by the indirect use of the power of the purse.⁷² On the other hand, if Congress is to function with a modicum of efficiency and economy, can it be prohibited from retaining the reins on the legislative fancy of these agencies,⁷³ including the executive agencies?

69. "The men who were responsible for framing our Constitution were influenced by eighteenth century liberal thought from both French and English sources. French influences, more philosophical than legal in character, were particularly strong with Franklin, who took a significant part in framing the treason clause." *Cramer v. United States*, 325 U.S. 1, 15 n. 21 (1945).

70. This diversity in conceptual approach is visible in the drafting, for instance, of modern contracts. There is no doubt that a contract written by a French lawyer is substantially shorter than a contract written by an American lawyer simply because the French lawyer feels that one cannot take care of all contingencies in a legal document and one must rely on common sense and good faith, something which is notably absent from the conceptual approach of the American lawyer who feels that every contingency, no matter how remote, must be covered. This explains to a great extent the volume of work created by American legal thinking as opposed to that of its civil law counterparts, particularly the French; this often is what produces some problems in international and multi-national negotiations and agreements.

71. See, e.g., *Hayburn's Case*, 2 U.S. 408 (1792); de Seife, *supra* note 15.

72. "The ultimate weapon of enforcement available to the Congress would, of course, be the 'power of the purse.'" *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974).

73. See Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285, 288-89.

It is doubtful that the branches of government were ever meant to be totally adversarial in nature and mutually exclusive.⁷⁴ The business of government is essentially a partnership. Government could not function if none of the actions of the Executive could have a quasi-judicial or quasi-legislative flavor on occasion, or where judicial decisions could not, at times, have an executive or administrative aspect, as well as some legislative flavor.⁷⁵ By the same token even Congress has traditionally been allowed to dabble in quasi-judicial and quasi-executive activities.⁷⁶ The basic issue in the latter area of activity being, apparently, whether the action involved makes the Representative or Senator an "Officer of the United States," in which case a constitutional obstacle is reached.⁷⁷

A minimum amount of interference is necessary between the three branches,⁷⁸ regardless of theory. This is indispensable if the system is to function properly over long periods of time without resulting in revolution.⁷⁹ To postulate otherwise would provide no rationale supporting the court ordered busing of school children (a legislative function) and the overseeing of the implementation of such busing rules (an executive function). Similarly, there would be no way to allow the executive to send American troops overseas in the absence of a formal declaration of war by Congress. The *Chadha* court apparently wants to have its cake and eat it too.

Does the separation of powers doctrine mandate that Congress can in no way interfere with another branch in the exercise of whatever its powers may be, and that the broad lines of jurisdiction cannot be, on occasion, crossed? Stated another way, that the legislative powers of Congress cannot be interfered with by the executive powers, and the judicial power cannot be interfered with by the legislative or executive powers?

74. "It seems, as historians have noted, that Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of department functions." WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 153-54 (1969).

75. *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

76. de Seife, *supra* note 15, at 433-34.

77. Strictly speaking, a person in the service of the government is not an officer of the United States unless he holds his place by virtue of the appointment of the President, or by one of the courts of justice, or by the head of the department authorized to make such appointment. *United States v. Mouat*, 124 U.S. 303 (1888).

78. *See Farmers Educ. & Coop. Union of Am., N. Dakota Division v. WDAY, Inc.*, 360 U.S. 525 (1959) (Frankfurter, J., dissenting).

79. "I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical." Letter from Thomas Jefferson to James Madison (Jan. 30, 1787).

Could it not then be assumed that for any branch to maintain a line of control within its own power spectrum (even though part of that power has been delegated to another branch) might not be inconsistent with a proper interpretation of the separation of powers?

If the first proposition reflects the logic of the *Chadha* majority, then it is an approach best implemented by the Powell concurring opinion which prudently and correctly avoids the illogical sweep of the majority opinion.⁸⁰

A flexible approach to the constitutional separation of powers is not a device invented by pragmatists and result-oriented scholars of the latter half of this century. Rather it has its roots intertwined with those of the Constitution itself.⁸¹ Therefore, those who argue that the flexible approach is what permeated the thinking of the Founders of this great Constitution are indeed heirs to an old, established and constitutional, indeed more correctly contemporaneous, thinking.⁸²

The Supreme Court in *Chadha* is saying that even when the Executive agrees to submit some *in futuro* executive decision, made in furtherance of a legislative delegation, to partial or full congressional approval, that such a legislative delegation is unconstitutional. This is a highly questionable interpretation of the separation of powers doctrine. Supreme Court decisions, more closely contemporaneous to the framing of the constitution, ought to carry more weight than strained constructions of the Courts, some 200 years later, trying to create a philosophy of literal construction which in all likelihood did not originally exist. It is not too much to say that *Chadha* is one case where a literal "modern" interpretation of language, not meant to be taken literally, does not represent the best approach to constitutional interpretation.⁸³

80. *Chadha*, 103 S. Ct. at 2788 (Powell, J., concurring).

81. See *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

82. My own thinking in that area has radically changed from some 25 years ago, when I favored division of powers within administrative agencies. I now feel very much opposed to this decision, seeing the wisdom of the pioneers of administrative law who correctly felt that the three powers—legislative, executive, and judicial—could very well be vested in the same body, provided that there is some kind of reviewing mechanism to insure equity and justice at the end of the process.

83. Other concepts, such as immunity, are not constitutional concepts and are not contemporaneous with the constitution. In fact, immunity as imposed by the Supreme Court is a relatively recent creation, dating back to 1838. President Reagan may consider it a virtue to be literal in the construction of constitutional provisions, but his enthusiasm applies only insofar as it does not affect the Executive branch, e.g. the War Powers Act, *codified at* 50 U.S.C. §§ 1541-48 (1976).

The problem with many of these fine distinctions is that in hoeing too close a line to a literal and doctrinaire interpretation of the separation of powers doctrine, we obtain results which were probably not intended by the Framers. The judicial gloss on the written Constitution if viewed in too orthodox a fashion, would soon reach unworkable situations: a result surely not intended by the Founding Fathers who were pragmatists and realists.⁸⁴

It ill behooves the Court to come up with dogmatic declarations as to the tenets of the separation of powers doctrine when, in other decisions, it has been more than cavalier in this area.⁸⁵

If it is impermissible under our present Constitution for the branches of government to arrive at a reasonable, cooperative theme, then this leads considerable impetus to those who claim that our form of government is dated and that the parliamentary form is to be preferred in this day and age⁸⁶ if we are to preserve democracy.

C. Delegation of Powers Doctrines

If it is accepted that legislators may delegate their legislative power,⁸⁷ the delegation is limited to the extent of rulemaking by the agency, an activity which is really an extension of the legislative process.⁸⁸

84. "The Constitution reflect[s] a more pragmatic view of government—a view that each branch of government [will] ultimately seek to attain for itself complete control over the exercise of political power." Comment, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U. L. REV. 1018, 1024 (1977).

85. A notorious example is *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 443 (1977), where the majority stated: "[T]he Court [in *U.S. v. Nixon*] squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. . . . [W]e therefore find that appellants argument rests upon an 'archaic' view of the separation of powers as requiring three outright departments of government.'" 433 U.S. 425, 443 (1971), quoting *Nixon v. Administrator of Gen. Services*, 408 F. Supp. 321, 342 (D.D.C. 1976). See also, *Powell v. McCormack*, 395 U.S. 486, 512-18 (1969) (Court's decision on House refusal to seat Congressman does not violate this principle).

86. See generally Cutler, *President vs. Congress: Does the Separation of Powers Still Work?*, 47 AM. ENTERPRISE INSTITUTE (1980). In fact, Loyd Cutler's ideas seem to favor the adoption of the French Model of the 5th Republic, the present system of French government.

87. *Yakus v. United States*, 321 U.S. 414, 426 (1944) (delegation of legislative power permissible under Constitution); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971) (every delegation of legislative power not forbidden by Constitution).

88. Bolton, *The Legislative Veto, Unseparating the Powers*, 148 AEI STUDIES 5-8 (Wash. D.C., 1977).

Under the non-delegation doctrine,⁸⁹ which has only been used in two instances by the Supreme Court, legislators may not delegate their legislative power. This is basically a historical notion in federal administrative law which occasionally makes noises as if it were ready to awaken from its American common law hibernation.⁹⁰

It should be remembered that, early on, the Supreme Court abandoned the non-delegation of powers doctrine to strike down the delegation of quasi-legislative powers to the President by Congress. It was then held that the delegatee of such congressional legislative powers had to work within the structures of a well-defined set of guidelines, the so-called "standards for administrative guidance." This in turn has been fairly well circumscribed. Also, at present, administrative law theory seems to be that, in exchange for a greater amount of court supervision of agency decisions, uncontrolled and practically unlimited congressional delegations are acceptable in the federal system.⁹¹

The "precise standard for administrative guidance" referred to above, another concept abandoned by the Supreme Court a number of years ago, further dilutes any pretense of reverting to a "strict construction" of the separation of powers doctrine under the Constitution.⁹²

It is questionable whether a return to the "good old" days of the non-delegation doctrine, or even that of the "precise guidelines for administration discretion,"⁹³ is possible or even desirable. This may well constitute a return to simpler times but does not necessarily offer a solution to the contemporary problems of a post-industrial society.

Why is it constitutionally untenable to argue that Congress is at least as capable of defining the laws it promulgates as the other branches of government? The fact that the Constitution

89. "That Congress cannot delegate legislative power to the President is a principal universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892).

90. Bolton, *supra* note 88, at 6-7. On the state level, however, the delegation doctrine functions in several jurisdictions.

91. Bolton, *supra* note 88, at 39-43. The importance of just results probably transgresses any of the importance now given to procedural due process. For the Constitution to survive as a viable legal document, it would seem that it is more important for the judicial system to function in furtherance of a constitutional scheme that is responsive to the needs of our society at particular times in its history.

92. Since the abandonment of that doctrine which had controlled administrative law up to the sixties, *see, e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), it seems that the new emphasis is Court review of administrative action. *See E.P.A. v. Mink*, 410 U.S. 73 (1973).

93. *See supra* note 92.

did not provide for such an interpretation is not a convincing argument since the Constitution did not provide for a lot of things which are now taken for granted.⁹⁴

It is interesting to speculate why this Supreme Court feels that in the tri-partite constitutional system so laboriously devised by the Founding Fathers, Congress is the only one that seems to be able to constitutionally delegate its legislative function to the other two branches and appears unable to retain any direct oversight.⁹⁵

When Congress adopts a bill which becomes law, after having passed both houses and having been signed by the President, this law is then in need of interpretation and elaboration by rulemaking. This is one of the functions of the agency to which this legislative power was delegated. The agency, in its executive function, implements and enforces the law. It operates in a quasi-judicial capacity when it decides whether an individual has violated the law it is executing or the rules it has promulgated in its legislative role. If Congress, or an oversight committee, were to intervene in the "legislative" process, is this not a process in which Congress has a peculiar right to intervene in "explaining" that the law which was passed meant X and not Y as this particular regulation provides? Why should Congress have to create a "new" law in a presentment clause to "explain" a law it has passed?⁹⁶ It is hard to rationalize, from a common sense viewpoint, that Congress, in its law-making function, cannot intervene after the law takes effect in order to ascertain that the agency, to which it delegated the lawmaking power by rulemaking, conforms with its initial desires.⁹⁷

94. Some good examples of this idea are the application of some of the amendments to state action, the extension of the 14th amendment to state laws or the extension of the commerce clause to matters that would have remained intrastate transactions otherwise.

The judicial branch has always been influenced by pressure, *e.g.* the Roosevelt era. It always knows when not to unduly threaten the powers of the other branches. For an interesting comment on what makes the courts tick see NEELY, *HOW COURTS GOVERN AMERICA* (1981).

95. For example, the Supreme Court retained direct oversight in *Swann v. Board of Educ.*, 402 U.S. 1 (1971), a school busing case.

96. *Javits and Klein, supra* note 45, at 460-61.

97. *See Martin, supra* note 50, at 287-88. It will be interesting to watch the Supreme Court chip away at the *Mink* decision, *E.P.A. v. Mink*, 410 U.S. 73 (1973), in future decisions that adopt a pro-executive prejudice against the Freedom of Information Act. These decisions would likely be in conformance with the philosophy espoused by the Seventh Circuit in some recent cases in which the congressional FOIA mandate for openness has been severely restricted due to the narrow construction given it by the executive branch. *See, e.g., Stein v. Department of Justice*, 662 F.2d 1245 (7th Cir. 1981).

Surely when Congress creates an "independent agency" to act on its behalf it may, or should, be able to attach strings to the delegation of its legislative power.⁹⁸ The independent agency then, in its rulemaking, merely extends the legislative function of Congress, refines it or "fills in the details" as it were.⁹⁹ Congress has a legitimate right of oversight to make certain that its creature, the agency, implements its organic legislation as it should be implemented and in the spirit in which it was adopted.¹⁰⁰

We enter into a somewhat murkier area when the delegation is to the executive branch of the government.¹⁰¹ Could it not be said that (if we accept the fact that the executive is to execute laws adopted by Congress but that, in pursuing this activity, there are certain actions which have a judicial or legislative flavor) the executive is "entrusted" by the legislature to "legislate" by rulemaking within the parameters of congressional intent as mandated by law?¹⁰²

Does the Supreme Court in *Chadha* mean that once Congress has delegated its lawmaking function to an agency, it cannot recapture it or cannot direct it in the correct channel except by going through the cumbersome "law making" process mandated by the Constitution?¹⁰³ It would not be proper for Congress to abandon for all time any of its powers; it can do so only on a transitory basis.¹⁰⁴ I would think that in the area of lawmaking, Congress can retain, and properly so, a measure of veto power to make certain that rulemaking is in consonance with

98. See de Seife, *supra* note 15, at 456. See also, Martin, *supra* note 50, at 289.

99. Such detail at [the point where Congress enacts a new statute creating a new agency], before adequate knowledge has been gained, may prove counterproductive. Moreover, a specialized agency, more efficiently than Congress, can amass the detailed factual data and undertake the reflective professional thought necessary for intelligent regulation.

Martin, *supra* note 50, at 289.

100. "Methods such as reporting requirements and congressional committee investigations allow Congress to scrutinize the exercise of delegated lawmaking authority, but they do not permit Congress to retain any part of that authority once it has been delegated." Javits & Klein, *supra* note 45, at 461-62.

101. See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 597 (1953).

102. Davis, *supra* note 6, at 292-94 § 5.01.

103. Martin, *supra* note 50, at 289.

104. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (statute regulating poultry declared unconstitutional because it resulted in an excessive delegation of powers to the executive and failed to provide adequate standards for its application).

its legislative intent.¹⁰⁵ After all, who knows better what Congress intended than Congress itself?

It would seem to me that "rulemaking" can be overridden by Congress, particularly if both houses participate in this action.¹⁰⁶ In addition, a plausible case can be made for Congress to delegate this particular review power to one of its houses or even one of their committees.¹⁰⁷ If Congress can delegate legislative powers to an "independent" agency then, surely, it ought to be able to delegate a portion of those powers to one of its own committees.¹⁰⁸ I am therefore not presently inclined to side with those who argue in favor of finding that the legislative veto, when applied to rulemaking, would fall by the wayside because of unconstitutionality if this power is exercised by a committee of Congress.¹⁰⁹

As stated earlier, it is difficult to understand the rationale by which the court holds that Congress, or a congressional committee, would have less authority to interpret its own laws than do the other branches of government to whom Congress' authority might be delegated by Congress.

D. Conclusion

Congress delegated to the Attorney General certain portions of its legislative power to implement its *desiderata* as spelled out in the Immigration and Naturalization Act. Properly, the Attorney General promulgated rules to accomplish the assigned task—rulemaking, or, in other words, using his quasi-legislative power as Congress' delegatee. In his executive capacity, through the Immigration and Naturalization Service, he proceeded to enforce the law. Mr. Chadha got caught in a conflict with the law and the rules issued pursuant to it by the Attorney General. To determine whether Chadha came within certain exceptions which would permit him to remain in this country involved the adjudicatory side of the Attorney General's job. Mr. Chadha then had a hearing before an examining magistrate who recommended to his delegator, the Attorney General on what to do. The Attorney General then followed the recommendation.

105. de Seife, *supra* note 15, at 459-60.

106. "The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings." *Chadha*, 103 S. Ct. at 2784.

107. Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735, 736 (1979).

108. de Seife, *supra* note 15, at 458-60.

109. Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 473-79 (1962).

If we look at *adjudication* in its proper context, it seems obvious that the *Chadha* decision by the Attorney General involved not his "rulemaking" but his "adjudicatory" capacity.¹¹⁰ At this point of our discussion it is not necessary to distinguish between limiting congressional delegation of power to an "executive" agency against an "independent" agency.¹¹¹

If I am correct that the Attorney General's decision not to deport Chadha constituted an exercise of the adjudicatory function within his discretion, then the concurring opinion of Justice Powell is the one that best states the law.¹¹² We are talking about interference by the legislative branch of the government with what is essentially an adjudicatory process.¹¹³ A finding of legislative overreaching is therefore constitutionally in order. Maybe it is too simplistic an argument for sophisticated lawyers to accept; however, it makes sense!

IV. HOW CHADHA'S IMPACT MAY BE LIMITED

A. By the Supreme Court

How are we to interpret *Chadha* and its apparent extensive effect?

I believe that the effect of *Chadha* may be circumscribed, even with its present language, permitting future Supreme Court interpretations to restrict its effects. This will mean, of course, a much more careful consideration of denials of certiorari affirming lower courts' decisions that invalidate other legislative veto provisions, where appropriate.¹¹⁴ While it is true that the English language as interpreted by the courts, and particularly the Supreme Court, may mean whatever the court chooses it to mean at any one time,¹¹⁵ this is not a desirable tradition, at least insofar as those who must construe court decisions are concerned.¹¹⁶ It is of course too late now for the Supreme Court

110. "[A]n agency adjudication within meaning of Freedom of Information Act, represents the judicial, rather than legislative function of the agency; such a proceeding also involves an accusatory or disciplinary element in which individual rights and behavior are put in issue." National Prison Project of American Civil Liberties Union Foundation, Inc. v. Sigler, 390 F. Supp. 789, 791-92 (D. Colo. 1975).

111. de Seife, *supra* note 15, at 434-35.

112. *Chadha*, 103 S. Ct. at 2791.

113. *See supra* note 60.

114. The lower courts have already followed the *Chadha* decision in several cases. *See e.g.*, Mohammed Ali Chaelian v. I.N.S. slip op. (6th Cir. Sept. 14, 1983); *LeBlanc v. INS*, 715 F.2d 685 (1st Cir. 1983).

115. *See supra* note 7. *Compare* *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

116. "The doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a

in *Chadha* to reverse itself on the rationale, while agreeing on the result, by espousing Justice Powell's intellectually and infinitely more tenable position.

This is not to say that Justice White's dissent is not persuasive,¹¹⁷ as is the dissent by Justice Rehnquist.¹¹⁸ Rehnquist's argument that the clause under scrutiny was not separable¹¹⁹ from the whole Act is one that deserves careful attention.

Of all the options available to the Court, the one which appeared to be the most prudent was Justice Powell's. His opinion offered reasoning consonant with the long established Supreme Court tradition to not lightly invalidate Congressional legislation on constitutional grounds and, more importantly, not to allow such invalidation to reach statutes other than the one involved in the "case and controversy" before the Court.¹²⁰

The Supreme Court could well, in a forthcoming case, indicate that its definition of the word "legislative" in the *Chadha* case was conceptually limited to "private legislation" as opposed to "public legislation", and thus confine the effects of legislative vetoes to those situations similar to *Chadha*. This would greatly limit the damage which many triumphantly claim is the virtue of the *Chadha* decision, something I fail to see.

society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2487 (1983).

117. *See supra* note 38.

118. *See supra* note 39.

119. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936); *Davis v. Wallace*, 257 U.S. 478, 484-85 (1922).

120. "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Liverpool N.Y. & Philadelphia S.S. Co. v. Emigration Comm'r*, 113 U.S. 33 (1885). The problem with the opinion is that it is strained to an extent where it will snap if it is not promptly compacted. Many of the distinctions are laborious and not overwhelmingly logical or even consistent with common sense. It is unfortunately true that hard facts make for bad cases and poor law, and *Chadha* is only another example proving this axiom.

The fact that this is a hard case coming from hard facts is underlined by the majority opinion's incursion into the facts which surrounded the legislative veto in *Chadha*. Apparently some information provided to the House by the committee chairman was less than correct and obviously this cast a negative pall on the proceedings, thus making the majority opinion much more palatable to those who cherish individual rights. The question, however, is whether the same result could not have been obtained by a less sweeping decision?

The fact that some of the present Supreme Court justices occasionally appear to be inclined to favor the executive's extension of powers as against any congressional retention of delegated powers may be a factor in the unprecedented "sweep" of the *Chadha* language of the majority opinion.

Such a pro-executive bias has occurred before in our history. We need only look at the rationale used by the Supreme Court in support of executive action in connection with the internment of our citizens of Japanese ancestry. *See infra* note 125.

Limiting the effect of *Chadha* is not inconsistent with previous decisions of this Supreme Court.¹²¹ Thus, the Supreme Court recognized that there had to be some flexibility in the *actual administration of government*.¹²² The fact that an agency should be subordinated to the principle of independence is not necessarily an exclusion of a rational approach.¹²³

B. Acceptable Legislative Oversight Mechanisms

Authors have already pointed out, and cogently so, that there is not that much substantive difference between the various forms of legislative oversight, including the congressional veto.¹²⁴

Among the questions which must be addressed is how one can find an alternative to the legislative veto acceptable to the Supreme Court if the *Chadha* decision does have the broad-ranging effect it is alleged to have. One assumes that the objective espoused by Congress in opting for the legislative veto is to maintain a government which is *limited* and which is *responsible* under the broad separation of powers doctrine espoused by the Constitution.

1. Legislative Veto—Criticisms

In 1941, Attorney General Jackson stated that once Congress created an agency and delegated certain powers under its organic legislation, any interference with the exercise of these powers would amount to altering the original legislation. This is a conclusory, and therefore questionable, line of reasoning.¹²⁵

It is overstating the case to say that Congress can only interfere with powers delegated to an agency by going through all of the steps involved in the original legislation. The fact is that

121. See, e.g., *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), was limited by subsequent Supreme Court decision such as *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), and *Davis v. Passman*, 442 U.S. 228, 245 (1979). For a discussion on the limitations now imposed on *Bivens*, see Hinchcliff, *The Limits of Implied Constitutional Damages Actions: New Boundaries for Bivens*, 55 N.Y.U.L. REV. 1238 (1980).

122. *Buckley v. Valeo*, 424 U.S. 1 (1976).

123. Chief Justice Taft, being quoted in, *Hampton & Co. v. United States*, 276 U.S. 394 (1928).

124. See Martin, *supra* note 50, at 257 n.9.

125. *But see, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (use of the war powers to justify the internment of Japanese-American citizens in World War II without due process) which was later criticized in *Greene v. McElroy*, 360 U.S. 474 (1959) (executive order empowering executive agency to fashion security program whereby persons are deprived of their civilian employment without being accorded the opportunity to effectively challenge evidence upon which adverse security determination might rest declared unconstitutional).

there are just about as many supporters of the legislative veto¹²⁶ as there are opponents.

John R. Bolton has written a monograph¹²⁷ in which he states that the legislative veto is constitutionally weak and seeks to suggest alternatives which do not quite meet the challenge. Bolton's appraisal of the constitutionality of the legislative veto seems to be right on point some six years prior to the Supreme Court's decision in *Chadha*. His analysis is thorough, merits serious study and is not inconsistent with any suggestions put forth here permitting some forms of legislative veto to survive.

Professor Walter Gellhorn opposes the legislative veto on the basis that it may have the effect of pressing administrative regulations and their ultimate decisions into the private arena of congressional offices.¹²⁸ This is a most troubling and valid charge. While I am not entirely sold on the legislative veto as a constitutionally valid management tool, I nevertheless think that it is a device that may be used sparingly to retain congressional control over errant executive rulemaking. I readily agree that such a control mechanism should be severely limited, and I share Professor Gellhorn's concern not to let legislative oversight become legislative dictatorship which is even more dangerous when it is lodged in the hands of a committee, or worse yet, in the hands of one individual, the Committee Chairman.¹²⁹ But, is it preferable to have a dictatorship by the President or by a politically unaccountable bureaucracy?

When a legislative veto provision is built into the original legislation approved by both houses of Congress and by the President, all in accordance with the presentation clause (unless the bill became law by virtue of the congressional overturning of the presidential veto), ought it not be argued that any oversight clause, including the legislative veto, contained in such a law ought to be tested against the totality of all the facts

126. With some reservations, I would be counted as one of that group.

127. Bolton, *supra* note 88.

128. *Congressional Review of Administrative Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 257 (1975) (testimony of Ernest Gellhorn, professor of law, University of Virginia) (microfiche, 1976).

129. It seems to me that it is as dangerous to funnel all these decisions to the White House where non-elected officials decide policy on a day-by-day basis with only occasional accounting to the Executive in power. See de Seife, *supra* note 15. Incidentally, one of the "poor facts" in *Chadha* is that the matter involving congressional review was mishandled by the Committee Chairman.

surrounding the particular case raising the question as to the validity of the oversight clause?

2. Report and Wait

The legislature could adopt the "report and wait-mechanism" which has been adjudged constitutional in *Clark v. Valeo*.¹³⁰ This is one approach that can be adopted fruitfully by Congress and one that had already been recognized by Bolton in his monograph as being constitutionally valid. However, this procedure is cumbersome. But as stated by Bolton, "the separation of powers was not designed for its efficiency," quoting Justice Brandeis' opinion in *Myers v. United States*.¹³¹

Negatives involved in the "report and wait" procedure are spelled out by Boughton.¹³² Interestingly, it is noted that both Presidents Hoover and Roosevelt supported versions of the report-and-wait provisions.¹³³

3. Sparing Delegation of Power

Of course the other option that Congress could and should exercise more frequently, is not to delegate so much unchecked discretionary power to the executive. The sparing delegation of legislative powers would help a great deal and good legislative drafting would lead to a further tightening of the process.

4. Legislative Drafting with Precision

Congress should endeavor to promulgate its laws in plain English so that the words utilized would not be subject to constant interpretation by the courts in seeking the "legislative intent" and, in effect, abrogating the plain meaning rule of statutory construction. It is not casting an aspersion on anyone's position to point out that were we to use the English language in a more circumspect and specific way in drafting statutes, in order to avoid the elasticity which courts give to legislative words, and if we were to return to the basic "plain meaning" rule of statutory interpretation, this would be immensely helpful in applying laws in a more commonsensical manner.

130. 429 U.S. 1088 (1977).

131. Bolton, *supra* note 88, at 6-7, quoting *Myers v. United States*, 272 U.S. 52, 293 (1926), *overruling*, *Humphrey's Ex'r. v. United States*, 295 U.S. 602, 627 (1935).

132. See Bolton, *supra* note 127.

133. *Id.*

5. *Appointments*

Congress might want to more effectively use its power over presidential appointments. To a large extent, even theoretically perfect institutions are only as good as the people who run them. For Congress to fall back on the lame excuse that it “defers” as a matter of “courtesy” to a presidential choice is, in my opinion, a cop-out.

6. *Sunset Legislation*

Another effective device is the adoption of appropriate limits on the existence of agencies. Thus, if a regulatory agency is created for a specific period of time, it must justify its existence if it wishes to have its life-span extended.

7. *Possible Constitutional Changes*

One of the political impacts of the court's decision in *Chadha* might be to supply fodder for arguments in favor of adopting a parliamentary system of government. Such a constitutional amendment, if it is ever to be passed, will take many years to become effective, during which time the government still has to function with some modicum of efficiency if we are to survive without handing over more unchecked power to the executive.¹³⁴

If the Supreme Court is calling for a constitutional convention, which “parliamentarians” would like to see,¹³⁵ then let it be so, and let the Court state forthrightly that the Constitution it is interpreting is indeed the literal document adopted in 1793, and that henceforth it will continue to be rigidly and literally interpreted without the elasticity heretofore attributed to that document by previous Courts. This should be a major impetus to the call for a constitutional convention to realign, reaffirm and redefine the Constitution—the document of the People.

V. CONCLUSION

Chadha's majority opinion, which ironically has been signed by one of the most pragmatic of the justices,¹³⁶ does create political and practical problems which far outweigh the possibly perceived advantages of its proponents. The decision may well please those who are not happy with any curtailment on the in-

134. See Adams, *Sunset: A Proposal For Accountable Government*, 28 AD. L. REV. 511 (1976).

135. See de Seife, *supra* note 15.

136. See Cutler, *supra* note 86.

crease of presidential powers,¹³⁷ as well as those who do not trust Congress, because of the fear that a "dictatorship of the people might be worse than the dictatorship of an individual," or at least not distinguishable from the former.¹³⁸ But I submit that this is not the way to go.

The respect afforded both the executive and the legislative branches by the judiciary¹³⁹ has eroded over the long period of history since the adoption of the constitution. Traditionally, the Court tends not to issue opinions which would be more extensive than the case warrants but rather limit its effect to the facts of the case.¹⁴⁰ The *Chadha* decision represents a historical departure from that concept and raises speculation as to why.

Absent that, *Chadha* is, in effect, a bull-in-the-china-shop decision which may be right in the result reached—as to Chadha and his five colleagues—but totally wrong in its rationale and scope. The Court, in denying recent petitions for certiorari involving the legislative veto in other areas, seems to be taking *Chadha* to its ultimate conclusions, which is regrettable.¹⁴¹

If it is true that the absence of a dogmatic approach has been the strength of American judicial thinking in interpreting the Constitution, then surely it should be feasible to limit the nefarious effect of *Chadha*. It would seem to be a little late in the history of our country for the Supreme Court to become dogmatic about the separation of powers when, in fact, modern political doctrine would question the practicality of espousing Montesquieu's total separation of powers theory.

If adjudication means adjudication, and legislation means legislation, then the *Chadha* decision, while it may have achieved the correct result, has done so for the wrong reasons. Chadha's deportation proceedings were properly upheld by the Attorney General under his adjudicatory powers, an action which could have been reviewed in the courts, but which should not have been reviewed by Congress since it does not have any constitutionally mandated adjudicatory powers except in very

137. "The Constitution vests the 'Executive Power' in the President, and when Congress delegates rulemaking power to offices in the executive branch, it places that power in an officer responsible to the President and subject to his control." Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830, 838 (1982).

138. Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962).

139. The first time the judicial branch "pushed" its powers was in *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803).

140. See *supra* note 4.

141. See *supra* note 8.

exceptional circumstances.¹⁴²

By adopting this straight-forward construction the Court would have achieved some desirable results: (1) reiterate the rule of non-interference by a branch of our government into the activities of another branch and, (2) achieved a just result, but limited its rationale to situations involving the specific action analyzed in *Chadha*, namely, the exclusion of an alien from deportation proceedings under the Immigration and Nationality Act of 1952. This would not have resulted in a weak, unnecessarily complex and sweeping decision, which on its face seems to abolish some 200 statutory provisions involving the legislative veto,¹⁴³ some of which are probably, if not patently, constitutional, and others which may well be constitutionally questionable.¹⁴⁴ It is indeed strange that of all the Supreme Courts, this one should take such a wide-ranging action. One may feel compelled to speculate that this may be due to a certain "anti-Congress" sentiment on the part of some of the current justices with a mixture of "pro-executive" sentiment on the part of some other of the Brethren.¹⁴⁵ Justice Powell's decision proves once again that he probably possesses one of the most incisive minds on this Supreme Court and it is unfortunate that his colleagues did not heed his call.¹⁴⁶

By declaring the offending clause of the Immigration and Nationality Act to be severable, the Supreme Court is achieving exactly the opposite of the congressional intent.¹⁴⁷ To curtail the powers of Congress to review executive action within the purview of delegated "legislative power" and to augment executive power without any check, even an imperfect one, is leading us down the primrose path of the Strong Executive and will require that we seriously look at other options to insure governmental responsiveness to the people.¹⁴⁸

142. *Chadha*, 103 S. Ct. at 2791-92 (Powell, J., concurring).

143. *Id.* at 2792 (White, J. concurring). White refers to nearly 200 statutory provisions.

144. *See supra* note 12.

145. *See* Martin, *supra* note 50, at 253-56.

146. *Id.*

147. *See supra* note 39 for an analysis of Rhenquist's dissent.

148. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 790 (1983). With his usual insight, Professor Strauss delves into the distinction of the use of the legislative veto in areas involving executive-congressional relations as against its use in the regulatory context. None of the Justices, nor for that matter did any of the parties, see that distinction which would have permitted the limiting of *Chadha*'s decision to the latter area and not affect the former—a point in support of the argument made in my article. Anyone interested in this subject matter should read the Strauss article.

