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SEPARATING POWER: NO LEGISLATIVE VETO OF AGENCY ACTION

Immigration & Naturalization Service v. Chadha

One of the most remarkable features of 20th century American government has been the growth of the administrative agency. Delegation of authority to agencies has been frequent and broad. For the past fifty years, Congress has included a number of specific legislative veto provisions in some statutes as a means of checking these otherwise broad delegations. From the beginning of this practice in 1932, over 200 federal statutes containing more than 300 specific veto provisions have been enacted, most of which have occurred since 1970.

In Immigration & Naturalization Service v. Chadha, the United States Supreme Court struck down the legislative veto provision of section 244 of the Immigration & Nationality Act by a 7-2 vote. This opinion is the first by the Court to address the validity of the legislative veto, and it appears to invalidate veto provisions in many federal statutes. Given the breadth of its holding, Chadha could be the last Supreme Court opinion on the legislative veto.

The majority opinion, written by Chief Justice Burger, focused exclusively on the legislative veto's failure to satisfy the requirements of bicameral action and presentment to the President as set out in article I, section 7 of the Constitution. The Court broadened the lower court's holding and departed significantly from other cases where the Court has considered conflicts between coordinate branches of the federal government over the proper alloca-

1. 103 S. Ct. 2764 (1983).
5. Chief Justice Burger wrote the opinion for a six justice majority, and Justice Powell concurred on separate grounds. Justice White was the only Justice dissenting on the constitutional merits. Justice Rehnquist, joined by Justice White, dissented solely on the issue of whether § 244 was severable.
6. 103 S. Ct. at 2781-84. "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.
7. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), aff'd, 103 S. Ct. 2764 (1983).
tion of governmental power. While the majority's opinion is clearly supportable, it is not free from difficulty, as the concurring and dissenting opinions point out. The chief objection is the majority's failure to harmonize satisfactorily the decision in Chadha with the Court's previous decisions allowing the modern administrative state to develop.

Jagdish Rai Chadha came to the United States in 1966 on a nonimmigrant student visa. When that visa expired on June 30, 1972, he became subject to deportation. Following his January 11, 1974 show cause hearing held pursuant to section 242(b) of the Immigration & Nationality Act (Act), Chadha applied for suspension of deportation and permanent residence under section 244(a)(1) of the Act. The immigration judge found that Chadha met the section 244(a)(1) requirements and suspended the deportation.

Under section 244(c)(1) of the Act, suspensions of deportation are reported to Congress along with a summary of the record. Either the Senate or the House may "veto" the suspension under section 244(c)(2) by passing a resolution stating it does not favor the suspension. If such a resolution is passed, the Attorney General must deport the alien. On December 16, 1975, the House passed a resolution without debate or a recorded vote lifting the suspension of deportation of Chadha and five others because they "did not

8. See notes 105-11 and accompanying text infra.
9. 103 S. Ct. at 2788 (Powell, J., concurring).
10. Id. at 2792 (White, J., dissenting); id. at 2816 (Rehnquist, J., dissenting).
11. See notes 112-15 and accompanying text infra.
14. 103 S. Ct. at 2770; see 8 U.S.C. § 1254(a)(1) (1982). This section allows the Attorney General to suspend deportation and adjust the status of certain aliens to that of an alien lawfully admitted for permanent residence if deportation would cause the alien "extreme hardship."
16. 8 U.S.C. § 1254(c)(1) (1982): "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."
17. Id. § 1254(c)(2) provides:
[If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.
18. This was a delay of one and a half years from the immigration judge's order of June 25, 1974 suspending deportation, and was three days before the end of the first session of the 94th Congress, which would have been the last time Congress could have acted. No reason for this delay is found in the record. 103 S. Ct. at 2771.
meet [the] statutory requirements, particularly as . . . to hardship."19

Following the House veto, the immigration judge reopened the deportation hearing. Chadha moved to terminate the deportation proceedings on the grounds that the legislative veto provision, section 244(c)(2), was unconstitutional.20 The immigration judge denied the motion, holding he had no authority to rule on the question, and ordered Chadha deported.21 Chadha appealed to the Board of Immigration Appeals, which held that it had no authority to decide the constitutional issue and dismissed the appeal.22 Chadha then sought review in the Ninth Circuit under section 106(a) of the Act.23 The INS joined with Chadha in arguing that the legislative veto was unconstitutional.24 The Ninth Circuit invited the Senate and the House to file briefs amici curiae.25 Following full briefing and oral argument, the court held that section 244(c)(2) was unconstitutional as violative of the doctrine of separation of powers.26

Before reaching the constitutional merits,27 the majority of the Supreme

20. 103 S. Ct. 2772.
24. 103 S. Ct. at 2772.
27. The court briefly considered a number of questions concerning the justiciability of the case. Two of the questions—appellate jurisdiction and case or controversy—appear to have been resolved in a novel manner.

The congressional parties argued that the INS was not a proper party to appeal to the Supreme Court under 28 U.S.C. § 1252 (1982). Congress argued the INS was not an aggrieved party and could not appeal from the circuit court because INS had agreed with Chadha and sought invalidation of § 244(c)(2) and had therefore received all the relief that had been sought. The Court held that the INS was "aggrieved" because the Ninth Circuit's decision prohibited the INS from taking an action it would have otherwise taken—deporting Chadha. When an act of Congress is held unconstitutional, the agency that administers the act may appeal as an aggrieved party, even if the agency agrees with the decision of the Court. 103 S. Ct. at 2773.

The Court cited no authority for this holding, and it appears to be an extension of existing law. The holding is consistent with at least one previous case that states the "aggrieved party" requirement is not mandated by article III. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333-34 (1980). In cases where a prevailing party has
Court held first that the veto provision was separable from the remainder of the Act. The majority believed that the provision was independent from the rest of the Act and that Congress would have enacted the statute even if it could not have included the legislative veto.

A finding that the statute was not separable would have ended the case. Chadha's suspension of deportation was based upon authority conferred by section 244(a). If all of section 244 would have been struck because the legislative veto provision of section 244(c) was not separable, there would be no authority to suspend Chadha's deportation. If the provision was not separable, Chadha could not have won because prevailing on the constitutional merits of his claim would also deprive him of the authority allowing his deportation to be suspended. Because the judicial relief requested—striking down the veto provision—would not prevent or redress the claimed injury, it seems likely Chadha would have lacked standing to bring the action if the provision had been unseparable.

While the majority and the minority reached different results on the separability issue, the disagreement is based primarily upon different readings of congressional intent, rather than a disagreement as to the applicable legal standard. Since the Act contains a separability clause, the majority noted there was a presumption of separability. Justice Rehnquist conceded that the

been able to appeal, however, there has been at least some continuing collateral adverse effect that operated against the appealing party. Id.; Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939). Thus, the rule set out by the Court seems broader than previous cases where the prevailing party has been allowed to appeal. There would be no continuing adverse effect operating against the INS.

There must be an article III case or controversy continuing throughout before a party may appeal. Sosna v. Iowa, 419 U.S. 393, 402 (1975); U.S. Const. art. III, § 2. Here, the Court found adverseness primarily from the presence of the House and Senate as intervenors. 103 S. Ct. at 2778. Further, the Court stated that INS and Chadha were adverse parties prior to congressional intervention. This does not resolve the question of whether a case or controversy still existed between INS and Chadha. The INS's status as an aggrieved party was based upon the fact that INS may not now deport Chadha. While this basis does make the INS adverse to Chadha for purposes of appeal to the Supreme Court, the INS is only adverse by virtue of the merits of the decision directly and not by an adverse effect that is collateral to the decision on the merits. Four other justiciability issues were also raised and quickly resolved. Id. at 2776-80.

28. 103 S. Ct. at 2774.
29. Id.
30. 8 U.S.C. § 1254(a) (1982); see note 14 supra.
32. Compare 103 S. Ct. at 2774-75 with id. at 2816 (Rehnquist J., dissenting).
33. Immigration and Nationality Act of 1952, § 406, 66 Stat. 166, 281, reprinted in 8 U.S.C. § 1101 note (1982): "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."
34. 103 S. Ct. at 2774; see Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938).
clause created a presumption, but he stated that the ultimate determination depends upon "the intent of the lawmakers" and that the presence of a severability clause rarely controls. The severability clause and resulting presumption allocate the burden of persuasion to the side arguing the provision cannot be severed. Although Congress was arguing the provision was not severable, the majority held there was not sufficient evidence showing intent in the legislative history to rebut the presumption of severability.

The majority and the dissenters drew substantially different inferences from the legislative evolution of section 244. Until 1940, an alien subject to deportation could remain in the United States only if his status was altered by a private bill passed by both houses and approved by the President. In 1940, Congress granted discretion to the Attorney General to suspend deportation unless Congress, by concurrent resolution, disapproved the suspension. In 1948, while widening the category of aliens whose deportations could be suspended, Congress limited the authority of the Attorney General by requiring approval of the suspension by concurrent resolution. By 1952, Congress sought to avoid the requirement of action on each suspension of deportation by enacting the predecessor of section 244(c)(2), which allowed one house to veto the Attorney General's suspension by resolution.

The majority viewed this history as an attempt by Congress to relieve itself from the burden of private bills. Thus, even if Congress knew that section 244(c)(2) would be unconstitutional, it was not clear they would have continued to subject themselves to "the onerous burdens of private bills." Justice Rehnquist concluded that the history showed Congress always insisted on ultimate control and that Congress had never indicated a willingness to allow suspension of deportation without a veto.

Despite the Court's holding on the constitutional merits, the majority concluded that the statute remains a workable administrative mechanism. An alien's suspension of deportation will still be reported to Congress under sec-

35. 103 S. Ct. at 2816 (Rehnquist, J., dissenting) (citing United States v. Jackson, 340 U.S. 570, 585 n.27 (1968)).
37. 103 S. Ct. at 2775.
38. Id. at 2774; see Immigration Act of 1924, Pub. L. No. 68-139, § 14, 43 Stat. 153, 162.
42. 103 S. Ct. at 2775.
43. Id. at 2817 (Rehnquist, J., dissenting).
44. Id. at 2776. This part of the severability analysis would be different under Justice Powell's reasoning. Section 244 would not remain fully operative via the use of a private bill because the Congress would still be improperly undertaking a judicial function. See id. at 2791-92 (Powell, J., concurring); notes 49-52 and accompanying text infra.
tion 244(c)(1) and such a suspension is revocable through a private bill passed by both chambers and approved by the President. Thus, congressional oversight of the delegated authority is preserved.46

Although the minority does not appear to dispute the majority’s contention that the statute remains “workable,” the minority states that the Court’s holding expands the scope of the statute because section 244(c)(2) is an excepting provision.46 The legislative veto provision serves as a limitation on the authority of the Attorney General. While Congress may still limit the actions of the Attorney General, the added hurdles of bicameral action and presentation to the President yield a very different and unquestionably lesser degree of limitation. By holding the Act severable, Justice Rehnquist believes the statute which remains is now broader than the statute Congress originally intended to enact. The remaining statute is thus a substantially larger delegation of power, and the courts should not sever a statutory provision when that is the result.47

Chadha provides little guidance48 for the future severability battles that may develop.49 A standard focusing on legislative intent will likely result in

45. 103 S.Ct. at 2775-76. The Court’s holding converts § 244 and wait” or laying provision, similar to that employed when the Federal Rules of Civil Procedure were promulgated. See Act of June 19, 1934, ch. 651, 48 Stat. 1064, 1070 (current version at 28 U.S.C. § 2072 (1976)). This practice was approved by the Court in Sibbach v. Wilson & Co., 312 U.S. 1 (1941). It is not clear how long the agency must wait. It presumably is the same time period extending to the end of the next following session from when the suspension is reported. Unlike most formulations of the report and wait procedure, where the proposed action is not effective until the waiting period is over, the suspension of deportation by the Attorney General will be effective unless Congress acts within the designated time period.

46. 103 S. Ct. at 2816-17 (Rehnquist, J., dissenting).

47. Id.

48. The Court has declined an opportunity to further explore the severability issue in another legislative veto case, Consumers Energy Council, Inc. v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (struck down veto section and found the provision severable even though there was no severability clause), aff’d mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council, 103 S. Ct. 3556 (1983). The D.C. Circuit adopted an analysis similar to the dissenters in Chadha: “We do not view the imposition of any unspecified burden of persuasion on either side as beneficial to the inquiry.” 673 F.2d at 442 (citing United States v. Jackson, 390 U.S. 570, 585 (1968)).

49. Four factors make it appear that the “next case” is some time away. First, the breadth of the majority opinion suggests that a veto will fail unless both houses act and it is presented to the President. Second, in the wake of the Process Gas Consumers Group v. Consumer Energy Council, 103 S. Ct. 3556 (1983), aff’g Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), and Consumers Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982), two of the better grounds for distinguishing Chadha (that it does not apply to agency rulemaking or independent congressional agencies) appear to be gone. Third, the legislative veto, while often enacted, is seldom utilized. Finally, alternative means for Congress to “control” an agency are likely to be used in order to achieve the desired result.

A district court in Mississippi has held that the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (codified at 5 U.S.C. § 912 (1982)), is unconstitutional
case by case examinations of each act’s legislative history. Such a history is often capable of two or more reasonable, but opposite, interpretations. Thus, a controlling issue may be which side has the burden of persuasion as allocated by the presumption resulting from the presence or absence of a severability clause.\(^50\) Additionally, a legislative veto by definition is a limiting provision, and striking such a provision will generally widen the delegation of power conferred by the statute. Subsequent cases where courts more adequately address the permissible extent to which the remaining statute may be substantively different from the original statute may yield a more predictable analysis.

The use of the legislative veto poses fundamental questions concerning the allocation and structure of national power among the coordinate branches of the federal government. Complicating the analysis is the use of the legislative veto to control administrative agencies that straddle the elusive boundaries between the branches. In analyzing any given exercise of governmental power, the threshold issue is federal authority.\(^51\) Then the inquiry shifts to determining which branch can exercise the power and what procedure must that branch use to properly exercise the power.

This framework was used by the Ninth Circuit in holding that the constitutional problem in \textit{Chadha} was a violation of the separation of powers doctrine.\(^62\) The court held that the House’s action was an impermissible legislative intrusion into the judicial power or alternatively an impermissible intrusion into the executive power.\(^63\) As a third ground, the Ninth Circuit held that even if the House’s action was a proper subject of legislative action it would not stand because it failed to satisfy the article I, section 7 requirements of presentation and bicameral action.\(^56\)

A majority of the Supreme Court affirmed the Ninth Circuit’s result but declined to follow its framework, relying only on the third ground to the exclusion of the first two.\(^66\) Justice Powell’s concurrence primarily followed the rea-

\(^{50}\) See notes 33-37 and accompanying text supra.

\(^{51}\) Federal authority over aliens was not an issue in \textit{Chadha}. The constitutional basis for this authority is found in the naturalization clause and necessary and proper clause, article I, section 8, and the Court has consistently recognized that the federal power over aliens is broad. See Mathews v. Diaz, 426 U.S. 67, 79-80 (1976).

\(^{52}\) Chadha v. INS, 634 F.2d 408, 435-36 (9th Cir. 1980), aff’d, 103 S. Ct. 2764 (1983).

\(^{53}\) \textit{Id.} at 429-30.

\(^{54}\) \textit{Id.} at 431-33.

\(^{55}\) \textit{Id.} at 433-35.

\(^{56}\) 103 S. Ct. at 2781.
soning of the first alternative used by the Ninth Circuit and found that the use of the legislative veto in Chadha was an impermissible intrusion into the federal judicial function. Justice White's dissent found that the House's action did not intrude into the functions assigned to the other branches and that article I, section 7 did not apply because the legislative veto is not legislation.

Thus, unlike the concurring and dissenting opinions, the majority's holding is not based on the separation of powers doctrine per se, and the doctrine as such is not discussed. The majority focused on the procedure by which Congress must act while exercising power, not on whether the particular exercise of that power impermissibly intrudes into the power allocated to another coordinate branch of the federal government. This difference led to an analysis by the majority that is substantially different from that employed by the concurrence and the dissent.

The majority avoided a prolonged discussion on the policy merits of the legislative veto and proceeded directly to an analysis of the article I, section 7 requirements of presentment and bicameralism. The majority held that bicameral action and presentment are necessary unless a specific section of the Constitution authorizes unicameral action without presentment. The majority noted that the "Great Compromise" of bicameralism was considered so important by the Framers that the provision may only be amended under article V with the consent of the affected states. In the Court's view, these requirements demonstrate the Framers' intention to require legislative action to be the result of a single, unified procedure. The majority concluded that the action of the House is legislative in character, and since it is not subject to bicameral approval and presentment, it is outside the constitutional sphere of the legislative branch.

The House action in Chadha was legislative in character and effect be-

57. Id. at 2789 (Powell, J., concurring).
58. Id. at 2808-10 (White, J., dissenting).
59. Id. at 2799-2800 (White, J., dissenting).
60. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." Id. at 2781.
61. 103 S. Ct. 2782-84.
62. Under article I, section 2, only the House initiates impeachment. Article I, section 3 requires the Senate to conduct impeachment trials. Article III, section 2 gives the Senate the power to approve or disapprove presidential appointments. Under article II, section 2, only the Senate ratifies treaties. But cf. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (presentment is unnecessary under article V, following the passage of a proposed amendment to the Constitution).
64. 103 S. Ct. at 2784; see U.S. CONST. art. V.
65. 103 S. Ct. at 2784; see THE FEDERALIST NO. 22 (A. Hamilton); id. No. 62 (A. Hamilton).
66. 103 S. Ct. at 2785.
cause it altered the legal rights, duties, and relations of persons outside the legislative branch.67 Because the legislature acted to affect rights and duties, the majority concluded that the action must fully conform with the requirements of article I, section 7.68 The majority essentially asked which branch of the government is affecting rights and duties, not what is the effect of the action. The majority viewed the Attorney General’s action under section 244 as the exercise of article II executive power.69 Even though executive action under delegated authority resembles legislative action, it is not subject to bicameral approval or presentment because the Constitution does not so require.70 Thus, defining what “type” of governmental power is being exercised depends upon which branch is exercising the power rather than the nature of the power itself. This syllogistic approach enabled the majority to state, “Congress’ authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto.”71 Under the majority’s formulation, even though the governmental power is the same in both instances, when Congress determines if an individual meets the statutory criteria it is legislative action, but when the Executive branch makes the determination it is executive action.

The majority stated that the House’s decision to deport Chadha was a policy decision in the same vein as the original congressional delegation allowing suspension of deportation.72 This analysis would be true if in the course of the House’s action it had purported to alter the standards under which Chadha’s suspension had been granted. The resolution affecting Chadha stated the House committee believed he did not meet the already existing policy requirements.73 Certainly the Congress, through a sustained exercise of legislative vetoes, may generate a de facto change in the policy embodied in a particular statutory scheme. Such a policy shift could be possible by even a single veto.74

In a situation where the exercise of legislative vetoes would change a sub-

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67. Id. at 2784.
68. Id. at 2787.
69. Id. at 2785 n.16; see U.S. Const. art. II, § 2.
70. 103 S. Ct. at 2785 n.16. The Court reasoned that the bicameral process is not necessary to check this executive power because the power is limited by the statute granting it. Id.
71. Id.
72. Id. at 2787.
74. Such an occurrence appears to be at least partly at work in Consumer Energy Council v. FERC, 673 F.2d 425 (1982), aff’d sub nom. Process Gas Consumers Group v. Consumer Energy Council, 103 S. Ct. 3556 (1983). FERC had promulgated incremental pricing regulations, but the House vetoed the regulations. The veto was primarily based upon a belief by most House members that changed circumstances made the regulations unwise, despite the fact that the FERC was within its statutory mandate. 673 F.2d at 437-38.
stantive policy, the effect would be functionally equivalent to new legislation that avoids bicameral approval and presentation. Such a situation might occur as the composition of Congress shifts with the new membership having a different perspective of the "intent" of a particular legislative scheme. The facts of Chadha, however, do not suggest such a policy shift. The executive and the legislature simply disagreed as to whether Chadha met the requirements of the statute authorizing suspension of deportation. Despite the absence of a clear exposition of why this action by the House is a policy determination, the majority viewed this action by the legislative branch as legislative in character and effect. 76

This is the point at which the majority and the concurrence differ. The concurring opinion advanced a narrower ground: when Congress finds that a particular person fails to satisfy statutory criteria it has assumed a judicial function in violation of the separation of powers doctrine. 76 Thus, the majority formulation started from the position that when the legislative branch exercises any governmental power it must do so in the manner constitutionally prescribed for legislation. The concurring opinion started from the position that the powers of the various branches are functionally different and that one branch may not exercise the power granted to another. 77

This difference is more than theoretical. Under the majority formulation, Congress may have deported Chadha only if a private bill had been introduced and passed. 78 Such a private bill would likely be unconstitutional under the concurring formulation because it would still be an assumption of the judicial power by the legislature. 79 The concurrence views the function of legislative power as that which prescribes general rules for the government of society. 80 Since the House's action is directed specifically at whether Chadha has met

75. 103 S. Ct. at 2785-86.
76. Id. at 2784.
77. Id. at 2792 (Powell, J., concurring); see also Chadha, 634 F.2d at 430 ("By assuming the task of correcting misapplications of the law, Congress is performing a role ordinarily a judicial or an internal administrative responsibility."). The lower court reasoned that if the veto is a method of sharing administration of the statute, it interferes with a core function of the Executive. Id. at 431-33. If the veto is a residual exercise of legislative power, it violates the requirement of bicameralism. Id. at 433-35.
78. While the majority stated this is the only way Chadha could be deported after a suspension of deportation, no opinion as to the ultimate constitutionality of such action was expressed. 103 S. Ct. at 2785 n.17.
80. 103 S. Ct. at 2792 (Powell, J., concurring) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)).
statutory criteria, it is adjudicatory.\textsuperscript{81}

The concurrence avoided any reliance on the presentment and bicameral action requirements. Since the veto provision contained in the Act is unusual, Justice Powell believed that depending upon the context, a particular veto provision may comply with the presentment clause, and that the majority's holding was unnecessarily broad.\textsuperscript{82} Because none of the legislative veto provisions currently in force require presentment, the application of the majority's decision would invalidate every use of the legislative veto.\textsuperscript{83} A two-chamber veto would satisfy the requirement of bicameral action but would not satisfy the rule in Chadha unless the action was presented to the President. In any event, the requirements of bicameral action and presentment are closely related and would be unlikely to apply differently to any particular congressional action.

Justice White's dissent did not dispute the Court's preliminary analysis regarding presentment and bicameralism but rather stated that the article I, section 7 requirements do not attach because the legislative veto is not a "Bill, Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary."\textsuperscript{84} The fundamental difference between Justice White and the majority is that the dissent believed the House action is not the equivalent of legislation. Justice White reached this conclusion by examining the function that the legislative veto is to fulfill against the role of Congress in the constitutional scheme. Justice White does not infer disapproval of the legislative veto from the absence of a specific provision authorizing such a practice.\textsuperscript{85} He stated that the majority's analysis failed to recognize the flexibility inherent in the Constitution and that the practice of government requires the integration of separated powers.\textsuperscript{86} Justice White also suggested only a modest role for the presentment clause, believing the clause serves only to insure those items that are clearly the equivalent of legislation are presented to the President.\textsuperscript{87} There is no clear textual statement in the Constitution controlling when bicameral action and presentment is "necessary." Since the lawmaking power of article I, section 8, particularly the Necessary & Proper Clause, is "expansive," the dissent concluded that the Constitution is suf

\textsuperscript{81} Id. at 2791.
\textsuperscript{82} Id. at 2788.
\textsuperscript{84} 103 S. Ct. at 2972 (quoting U.S. CONST. art. I, § 7).
\textsuperscript{85} 103 S. Ct. at 2798, (White, J., dissenting).
\textsuperscript{86} \textit{Id.} (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring) ("While the Constitution diffuse power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.")
\textsuperscript{87} 103 S.Ct. at 2800 (White, J., dissenting).
tly flexible and the power of Congress sufficiently wide to allow the legislative veto.⁸⁸

The Court combined a flexible reading of the Constitution with a recognition that Congress must have the power to legislate effectively in a changing and complex world to allow the federal government to construct the modern administrative state. In tracing the Court's sanction of broad delegations to administrative agencies, the dissent noted that although administrative agencies are in theory only to "fill up the details"⁹⁹ under prescribed standards that lay down an intelligible principle,⁹⁰ in practice delegation has yielded standards of great breadth.⁹¹ Only two cases have held that a delegation to a government official or agency was unconstitutionally broad.⁹² While stating that the constitutionality of such broad delegations has not "been put to rest," Justice White concluded that agency rulemaking is realistically and functionally the same as lawmaking.⁹³

Justice White challenged the artificial character of the majority's definition of legislative action by pointing out that administrative bodies affect rights and obligations of people outside the executive branch without the checks of bicameral approval and presentment.⁹⁴ Thus, if Congress can delegate this power to the Executive branch, it should also be able to reserve to itself the power to veto such agency action.⁹⁵ Justice White was more concerned with examining the function of the power than the label attached to it. The dissent squarely addressed the basic flaw in the majority's analysis: "Under the Court's analysis, the Executive Branch and the independent agencies may make rules with the effect of law while Congress, in whom the Framers confided the legislative power . . . may not exercise a veto which precludes such rules from having operative force."⁹⁶

The differing conclusions as to the constitutionality of the legislative veto reached by the Justices can be explained in part by examining their origins. The Constitution established three branches of government with each branch possessing limited powers that are to be exercised in a specified manner. From a constitutional point of view, any action by one of the branches requires two questions to be answered in the affirmative: is the action within the delineated power of that branch, and has the branch acted in the prescribed manner.

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⁸⁸. Id. at 2801 (White, J., dissenting).
⁸⁹. Id.
⁹². Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). Neither case, however, was decided under a separation of powers analysis.
⁹³. 103 S. Ct. at 2802 (White, J., dissenting).
⁹⁴. Id.
⁹⁵. Id.
⁹⁶. Id.
Since the majority addressed the second question first and answered it in the negative, there was no need for Chief Justice Burger to go further. The concurring and dissenting Justices both started their analysis with the first question, although they reach different results. This difference in starting point also affects the type of analysis used. The separation of powers doctrine is only implicated when answering the first question. Deciding whether a particular branch is acting within its defined power requires an examination of the purpose of the action. That purpose must then be evaluated to see first, if any branch may properly undertake the action, and second, to see if the act is within the function of the branch taking the action.

The approach taken by the majority did not require examination of the function of the legislative veto. The majority characterizes the veto in Chadha as legislative action primarily because it is Congress that is acting. The action by the House does alter the rights and duties of the people outside the legislative branch. Virtually all action taken by the government, however, has that same effect. Clearly Chadha's rights and duties were altered in the original decision by the immigration judge to suspend his deportation. Yet the majority stated that the decision to suspend deportation is an executive power, not subject to bicameral action and presentment.

It is certainly difficult to draw any functional difference between the agency action and the House action in this case. Nevertheless, the majority's logic requires that this distinction be made. If the typical agency action is defined to be "legislative," then under the holding in Chadha such action is not permissible without fulfilling the requirements of article I, section 7. The definitional approach taken by the majority provides a way for the legislative veto to be struck down and still leave intact the constitutional foundation for the modern administrative state. The majority avoided the necessity of balancing functions because the opinion was focused primarily in terms of insuring that governmental power exercised by the legislative branch conforms with the procedures of article I, section 7. While the Court's classification of administrative action as an exercise of article II executive power is supportable, it is difficult to harmonize with existing case law. Administrative power has been referred to as "quasi-legislative" with a "legislative effect." Moreover, the administrative power to deport aliens has been referred to as an exercise of legislative power.

97. See Buckley v. Valeo, 424 U.S. 1, 141 (1976) (per curiam) (rulemaking is "the performance of a significant governmental duty exercised pursuant to a public law" and must therefore be performed by "Officers of the United States," who are appointed by the President and therefore may not be legislatively appointed); see also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976) (rulemaking is not the power to make law, only the power to carry out the will of Congress).
Not all agencies are so easily characterized as "executive." Some agencies have been regarded as legislative or independent agencies\(^{101}\) and therefore calling their functions executive does not easily follow. Executive control of these agencies is also limited.\(^{102}\) As noted earlier, unless the function of these agencies is considered an executive function, the article I, section 7 requirements will attach.

The breadth of the rule announced in *Chadha* is a manifestation of the Court's decision not to employ a separation of powers analysis. Perhaps the most troublesome aspect of this treatment is that it does not require significant examination of the relationships between the coordinate branches. The Court made no attempt to discuss whether a legislative veto might apply differently as between agency rulemaking and agency adjudication or whether the distinction between an executive agency, such as the INS, or an independent agency, such as the FTC, is meaningful.\(^ {103}\) Indeed, under the Court's holding, the nature of the underlying administrative action does not appear significant.\(^ {104}\)

While the article I, section 7 requirements are related to any separation of powers analysis, the Court's emphasis on these clauses represents a shift in approach toward cases involving conflicts among the coordinate branches. Previous cases focused more on whether a particular exercise of power by one branch is an encroachment on the power of another branch.\(^ {105}\) Although the

\(^{101}\) Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (FTC is a legislative agency and independent of the Executive).

\(^{102}\) For example, the President may not remove FTC commissioners without cause. *Id.* at 629. “[T]he President, as representative of the Executive, does not have a claim to control the decisionmaking of independent agencies.” *Consumer Energy*, 673 F.2d at 472.

\(^{103}\) The Court has denied review in two cases where these potentially distinguishing factors could have been explored, in both instances affirming holdings that the legislative veto provision was unconstitutional. Process Gas Consumers Group v. Consumer Energy Council, 103 S. Ct. 3556 (1983), *aff'd* Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) and Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982). In *Consumer Energy*, the court held that the constitutionality of the one-house veto is not dependent upon whether the agency is executive or independent. The court also noted that the basis for creating independent agencies is to avoid political interference in agency decisionmaking, and therefore their "independence" does not advance the need for the legislative veto in order to provide political accountability. 673 F.2d at 472.

\(^{104}\) The majority made no attempt to distinguish rulemaking and adjudication. Despite the fact that the action by the INS in this case is adjudication, the bulk of the majority opinion is written in terms of the effect of a legislative veto on rulemaking.

\(^{105}\) See Buckley v. Valeo, 424 U.S. 1, 118-24 (1976) (per curiam) (actions of Congress interfered with the constitutional appointment power of President); United States v. Nixon, 418 U.S. 683 (1974) (generalized claim of privilege may not interfere with judicial function); *see also* Myers v. United States, 272 U.S. 52, 119, 125 (1926) (President may remove appointments without the advice and consent of the Senate); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 445 (1977) (law requiring the presidential papers to be under the control of the administration did not interfere with the Executive function); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952) (President's act of seizing steel mills was an improper assumption of a legis-
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lative role); see, e.g., J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405 (1928); (tariff law was a permissible delegation of power); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (Act of Congress intruded into both judicial and executive power).

The lower court, while undertaking an analysis under the presentment and bicameral action clauses, primarily examined the veto provisions as potential encroachments into the judicial and executive functions. It formulated three alternatives: (1) impermissible encroachment into the judicial function; (2) impermissible intrusion into the executive's administration function; and (3) impermissible avoidance of the article I, § 7 requirements of bicameral action and presentment. 634 F.2d at 429-35.

In Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd mem. sub nom. Process Gas Consumer Group v. Consumer Energy Council, 103 S.Ct. 3556 (1983), while the court struck down a legislative veto provision primarily on the basis of a violation of article I, § 7 requirements, it also held in the alternative that the provision impinged upon the judicial and executive functions. 673 F.2d at 448.

In Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (per curiam), cert. denied, 434 U.S. 1009 (1978), the court upheld a legislative veto provision concerning salary recommendations of some government officials by finding the provision did not violate article I, § 7 and did not interfere with any essential executive function. Id. at 1063-70.

The more pragmatic, flexible approach of Madison in the Federalist [47] and later of Mr. Justice Story [1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 525 (M. Bigelow 5th ed. 1905)] was expressly affirmed by this Court only three years ago in United States v. Nixon.

Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) (the three branches of government are not "hermetically" sealed from each other).

United States v. Nixon, 418 U.S. 683, 705-06 (1974) (executive privilege has "constitutional underpinnings" despite the absence of a specific provision authorizing such a privilege); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("... to give to the enumerated powers the scope and elasticity afforded by what seems to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism."); McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (both the House and Senate have subpoena power, including the power to jail those who ignore process).

"[T]here is a zone of twilight in which [the President] and Congress may have concurrent authority or in which its distribution is uncertain." Youngstown Sheet & Tube, 343 U.S. at 637 (Jackson, J., concurring); see also Ex parte Milligan, 71 U.S. (4 Wall) 2, 114-24 (1866) (discussing whether Congress or the President has the authority to suspend habeas corpus).
is well settled that there is some limited federal judicial power that operates outside the constraints of article III.\textsuperscript{110} In the separation of powers context the most enduring example of the flexibility of the Constitution is the existence of the "fourth branch" of administrative agencies that routinely perform executive, legislative and judicial functions that are, as Justice Holmes said, "only softened by a quasi."\textsuperscript{111}

The Chadha Court's resolution of the legislative veto issue, standing alone, is not problematic. The decision is troublesome because it does not "fit" within the constitutional scheme allowing Congress to delegate substantial authority to agencies.\textsuperscript{112} Justice Powell's concurrence highlights this lingering inconsistency. In his formulation, the House's action is invalid because it assumed a judicial function of determining whether an individual had complied with statutory criteria. Yet under the statutory scheme being considered, this judicial function has been primarily delegated to the executive, and this delegation poses no problem for Justice Powell.\textsuperscript{113} It is true that the act provides for judicial review\textsuperscript{114} and for detailed administrative procedures.\textsuperscript{115} The absence of these types of procedural safeguards highlights the impropriety of the House's action.\textsuperscript{116} Judicial review of the agency's action is limited, however, and Chadha's position before the immigration judge is of a different character than if he had been before an article III court in the first instance. The point here is not to question the constitutionality of the delegation of authority to the INS but to suggest that the shortcoming of the Court's analysis is its failure to seek any unifying principle that reconciles the decision in Chadha with the reality of the modern administrative state.

Justice Powell's concurrence and his reservation of the broader presentment clause issue for another day is persuasive. Deferral would have allowed the Court the opportunity to resolve the competing values of the government's need to delegate power within the separation of powers doctrine in the context of a case where the issue was more squarely put. The majority's approach, by relying on a more literal application of the Constitution, yields a more widely applicable result because none of the current legislative veto provisions in force

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\item \textsuperscript{110} Congress may under a specific article I power provide a federal forum even if article III might otherwise deny such a forum. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 600 (1949). There is at least some article III judicial power which may be exercised by non-article III courts. See, e.g., Palmore v. United States, 411 U.S. 389 (1973); Glidden v. Zdanok, 370 U.S. 530 (1962). But see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982) (bankruptcy courts are not beyond the reach of article III, and non-article III courts may not adjudicate private rights arising solely from state law.)
\item \textsuperscript{111} Springer v. Philippine Island, 277 U.S. 189, 210 (1928) (Holmes, J., dissenting).
\item \textsuperscript{112} See notes 107-11 and accompanying text supra.
\item \textsuperscript{113} 103 S. Ct. at 2792, n.10.
\item \textsuperscript{114} 8 U.S.C. § 1105a(a) (1982).
\item \textsuperscript{115} Id. § 1252(b).
\item \textsuperscript{116} 103 S. Ct. at 2792.
\end{itemize}
require presentment. However, the majority opinion stands in stark contrast to the Court's flexible approach toward congressional delegation of power to executive and independent agencies. Congressional action in response to the demands of modern government has been examined under one standard, while congressional action in response to the modern government thus created appear to be examined under a different standard.

The problem that remains after Chadha, for Congress and for the Court, is the same problem that gave rise to the case itself—what avenues are available to control the exercise of power by administrative agencies. Current congressional efforts seem to be directed at two alternatives. The first alternative is essentially a laying provision where proposed rules would go into effect after a specified period unless Congress disapproves by passing a joint resolution that is presented to the President.\textsuperscript{117} The second method requires rules to be approved by a joint resolution and presented to the President before they can become effective.\textsuperscript{118} While both alternatives appear to be consistent with the holding of Chadha, they would appear to have significant practical differences. The second alternative essentially has the agency recommending legislation. Congress must act affirmatively before rules become effective under the second alternative, but rules would become effective under the first alternative whenever Congress took no action; thus, it seems likely that the first alternative would result in more rules becoming effective.

Since the majority did not distinguish between agency rulemaking and agency adjudication, the question of whether the Congress may in some situations "veto" an agency adjudication may become an issue in some later case. Generally, the Court may be in a position to reexamine the non-delegation doctrine. Although the doctrine has been dormant since the mid-thirties, Justice White indicated that the limits of the doctrine "have not been put to rest."\textsuperscript{119} Justice Rehnquist and some commentators have also suggested that the doctrine be revived.\textsuperscript{120}

In Chadha, the Court has broadly reduced, and perhaps totally eliminated, the availability of the legislative veto as a congressional remedy for controlling administrative agencies. The Court shed little light on identifying the underlying cause of tension that results from the allocation of governmental authority to administrative agencies that sit on the boundaries between

\textsuperscript{117} See note 45 supra.

\textsuperscript{118} These two alternatives were placed in the Consumer Product Safety Amendments of 1983. S. 861, H.R. 2668, 98th Cong., 2d Sess., 129 CONG. REC. H4769, H4771 (daily ed. June 29, 1983).

\textsuperscript{119} 103 S. Ct. at 2802.

\textsuperscript{120} Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring) (the "Court should take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators"); see also J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980).
branches of the federal government, and it provided no guidance in the search for a cure.

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