

In the

ORIGINAL

# Supreme Court of the United States

In the Matter of:

IMMIGRATION AND NATURALIZATION  
SERVICE,

Appellant

v.

JAGDISH RAI CHADHA ET AL.;

UNITED STATES HOUSE OF REPRESENTATIVES,

Petitioner

v.

IMMIGRATION AND NATURALIZATION  
SERVICE ET AL.; and

UNITED STATES SENATE,

Petitioner

v.

IMMIGRATION AND NATURALIZATION  
SERVICE ET AL.

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Washington, D. C.

February 22, 1982

Pages 1 thru 74

ALDERSON

REPORTING

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Service.

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9 of Appellees Chadha et al.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Gressman, you may proceed when you are ready.

ORAL ARGUMENT OF EUGENE GRESSMAN, ESQ.

ON BEHALF OF THE PETITIONER

UNITED STATES HOUSE OF REPRESENTATIVES

MR. GRESSMAN: Chief Justice Burger, and may it please the Court, this is something of an historic occasion. Never before have the two Houses of Congress been forced to intervene as litigating parties before this Court. They have been forced to intervene to protest another episode in the -- what this Court once described as the tug of war between the executive and the legislative branches of government.

The House of Representatives, which I represent here, views this attack upon the legislative powers of Congress as directed primarily at the historic, necessary, and proper power of the Congress to enact legislation which it deems appropriate and necessary in execution of its vested legislative powers.

I suggest that that is the proper place for starting the constitutional analysis of the validity of Section 244(c)(2) of the Immigration and Nationality Act of 1952. But before we get to that analysis, we must understand that, as I stated before, while the assault

1 here comes upon that particular provision of the  
2 Immigration and Nationality Act, this is but one episode  
3 in the far-flung, orchestrated war declared by the  
4 executive branch against the device that is popularly  
5 and often inaccurately known as the legislative veto.

6           In case after case where private parties seek  
7 to raise this constitutional attack upon the so-called  
8 legislative veto, the executive branch immediately drops  
9 all opposition and concedes that the veto provision is  
10 indeed unconstitutional. That has forced the two Houses  
11 of Congress to become litigating parties, which is not  
12 their basic function, but we have been forced by the  
13 fact that there is no one in the executive department  
14 that sees fit to defend or state the case for the  
15 constitutionality of these provisions.

16           Now, that very fact, as in this case, gives  
17 rise to a tremendous number of severe problems,  
18 threshold problems about whether or not that is a case  
19 or controversy, or whether there are other reasons why  
20 such a momentous constitutional question should be  
21 addressed under the circumstances in which this case  
22 arises.

23           We have in this case alone critical problems  
24 about the jurisdiction of the lower court to consider  
25 this constitutional question. We have problems of

1 justiciability. We have problems about the standing of  
2 Mr. Chadha to institute this kind of constitutional  
3 challenge based not on his personal claims or rights but  
4 upon the executive's claims with respect to the  
5 legislative veto.

6           We have a severe problem with respect to the  
7 lack of any adverse parties in the court below, and  
8 there are other prudential considerations, to say  
9 nothing of a critical severability problem which may  
10 preclude resolving the constitutional question, a matter  
11 which my colleague, the Senate legal counsel, will  
12 address.

13           To take but one brief look at the technical  
14 appeal problem that is before this Court in Number  
15 80-1832, where the government has sought to take an  
16 appeal to this Court under Section 1252 as a  
17 non-aggrieved party.

18           I will not add anything to what has been said  
19 in our written briefs on this subject, except to call  
20 attention to the Court's procuring of a ruling one month  
21 ago, on January 11th, in Donovan against Richmond County  
22 Association, which I suggest makes even more severe the  
23 government's problem in trying to take an appeal to this  
24 Court under Section 1252.

25           But to get back to the other issues in this

1 case, I suggest that the key to understanding all these  
2 threshold problems as well as the basic constitutional  
3 question, lies in an appreciation of the actual meaning  
4 and scope of the statutory scheme issue, to wit, Section  
5 244 of the Immigration and Nationality Act.

6           Now, the executive and Mr. Chadha would begin  
7 and end their constitutional analysis by referring to  
8 the two constitutional objections that are repeated over  
9 and over again in all this litigation respecting the  
10 so-called legislative veto. That is an objection based  
11 upon the presentment clause, Article I, Section 7 of the  
12 Constitution, which typifies the bicameral method of  
13 legislating, subject to presentment to the President for  
14 his approval or veto.

15           The other claim, the only other constitutional  
16 objection raised, again by Mr. Chadha as well as by the  
17 executive, is that this provision somehow violates the  
18 general separation of powers doctrine, not that it  
19 violates any function vested expressly in the President  
20 or the judiciary, but that it violates simply Baron de  
21 Montesquieu's original theory of separation of powers.

22           It seems to me, however, that that is turning  
23 constitutional analysis upside down. We must begin  
24 analysis where this Court has always begun to evaluate  
25 Congressional legislation, and that is, let's see what



1 Congress was actually doing, what power was it trying to  
2 execute when it adopted this provision in the  
3 Immigration and Nationality Act.

4           Basically, I rely upon the analysis that was  
5 established by Chief Justice Marshall in McCulloch  
6 versus Maryland in 1819, and has been followed literally  
7 hundreds of times by this Court in evaluating the  
8 constitutionality of Congressional legislation, where  
9 Congress is trying to exercise some of its given power.

10           It is not difficult to state that standard  
11 that Marshall laid down. In the first part, he says,  
12 let the end be legitimate. Let it be within the  
13 constitutional scope of Congressional powers. Secondly,  
14 he said that all means which Congress considers  
15 appropriate to a legitimate end are constitutional, and  
16 this Court has said many times that that simply means  
17 that there must be a rational connection between the  
18 means and the end. And thirdly, the McCulloch opinion  
19 says that the means selected by the Congress in exercise  
20 of its vast discretion under this necessary and proper  
21 clause must be consistent with the letter and spirit of  
22 the Constitution.

23           Now, he also added another part to that last  
24 step. In order for any other provision in the  
25 Constitution to inhibit or restrict the means selected

1 by the Congress, he says, at Page 408 of the McCulloch  
2 opinion, that those other words of the Constitution must  
3 imperiously require a restriction upon the means.

4 QUESTION: Well, Mr. Gressman, do you think  
5 that cases like United States against Myers involving  
6 the firing of a postmaster, and Buckley against Valeo,  
7 involving the method of appointment to the Federal  
8 Election Commission, violate McCulloch against Maryland?

9 MR. GRESSMAN: Not at all, Your Honor. It  
10 seems to me that the appointments clause in Article II,  
11 I think it is, imperiously inhibits any means selected  
12 by Congress whereby Congress is trying to appoint an  
13 officer of the United States. So it is entirely  
14 consistent. I am not objecting to the use of the  
15 separation of powers doctrine. I am merely saying that  
16 somehow, if that is the objection, the doctrine must be  
17 reduced to a specific imperious restriction, as it is  
18 when you have some vested Presidential power that is  
19 specified in Article II, where Congress seeks to invade  
20 or utilize.

21 I think that is a clear imperious restriction  
22 upon Congressional power.

23 QUESTION: Does United States against Lovett  
24 have something to do with this, too?

25 MR. GRESSMAN: No, I don't believe the Lovett

1 case had anything to do with the power of Congress  
2 vis-a-vis the executive.

3 QUESTION: Well, wasn't that an effort, at  
4 least so Justice Black's opinion reached a conclusion  
5 that Congress was undertaking to terminate the  
6 employment of an executive branch officer without any  
7 due process.

8 MR. GRESSMAN: Yes, without any due process,  
9 and it was considered to be a bill of attainder, which  
10 was a right adhering to the private parties in those  
11 cases. That was -- the Congress was not there  
12 attempting to execute some kind of power that was vested  
13 in the President. It was simply that Congress violated  
14 the bill of attainder clause.

15 Now, I say that that is another good example  
16 of a provision in the Constitution which might  
17 imperiously restrict the means selected in a given case.

18 QUESTION: I take it you think the bill of  
19 attainder is the only basis on which that result is  
20 supportable in the Lovett case.

21 MR. GRESSMAN: Well, as I read the majority  
22 opinion and the briefs in that case, that was the main  
23 and the only issue that became decisive in this Court's  
24 opinion, and it was not conceived of as an  
25 executive-legislative conflict.

1           Now, to quickly address the McCulloch analysis  
2 to the provisions in Section 244, I think it is without  
3 any doubt that the end being sought in this legislation  
4 was within the legitimate powers of the Congress under  
5 the Constitution. The Immigration and Nationality Act  
6 and Section 244 thereof are directed toward the  
7 Congressional control over aliens and deportation, and  
8 as this Court said as late as 1977 in Fiallo versus  
9 Bell, in 430 U. S., this Court has repeatedly emphasized  
10 that over no conceivable subject is the legislative  
11 power of Congress more complete than it is over the  
12 admission of aliens.

13           Our cases have long recognized the power to  
14 expell or exclude aliens as a fundamental sovereign  
15 attribute exercised by the government's political  
16 departments, largely immune from judicial control. So,  
17 the end sought here, that is, the control over aliens,  
18 is certainly a legitimate end.

19           Secondly, let us look at the means selected by  
20 the Congress to achieve that kind of control or end.  
21 Was it appropriate? Well, we have attempted time and  
22 again in our briefs to outline the meaning and the  
23 significance of Section 244. Any way you look at it, it  
24 is by intention and by language a procedure for  
25 petitioning the Congress of the United States to be



1 excused from compliance with a lawful deportation order.

2           It replaces the private bill technique for  
3 attaining identical kind of relief through private bill  
4 legislation. Section 244 also delegates to the Attorney  
5 General certain limited functions in the consideration  
6 of those petitions or applications.

7           QUESTION: Mr. Gressman, may I ask you, you  
8 rely on the power to pass private naturalization bills,  
9 I understand. Are those bills consistent with the  
10 constitutional requirement that naturalization bills  
11 must be uniform?

12           MR. GRESSMAN: Well, I am not sure that those  
13 are the types of legislation, private legislation I am  
14 referring to. These are simply ones that permit by  
15 private bill an alien to stay within this country, not  
16 to be naturalized.

17           QUESTION: Well, isn't that -- Oh, I see.

18           MR. GRESSMAN: It is a different operation,  
19 but --

20           QUESTION: It has nothing to do, you suggest,  
21 with naturalization?

22           MR. GRESSMAN: No, not the kind of private  
23 bill, nor does Section 244 have anything to do with  
24 naturalization. It merely is a --

25           QUESTION: Even if it doesn't, is a

1 naturalization bill a little broader than just --

2 MR. GRESSMAN: I would think it is broader than  
3 to --

4 QUESTION: I mean, does it include deportation  
5 bills, too?

6 MR. GRESSMAN: Well, they are different, is  
7 all I can say. I think they are conceptually different.

8 QUESTION: In any event, what you are saying  
9 is -- of course, I guess the question isn't here -- that  
10 the uniformity provision in any event does not apply.

11 MR. GRESSMAN: No. No. Well, as I said, the  
12 Attorney General is given a limited function, to wit, he  
13 is given a certiorari-like weeding-out process, a  
14 screening process whereby he weeds out the ineligible  
15 and the unworthy applicants who seek this relief, and he  
16 is authorized to give temporary stays or suspensions of  
17 deportation to those who he considers worthy of relief.  
18 Then, he reports those to Congress for a final  
19 consideration, and only after Congress considers this  
20 under 244(c)(2) can the alien be excused from  
21 deportation.

22 QUESTION: Well, now, you couldn't do that in  
23 the case of the judicial branch, could you?

24 MR. GRESSMAN: No.

25 QUESTION: Say that a court is given kind of

1 certiorari-like jurisdiction to make recommendations to  
2 Congress.

3 MR. GRESSMAN: Absolutely not, Your Honor, and  
4 I think there is a vast difference in the  
5 interrelationships between Article I and Article II as --

6 QUESTION: Does that suggest, Mr. Gressman,  
7 that -- I gather the action of the Attorney General,  
8 suppose he refuses to grant the suspension. That is  
9 judicial review, isn't it?

10 MR. GRESSMAN: That is judicial review.

11 QUESTION: And suppose that it is reviewed,  
12 and the court says, no, the Attorney General is wrong,  
13 he should have granted the suspension.

14 MR. GRESSMAN: I don't think --

15 QUESTION: May Congress then step in under the  
16 statute and --

17 MR. GRESSMAN: No. I don't think that -- I  
18 don't think the court has ever said that you must grant  
19 a deportation. But you raise a very interesting point,  
20 Justice Brennan, and that is that if the Attorney  
21 General grants this temporary relief, that is not  
22 reviewable by the courts. There is no aggrieved party  
23 in that situation.

24 QUESTION: No, that is not the case I put to  
25 you.

1                   MR. GRESSMAN: I know.

2                   QUESTION: It is where he refuses it.

3                   MR. GRESSMAN: That's right.

4                   QUESTION: And the court says he should have  
5 granted it.

6                   MR. GRESSMAN: Well, I would think that --

7                   QUESTION: Then my interest was whether or not  
8 the Congress then could step in and pass a suspension.

9                   MR. GRESSMAN: No, I don't think that that is  
10 likely to happen, and I don't know of any instance where  
11 it ever followed through. I don't think Congress would  
12 overturn, seek to overturn a judicial determination of  
13 that nature.

14                  QUESTION: Well, I gather what was said in  
15 Waterman rather indicates that Congress could not,  
16 doesn't it?

17                  MR. GRESSMAN: I would think that might be the  
18 case, yes. But the point finally is that neither the  
19 presentation -- the presentment clause nor the general  
20 separation of powers doctrine can be said to be an  
21 imperious restriction upon the choice of means selected  
22 by Congress to execute its power over the naturalization  
23 or deportation of aliens. The clause, in other words,  
24 as was -- the Section 244, as this case -- as this Court  
25 said in Jay versus Boyd, Section 244 really calls upon



1 the Congress to commit an act of grace. It is just like  
2 a pardon given by the President. Congress is authorized  
3 itself in exercise of its necessary and proper clause to  
4 pardon, to excuse a lawful deportation requirement.

5 QUESTION: Well, except, Mr. Gressman, this  
6 was an action of the Immigration Subcommittee, wasn't  
7 it? And what the Immigration Subcommittee said was, it  
8 was the feeling of the Committee that Chadha did not  
9 meet the statutory requirements, particularly as it  
10 relates to hardships. Now, is that a legislative act?

11 MR. GRESSMAN: It is a legislative act of  
12 grace. That is what Jay versus Boyd said.

13 QUESTION: Well, what it said was that Chadha  
14 did not meet statutory requirements.

15 MR. GRESSMAN: That is right.

16 QUESTION: Isn't that an adjudicatory act?

17 MR. GRESSMAN: Not at all, Your Honor, any  
18 more than when a prisoner seeks to get a pardon. As Jay  
19 versus Boyd says --

20 QUESTION: I know, but what is involved, I  
21 think, is, did Congress perform a legislative act in  
22 that determination? Congress can't do other than  
23 legislative action, can it?

24 MR. GRESSMAN: If you -- if you describe a  
25 legislative act as including a legislative act of grace,

1 well and good, and I think there is a world of  
2 difference.

3 QUESTION: Where does Congress get the right  
4 to pardon?

5 MR. GRESSMAN: That is an analogy drawn by  
6 this Court in Jay versus Boyd, an analogy to what  
7 Congress  
8 is --

9 QUESTION: That gave Congress the right to  
10 pardon?

11 MR. GRESSMAN: To pardon.

12 QUESTION: Yes, sir.

13 MR. GRESSMAN: We have nothing --

14 QUESTION: That is your word. You said pardon.

15 MR. GRESSMAN: That is right, by analogy to  
16 the pardon power of the President, but here, Congress  
17 has established --

18 QUESTION: Well, all of us can point to the  
19 pardon power of the President.

20 MR. GRESSMAN: Right.

21 QUESTION: In haec verba. But you can't even  
22 get close to verba, let alone in haec, as to the  
23 Congress.

24 MR. GRESSMAN: Well --

25 QUESTION: Am I right?

1           MR. GRESSMAN: All I can do is to repeat the  
2 words of this Court in the Jay case, that an applicant  
3 for suspension, like Mr. Chadha, comes to the INS and to  
4 Congress not as a matter of right but as a matter of  
5 grace. It is like probation or suspension of criminal  
6 sentence. It comes as an act of grace and cannot be  
7 demanded as a right, and they footnote the analogy to  
8 the Presidential pardon power.

9           Well, I see my time has expired, but I will  
10 only conclude by saying that as we have developed at  
11 some length in the brief, the separation of powers  
12 doctrine, the general separation doctrine simply does  
13 not imperiously prohibit this kind of action, this kind  
14 of act of grace by the Congress. Now, you will note in  
15 that connection that the opposing parties are totally  
16 confused as to what this act is. When they talk about  
17 the presentment clause, they talk about it as if it were  
18 a legislative act.

19           CHIEF JUSTICE BURGER: Mr. Gressman, you are  
20 now cutting into your colleague's time.

21           MR. GRESSMAN: But I would only -- I would  
22 conclude by repeating or emphasizing what we have said  
23 in our briefs concerning the total lack of adverseness  
24 of parties and the lack of standing of Mr. Chadha to  
25 raise the executive's powers vis-a-vis the Congress in

1 this situation.

2 CHIEF JUSTICE BURGER: Mr. Davidson.

3 ORAL ARGUMENT OF MICHAEL DAVIDSON, ESQ.

4 ON BEHALF OF THE PETITIONER

5 UNITED STATES SENATE

6 MR. DAVIDSON: Chief Justice Burger, and may  
7 it please the Court, between 1934 and 1940, the Congress  
8 and the executive were at an impasse over the question  
9 of relief from deportation. The impasse had resulted  
10 from the inability of those two branches to reconcile  
11 the desire of the executive for discretionary authority  
12 to waive mandatory deportation laws, and the prevalent  
13 belief in the Congress that to grant such discretion  
14 would be to advocate its responsibility over the  
15 Immigration Act.

16 In 1940, the Congress and the executive  
17 resolved their stalemate by agreeing to a compromise,  
18 since amended into Section 244, by which they have since  
19 cooperated in granting permanent residence to thousands  
20 of deportable aliens. The executive now asserts that  
21 there was a fundamental constitutional defect in that  
22 accommodation, and that this Court should now revise the  
23 legislative bargain to give to the executive the very  
24 power which the Congress had refused to grant to it.

25 QUESTION: When the Congress took the kind of



1 action that you just described, was that after a  
2 proceeding in the Immigration Service or before?

3 MR. DAVIDSON: All actions by the Congress  
4 under this statute are after proceedings before the  
5 Immigration Service, where the Immigration Service makes  
6 two judgments by delegation from the Attorney General.

7 QUESTION: You are speaking now of the private  
8 bill process.

9 MR. DAVIDSON: No, I am talking only about  
10 this --

11 QUESTION: No, but I am talking about what was  
12 actually taking place in the past, not --

13 MR. DAVIDSON: Prior to 1940, and only several  
14 years prior to that, the Congress considered these  
15 matters as private bills. Up to 1937, it had in fact  
16 insisted on mandatory adherence to mandatory deportation  
17 laws. One of the ironies of this case is that the  
18 prescription which is given to the Congress, that it  
19 should be more exact in its legislative classifications,  
20 was indeed the very illness of the times. The Congress  
21 was exact. The laws were precise, and there was no  
22 relief from them.

23 The executive came to the Congress and said,  
24 in the interest of humanity, there should be a procedure  
25 for relief. But year after year, the Congress refused

1 to grant that until they fashioned this accommodation  
2 whereby both branches would participate in that decision.

3 Two principal questions are presented by the  
4 executive's claim. The first is whether the Court may  
5 sever and refashion the statute to grant to the  
6 executive the precise statutory power which the Congress  
7 had refused to delegate to that branch. Second is  
8 whether the doctrine of separation of powers requires  
9 the Court to deny to the two political branches that  
10 means of compromise and accommodation.

11 Severability is a statutory question, but in  
12 this case it is also an important question of separation  
13 of powers. The court of appeals concluded that the  
14 introductory subsection to 244 could be severed from the  
15 remainder of the section, and stand as an independent  
16 grant of final authority to the executive, but  
17 Respondents do not defend that precise holding in their  
18 briefs.

19 The central feature of the compromise of 1940  
20 was participation by the Congress in the granting of  
21 permanent residence to deportable aliens. The text of  
22 the statute confirms this, because the Attorney General  
23 may only cancel a deportation if neither house  
24 disapproves. This is why Respondents urge this Court to  
25 ask a very different question than has ever been put to

1 the Court on the question of severability, and that is,  
2 what would Congress have done if it had known that this  
3 Court years later would find unconstitutional a  
4 procedure chosen by Congress.

5           The degree to which the Respondents' test  
6 would ask the Court to become involved in the  
7 legislative process is illustrated by the history of  
8 Section 244. The Congress chose and adhered to the  
9 basic design of this section in the course of rejecting  
10 a variety of alternatives. Even if the Court thought  
11 that it was within its power to make a second choice for  
12 the Congress, it would be difficult to know which second  
13 choice to make.

14           Among the diverse second choices rejected by  
15 the Congress have been the following. In 1937,  
16 Representative Diaz proposed that the executive be  
17 granted this final authority, but for only a limited  
18 number of aliens, for a limited number of years. The  
19 second possibility was the House bill in 1939, which  
20 might very well have become the law but for the Senate  
21 compromise, and that was to give the executive the power  
22 to suspend deportations temporarily, and ask the  
23 Congress for legislation to cancel those deportations.

24           A third was President Eisenhower's proposals  
25 in 1956 and 1957 to give to the Attorney General this

1 final authority but for only certain classes of aliens,  
2 such as clergymen and veterans. And a fourth was what  
3 the Congress was fully prepared to do prior to the 1940  
4 Act, and that was to do nothing except expect compliance  
5 with mandatory deportation laws.

6           There is no judicial standing by which the  
7 Court may now determine what alternative choice to make  
8 for the Congress.

9           QUESTION: What is your proposal as to the  
10 test we should apply for severability?

11           MR. DAVIDSON: The Court must ask two  
12 questions. One is, what is left? Is that fully  
13 operative as law? The court of appeals thought that it  
14 could take the introductory subsection of 244 and make  
15 it into the entire section as a full and final grant to  
16 the executive, but the problem with that, which we think  
17 is recognized in the briefs in this case, is that that  
18 section begins and is hereinafter proscribed and  
19 incorporates all the procedures which follow. This is a  
20 tightly interwoven section which either must be accepted  
21 or rejected as a whole.

22           Without being able to make any individual part  
23 a complete statute by itself, there is nothing for the  
24 Court to sever, which then brings the Court --

25           QUESTION: What does the Court do with the



1 severability clause that Congress itself enacted, then?

2 MR. DAVIDSON: In the 1952 Act, there is a  
3 severability clause which applies to the vastness of the  
4 Immigration and Nationality Act, and quite certainly the  
5 diverse provisions of that Act, which include quotas for  
6 immigration, rules for naturalization, procedures of all  
7 kinds, many of those provisions are severable from each  
8 other, but here, in this one section, where the  
9 statutory procedures refer quite explicitly, and in  
10 which there is no way to grant the final relief sought  
11 here unless Section 244(c)(2) is in its entirety an  
12 effective provision, then the Court may not do what only  
13 the Congress can do, which is to make the second choice,  
14 what powers should exist if these powers are invalid.

15 I think this brings the Court to the second  
16 question, and it is one that is briefed by both sides.  
17 If it is impossible to sever this statute without being  
18 unfaithful to the intent of the Congress, that the  
19 judgment of the Attorney General is only a preliminary  
20 judgment, and that legal effect may only be given with  
21 the approval of the Congress, then the Court must  
22 decide, is there any basis upon which it can give relief  
23 to the alien respondent.

24 If the statute is inseverable, then the entire  
25 system for discretionary relief falls, and the issue

1 goes back to the Congress to decide whether it should be  
2 replaced at all, but if that is the case, then there is  
3 no benefit that the particular individual who brought  
4 this proceeding has to gain from the Court's judgment.

5           The Respondents argue nonetheless that the  
6 Court should proceed to decide the issue, that the Court  
7 has never decided a case in which there is no benefit to  
8 be conferred either immediately or potentially on the  
9 individual who invokes the Court's jurisdiction.

10           QUESTION: But you don't get to severability  
11 until you first decide the constitutional question, do  
12 you?

13           MR. DAVIDSON: This Court's ordinary approach  
14 to statutory and constitutional matters is to determine  
15 statutory issues first, in order --

16           QUESTION: But that hasn't been true in cases  
17 where we have been dealing with the constitutional  
18 argument that a part of a statute is invalid. There is  
19 just no need to pass on the issue of severability until  
20 you find that part of a statute is invalid.

21           MR. DAVIDSON: The ultimate question is of the  
22 Court's role, and particularly of the Court's role in a  
23 dispute between its coordinate branches. If a ruling on  
24 severability establishes that there is no basis for  
25 granting relief, then it is within the Court's tradition

1 not to reach a constitutional issue of the dimensions  
2 presented here.

3 QUESTION: Is there any case you can cite for  
4 that proposition, that you first take up severability  
5 and then the constitutional issue?

6 MR. DAVIDSON: There is a direct conflict  
7 between the decision in this case and the decision of  
8 the court of appeals for the Fourth Circuit, because  
9 that court, in a legislative review case, decided  
10 explicitly that it should reach the question of  
11 severability. It found that the statute was  
12 non-severable, and that it should therefore not render  
13 an advisory opinion on the constitutionality of the  
14 statute.

15 QUESTION: Any case from this Court that takes  
16 up severability before constitutionality?

17 MR. DAVIDSON: We have cited the Carter  
18 Company coal case, in which the Court did not reach the  
19 question of the constitutionality of wage -- of price  
20 control provisions under the NIRRA, because it had  
21 decided that those provisions fell on account of the  
22 inseverability of the statute.

23 The only cases in which the Court has dealt  
24 with both issues is when it was simply a matter of the  
25 structuring of its opinions, but we have now a question

1 of the role of the Court. It is very important, because  
2 this case not only implicates this statute, but  
3 implicates a constellation of other relationships  
4 between the executive and legislative branch, from war  
5 powers to control of arms sales, budget, rulemaking  
6 throughout the national government, that the Court not  
7 depart from traditional rules of restraint and determine  
8 whether a statutory question must be resolved in a way  
9 which makes the constitutional issue unavoidable.

10 QUESTION: Mr. Davidson, are you going to  
11 reach the -- are you going to touch upon or are you  
12 going to leave to your brief the question -- the related  
13 question of whether Mr. Chadha has other -- possible  
14 other grounds for relief that would also perhaps serve  
15 to avoid the constitutional issue?

16 MR. DAVIDSON: Let me address those quite  
17 briefly. Mr. Chadha does have two other grounds.  
18 Fortunately for Mr. Chadha, this case has become an  
19 academic matter. He has married, is married to a United  
20 States citizen. He has been married since August,  
21 1980. He is eligible for permanent residence on that  
22 basis. Additionally, the Congress in the Refugee Act of  
23 1980 has provided a system to deal with the problem that  
24 may have concerned the immigration judge, and there are  
25 now a whole set of procedures in an important Act of



1 Congress to deal with --

2 QUESTION: That Act has been adopted since the  
3 decision of the court of appeals.

4 MR. DAVIDSON: No, it was adopted nine months  
5 prior to the decision of the court of appeals.

6 QUESTION: Prior to it. Then, when was his  
7 marriage?

8 MR. DAVIDSON: His marriage was in August of  
9 1980. The decision of the court of appeals was in  
10 December of that year.

11 QUESTION: So both of these developments  
12 occurred prior to the decision of the court of appeals.

13 MR. DAVIDSON: That is correct.

14 QUESTION: And they were both presented to the  
15 court of appeals and rejected?

16 MR. DAVIDSON: No. No one informed the court  
17 of appeals of the Refugee Act until the petition for  
18 rehearing. However, the court of appeals was informed  
19 of the marriage. The Senate and the House asked for an  
20 opportunity to brief that issue, but the court rendered  
21 its decision before receiving briefs.

22 QUESTION: Was that in connection with the  
23 motion for rehearing en banc?

24 MR. DAVIDSON: No, prior to it. You will see  
25 in the record a letter from the House and Senate in

1 response to information provided by Mr. Chadha's counsel  
2 that he was married, that this was an important issue  
3 which should be considered.

4 QUESTION: May I ask you another question,  
5 perhaps not related? Could the House or the Congress  
6 delegate this veto function to the Judiciary Committee  
7 of either House or of the two Houses acting together?

8 MR. DAVIDSON: This case does not require the  
9 Court to anticipate its response to any statute which,  
10 one, goes beyond the field of Immigration and  
11 Nationality, and two, delegates authority to anything  
12 other than a constitutional unit of government, an  
13 entire House.

14 I think it is important in this and many other  
15 respects that the Court approach this case, which is a  
16 rather singular controversy, in the most narrow manner  
17 possible. There have from time to time been statutes  
18 which have delegated authority to Committees. They are  
19 not in very much use now. In fact, there aren't very  
20 many that are actually in force. But in any event, they  
21 pose quite distinct problems.

22 In establishing this system, the Congress was  
23 attempting to maintain the essential relationship  
24 between the executive and its houses on the question of  
25 relief. There must be concurrence by the executive and

1 by each House expressed in the forms of this statute  
2 before there may be what is very significant, a  
3 variation from the otherwise mandatory effect of the  
4 deportation laws, an act of dispensation.

5 We do not ask the Court to intimate at all  
6 what the result would be if there were to be a further  
7 delegation to a subunit of Congress.

8 QUESTION: Do you find any significance in the  
9 fact that the Constitution explicitly grants certain  
10 powers to the Senate acting alone, that is, the treaty  
11 and the appointment powers, but that the Constitution is  
12 silent on this subject?

13 MR. DAVIDSON: We don't think the Constitution  
14 should be read as a contract in which those particular  
15 methods of blending power are thought to be exclusive.  
16 By bicameral agreement and presentation to four  
17 Presidents, this device has obtained that consensus  
18 through constitutional means necessary to establish a  
19 governmental procedure, and we think that those are --  
20 the other illustrations are illustrations where the  
21 Constitution mandates cooperation, but does not preclude  
22 the Congress and the President from agreeing that there  
23 are other important areas which should be resolved  
24 through related mechanisms.

25 QUESTION: Mr. Davidson, may I follow up on

1 the Chief Justice's question about delegation to a  
2 Committee? I can understand why you say that would be a  
3 different case when we are considering the issue of  
4 separation of powers, but when we are considering what I  
5 understand to be your principal argument, namely, the  
6 necessary and proper clause, why couldn't that be  
7 equally necessary and proper to use a more efficient way  
8 of processing these things?

9 MR. DAVIDSON: The Senate's position in this  
10 case is that the key issue is separation of powers. The  
11 question that should be asked of any of these  
12 arrangements is, does it preserve the essential balance.

13 QUESTION: But let me be sure you understand  
14 my question. If we were focusing on the necessary and  
15 proper clause, then we could not distinguish an action  
16 by the whole House and action by a Committee, could we?

17 MR. DAVIDSON: The necessary and proper  
18 clause --

19 QUESTION: If we are buying Mr. Gressman's  
20 argument.

21 MR. DAVIDSON: The necessary and proper clause  
22 must be exercised consistent with the limitations of the  
23 Constitution, and we accept as a major limitation  
24 adherence to the separation of powers. Once authority  
25 is delegated in a way which changes the relationship of



1 the two Houses of Congress to the President, there may  
2 be questions raised for this Court that are not  
3 presented in a case such as this.

4 Another factor in this case is that it does  
5 deal with authority over immigration, an area which the  
6 Court has historically deferred to the political  
7 branches. This is a very special arrangement. There is  
8 no other legislative review statute that concerns  
9 individuals.

10 QUESTION: Which political branch would you  
11 have us defer to here?

12 (General laughter.)

13 MR. DAVIDSON: I would have you defer to the  
14 joint decision of the Congress and the four Presidents  
15 to whom these statutes were presented and approved.

16 QUESTION: Well, but in Myers, the President  
17 in office at the time the law was passed had signed it.  
18 In Buckley against Valeo, the President in office at the  
19 time the Act was passed had signed it. That has never  
20 been thought to be a reason for finally resolving the  
21 separation of powers on kind of an estoppel basis.

22 MR. DAVIDSON: We are not arguing that the  
23 Congress and the President may amend the Constitution,  
24 but when the question is separation of powers, and not  
25 compliance with a specific provision of Article II, it

1 is a factor that none of the Presidents, that none of  
2 the Attorney Generals who advised the Congress, and  
3 whose opinions were sought during the period of this  
4 legislation, in any way intimated that any function of  
5 the executive branch would be disrupted by this  
6 cooperative arrangement.

7 QUESTION: Is this something like a waiver?

8 MR. DAVIDSON: No, I am not arguing that the  
9 Congress and the President may waive. The opinion of  
10 the Court of Appeals focused on what it thought to be  
11 the disruption of the office of the Attorney General in  
12 the administration of the Immigration Act. There is in  
13 fact no record of disruption. There is a legal argument  
14 in this case. There is the experience of Attorney  
15 General after Attorney General considering this matter,  
16 with the responsibilities he has over the Immigration  
17 Service, and not finding that this provision in any way  
18 rendered him unable or less able to fairly administer  
19 this statute.

20 QUESTION: Well, which one of the four  
21 Presidents said that?

22 MR. DAVIDSON: These bills were approved by --

23 QUESTION: You mean they just didn't take any  
24 action.

25 MR. DAVIDSON: Well, more than --

1               QUESTION: But you said they approved it and  
2 they loved it.

3               MR. DAVIDSON: They approved. They were doing  
4 this at a time --

5               QUESTION: Were you just about to say they  
6 loved it?

7               MR. DAVIDSON: No, I won't say that.

8               QUESTION: Not quite, but you --

9               QUESTION: I won't say they loved it. In  
10 fact, for administrative reasons, some may have wished  
11 it to be done in another way, as President Eisenhower  
12 proposed an alternative mechanism. This legislation was  
13 considered in tandem in 1939 through 1962 with the  
14 reorganization legislation, and in the reorganization  
15 field, Presidents repeatedly asked for the renewal of  
16 that authority as a cooperative relationship which they  
17 thought important to both branches.

18              In this area, Attorney Generals would ask for  
19 renewal or revisions of the authority without indicating  
20 at all that there was a constitutional problem. It is  
21 important before the Court involve itself in that kind  
22 of issue to determine whether this has been fairly  
23 considered in the executive and with the Congress. And  
24 although there have been executive objections to other  
25 legislative review statutes, there has been none to

1 this. It was enacted, revised, and has worked a totally  
2 beneficial purpose.

3 QUESTION: Mr. Davidson, I guess we don't  
4 reach these questions unless we get over the various  
5 justiciability hurdles that have been raised, and you  
6 spoke about one of them, and mentioned that because Mr.  
7 Chadha now is married to a citizen, and because of the  
8 passage of the Refugee Act of 1980, that he has gotten  
9 everything that he wanted.

10 Let me just ask you a further question about  
11 that, if I may. Now, I assume that if this Court were  
12 to affirm the lower court, that then Mr. Chadha would be  
13 immediately eligible to apply for citizenship, whereas  
14 if we did not do that, these other Acts would not enable  
15 him to do that for a number of years. Does that make a  
16 difference, so the questions really are not resolved?

17 MR. DAVIDSON: It is not at all clear that he  
18 would be immediately eligible for citizenship. The  
19 judgment of the court of appeals was that the  
20 deportation should be cancelled. The statute provides  
21 no means for retroactive grant of permanent residence.  
22 It provides explicitly that permanent residence shall be  
23 recorded upon the cancellation of deportation. That is  
24 an event with the stay of the mandate that is yet to  
25 occur. So he will not become eligible for permanent



1 residence until there is a mandate, and would have to  
2 wait three years.

3           There is a footnote, not the judgment of the  
4 court of appeals, that the court thinks that permanent  
5 residence would be retroactive to some earlier time, but  
6 this Court and the court before has jurisdiction to  
7 review a deportation order. He essentially raises a  
8 naturalization question, and a question which would  
9 require the Court to read some other term into the  
10 statute, because as the statute is now written, his  
11 permanent residence is prospective only.

12           Thank you.

13           CHIEF JUSTICE BURGER: Mr. Solicitor General.

14           ORAL ARGUMENT OF REX E. LEE, ESQ.,

15   ON BEHALF OF THE IMMIGRATION AND NATURALIZATION SERVICE

16           MR. LEE: Mr. Chief Justice, and may it please  
17 the Court, any attempt to defend the constitutionality  
18 of a legislative veto faces, I submit, an insoluble  
19 dilemma. The reason is that there are two separate  
20 constitutional demands that that device has to satisfy.  
21 They are, first, the twin requirements for lawmaking  
22 specified in Article I of the Constitution, passage by  
23 both Houses of Congress and presentation to the  
24 President, and the second is separation of powers.

25           And now the dilemma. Any attempt to explain a

1 legislative veto in such a way as to blunt the  
2 separation of powers problems, that this is not really  
3 enforcement of the law, or this is not really  
4 interpretation of the law, only serves to highlight the  
5 fact that whatever else may be involved, the Congress is  
6 clearly exercising legislative power, making new law,  
7 and is doing so by one House of Congress and without  
8 participation by the President.

9           QUESTION: Has there ever been a statute held  
10 invalid by this Court beginning with the jurisdictional  
11 statute that was involved in Marbury against Madison, in  
12 which it could not be said that the statute had the  
13 blessing of the two Houses and the President?

14           MR. LEE: Not to my knowledge, Mr. Chief  
15 Justice, and that is the most fundamental underpinning  
16 of Article I and it is also the most fundamental  
17 underpinning of the -- of the Framers' intention. If  
18 there is one thing that is clear from the constitutional  
19 history, it is, Number One, that they were concerned  
20 above all, as this Court observed in Buckley versus  
21 Valeo, about an overweening Congress, and Number Two,  
22 that the two protections that they built into the  
23 Constitution against that very eventuality was, Number  
24 One, bicamerality, if there is such a word, the  
25 requirement of two Houses of Congress, and Number Two,

1 the Presidential veto.

2 In an understandable attempt by the House and  
3 Senate to focus this Court's attention on the separation  
4 of powers issue on that issue alone, and I will deal  
5 with that in just a moment, the House and Senate  
6 stressed the fact that this is legislation. The House  
7 brief asserts, for example, that Congress is here  
8 executing its own vested legislative powers, and with  
9 that statement I agree. It is only part of the case,  
10 but it is a correct statement.

11 QUESTION: Mr. Solicitor General --

12 MR. LEE: Yes, sir.

13 QUESTION: -- may I just interrupt you on that?

14 MR. LEE: Yes, sir.

15 QUESTION: When the Attorney General exercises  
16 his power to suspend deportation, is he exercising  
17 legislative power?

18 MR. LEE: No, he is not. This Court held in  
19 Buckley versus Valeo that rulemaking was an executive  
20 power. A fortiori, in my view, adjudication of this  
21 kind is an executive power, carrying out the intent of  
22 the -- or carrying out the statute.

23 QUESTION: Couldn't one argue that what the  
24 House does is precisely the same thing the Attorney  
25 General has done?

1           MR. LEE: Well, the dilemma that the House  
2 faces is not that -- we do not face the same dilemma  
3 that the House faces for this reason. They are two  
4 separate constitutional hurdles, and you have to get  
5 over both of them. And any -- as I say, any attempt to  
6 highlight -- or to downplay the separation of powers  
7 clause does highlight the presentment and bicameral  
8 requirements.

9           The same is simply not true insofar as the  
10 executive's position is concerned, because we contend  
11 that this is -- that it doesn't matter what you call it,  
12 and this is one instance in which labels clearly can  
13 become an enemy of analysis, that whatever else it is,  
14 it is a violation of Article I, Section 1, for this  
15 reason. Maybe Mr. Gressman is right, maybe Mr. Gressman  
16 is not right when he says that what Congress was doing  
17 here was exercising legislative power. It doesn't  
18 matter, for this reason.

19           There are certain instances in which the  
20 Constitution authorizes Congress to take action other  
21 than by legislating, such as proposal of constitutional  
22 amendments, treaty ratification, confirmation, and  
23 disciplining of Members, and there are some others, but  
24 not even the best friends of the legislative veto  
25 contend that that device falls into any one of those



1 categories.

2 All right. So that aside from those  
3 categories, the only way that Congress can act is by  
4 legislation. If Section 244(c)(2), then, of the  
5 Immigration and Nationality Act is not legislation, then  
6 Congress lacks the constitutional power to do it. And  
7 if it is legislation, then the bicameralism and the  
8 presentation requirements must be met.

9 For that reason, you don't need to  
10 characterize it as either legislation or not  
11 legislation, because one thing that is clear is that it  
12 is something that Congress has attempted to do. If it  
13 is legislation, then bicameralism and presentation must  
14 be complied with. If it is not legislation, then  
15 Congress lacks the authority to do it.

16 QUESTION: I observe, Mr. Solicitor General,  
17 that both you and your friends have referred to this as  
18 legislative veto, not as it is sometimes called, one  
19 House veto. Does that mean in your view and perhaps his  
20 it wouldn't make any difference whether it was one House  
21 or both Houses if it isn't legislative action in what  
22 you have just described as the traditional way?

23 MR. LEE: Absolutely. The two Houses --

24 QUESTION: In other words, if both the House  
25 and the Senate had taken this action, you would be --

1           MR. LEE: Same result. Same result. It  
2 satisfies the bicameralism requirement. It does not  
3 satisfy the presentation requirement.

4           QUESTION: Mr. Lee, I think that the House and  
5 Senate, though, have taken the position that this  
6 particular legislation was in fact passed by both Houses  
7 and presented to the President, and therefore met all  
8 the requirements. Would you address yourself to that?

9           MR. LEE: That is a very easy question, or  
10 very easy argument to answer, and it is simply that the  
11 House and Senate by two-thirds vote at least, as I read  
12 the Constitution as I came into Court this morning,  
13 cannot amend the Constitution. This one was in fact  
14 passed over President Truman's veto, but that is  
15 immaterial. Neither the House and Senate acting  
16 together with the President nor the House and Senate by  
17 two-thirds vote have the power to eliminate the very  
18 clear requirements in Article I, Section 1 of the  
19 Constitution that legislative power means -- that  
20 legislative power means power that is to be exercised by  
21 two Houses, and the requirement in Article I, Section 7,  
22 that any exercise of legislative power must be presented  
23 to the President, and that is the defect also with the  
24 -- excuse me.

25          QUESTION: Well, I just want to press your

1 argument a moment. Legislative power, I presume, could  
2 be delegated in some situations to somebody that will  
3 act other than by -- through the presentment process.

4 MR. LEE: Well, I won't --

5 QUESTION: Say, delegate to an administrative  
6 agency the process of drafting regulation.

7 MR. LEE: Yes, sir. It then becomes execution  
8 of the laws, in my view, Justice Stevens, and that, I  
9 think, follows naturally from both this Court's  
10 decisions of a half-century ago and also even more so  
11 Buckley versus Valeo.

12 QUESTION: What if, in this statute, instead  
13 of having a one-House veto they created a special  
14 administrative review board, some special, unusual name  
15 for it, of three persons appointed by the President, or  
16 something like that, who would then make precisely the  
17 decision at the same end of the process that the full  
18 House now makes. Would that be constitutional?

19 MR. LEE: It would not violate, in my view --

20 QUESTION: It would execute the law through  
21 that --

22 MR. LEE: That is right. So long as it is not  
23 a Congressional -- that gets you into the Buckley versus  
24 Valeo appointments problem. Then it would be  
25 constitutional. And parenthetically, let me mention

1 that if, as this Court held in Buckley versus Valeo,  
2 Congress may not constitutionally appoint officers of  
3 the United States, a fortiori, they may not perform the  
4 executive function themselves by stepping in and in  
5 effect appointing themselves.

6 QUESTION: So that it would follow a fortiori  
7 also they couldn't give such power to a Committee of  
8 Congress.

9 MR. LEE: Absolutely. I would think it's  
10 really a fortiori. I think it is the same case.

11 Similarly, the Petitioners' arguments with  
12 respect to Congress's power over aliens and the  
13 necessary and proper clause simply will not wash under  
14 the constitutional provisions of Article I, Section 1  
15 and --

16 QUESTION: What if the requirement in the  
17 statute was simply that the recommendations of the  
18 Attorney General for hardship relief lie on the table of  
19 Congress for 60 days, will not become effective?

20 MR. LEE: No problem. No problem. It is  
21 constitutional.

22 QUESTION: What is the -- is there that much  
23 difference?

24 MR. LEE: Well, because it gives to Congress  
25 the opportunity to pass -- to exercise its legislative



1 powers.

2 QUESTION: But it is also putting a tail end  
3 limitation on what would otherwise be the final action  
4 of the executive.

5 MR. LEE: You can make an argument that that  
6 is a violation of separation of powers. I think that  
7 given this Court's decision in Sibbach versus Wilson, it  
8 wouldn't be a very strong argument, and we are not  
9 pursuing it here.

10 QUESTION: What if the law just said that the  
11 Attorney General should take these cases and then make a  
12 recommendation to Congress as to whether -- as to  
13 wherever he thought suspension was authorized. The same  
14 result as here?

15 MR. LEE: The same result. It is  
16 constitutional.

17 QUESTION: It is constitutional?

18 MR. LEE: It is constitutional. If he is just  
19 making the recommendation, and absent any -- absent  
20 any --

21 QUESTION: Yes, but he makes a recommendation,  
22 he makes a recommendation for suspension.

23 MR. LEE: For suspension, but it is only a  
24 recommendation, and if Congress does nothing, it is not  
25 sustained.

1           QUESTION: Well, I know, but what if the law  
2 says, please, Mr. Attorney General, look at these cases  
3 and make recommendations where you think suspension  
4 should be authorized, and then one House would have the  
5 power to disagree.

6           MR. LEE: Yes, but what if Congress doesn't,  
7 under your hypothetical --

8           QUESTION: No, take my example, Mr. Solicitor  
9 General.

10          MR. LEE: But I just want to test your example.  
11          (General laughter.)

12          MR. LEE: If Congress does nothing, then does  
13 it become -- Did I misunderstand?

14          QUESTION: No, no, you just didn't listen.  
15 Mr. Attorney General, please give a recommendation, and  
16 then if one House vetoes your recommendation, then he is  
17 going to be deported.

18          MR. LEE: What I have to know, Justice White,  
19 is what happens in the event that neither House does  
20 anything, what happens to that recommendation? Does the  
21 deportation get suspended or not?

22          QUESTION: The Attorney General's judgment  
23 stands.

24          MR. LEE: Oh, then it is unconstitutional.

25          QUESTION: Just like this.

1           MR. LEE: That's correct.

2           QUESTION: So it really isn't the adjudication  
3 or judicial review or anything else. He just makes a  
4 recommendation.

5           MR. LEE: That is correct. That is correct.  
6 Let me return --

7           QUESTION: Let me ask you another question.  
8 Before this statute was passed, or before they -- in the  
9 era of private bills --

10          MR. LEE: Yes.

11          QUESTION: -- in order to suspend deportation,  
12 there had to be legislative action.

13          MR. LEE: That is correct.

14          QUESTION: Now, this bill leaves the President  
15 and the Congress, talking about the separation of powers  
16 issue --

17          MR. LEE: Right, okay.

18          QUESTION: -- in relatively the same position,  
19 doesn't it? The President takes the initiative here,  
20 and recommends a suspension, and that would take the  
21 agreement of both Houses.

22          MR. LEE: I do not agree that it is relatively  
23 the same insofar as separation of powers is concerned,  
24 for this reason. Before, all that the Attorney General  
25 could do was to make recommendations, and then Congress

1 would consider it. Now, effectively, what Congress has  
2 done insofar as separation of powers is concerned is to  
3 say, we passed this 1952 Nationality and Immigration  
4 Act. It is a massively complex statute. Over every  
5 provision except for two, the enforcement is going to be  
6 vested in the Attorney General. But as to two  
7 provisions, and one of them is this 244(c)(2), we are  
8 going to wait and see how it is that the executive  
9 decides to enforce the statute, and then, in the event  
10 that we decide we don't like the way the executive  
11 enforces the statute, then we will do the job ourselves.

12 QUESTION: But it still takes on -- it would  
13 still leave the -- in order to have a suspension, it  
14 would still take the agreement of the President and both  
15 Houses of Congress, under this statute.

16 MR. LEE: That is correct, but as the House  
17 itself says in its brief, Congress has withheld from the  
18 executive some part of the functions of executing the  
19 whole of the statute, and we agree completely that that  
20 is exactly what Congress has done, and that is exactly  
21 what Congress --

22 QUESTION: Well, that's true, but it still  
23 leaves the -- in relatively the same position as before  
24 the statute was --

25 MR. LEE: Well, relatively the same position



1 if all the Constitution was talking about was the matter  
2 of the total package of power on the President's side  
3 and the total package of power on the Congress's side.

4 QUESTION: With respect to suspension of  
5 deportation.

6 MR. LEE: With respect to suspension. But the  
7 Constitution also requires more. Number One, there is  
8 also an Article I of the Constitution, and Number Two,  
9 the Constitution does address in what respect those  
10 powers are in fact exercised vis-a-vis the other branch.

11 QUESTION: Where does the government stand on  
12 severability?

13 MR. LEE: That it is really not -- that it is  
14 one of the less important severability issues, less  
15 serious severability issues that this Court has --

16 QUESTION: Why does the government take any  
17 position on severability?

18 MR. LEE: Well, we take exactly the same  
19 position that was implied in your colloquy with Mr.  
20 Davidson. It shouldn't be reached here. And let me  
21 fill that out just a bit and give you a few of the cases  
22 that you were asking Mr. Davidson about.

23 We have examined, Justice Rehnquist, the cases  
24 that we can find, and I do not represent that it was  
25 exhaustive, but it was as exhaustive as we could make

1 it. I do not know of any single case -- we found about  
2 25 of them -- I do not know of any single case, and  
3 certainly Carter versus Carter Coal is not one of them,  
4 in which this Court has ever considered the issue of  
5 severability prior to the issue on the merits.

6 Now, in fairness, I must say that there is  
7 never any case in which the issue was exactly as Mr.  
8 Davidson has argued, and I understand what his argument  
9 is, but I will also say that I agree completely with the  
10 proposition that there is simply no reason even to reach  
11 the severability issue unless and until you first reach  
12 the issue on the merits.

13 QUESTION: Well, supposing we reach the issue  
14 on the merits, and decide it in your favor. Then what  
15 is your position on severability?

16 MR. LEE: That it is not severable, for these  
17 reasons. Mr. Morrison will develop this in more detail,  
18 because it pertains more to his client, but in the first  
19 place, severability is merely an aspect of the more  
20 general and the broader constitutional principle that  
21 the function of the Court is to save rather than to  
22 destroy. Now, using Mr. Davidson's own characterization  
23 in that respect, that the question is whether the  
24 balance could stand if we took out this particular  
25 provision, it can stand very, very well.

1           You take out 244(c)(2) and just put them out  
2 of the statute. The rest of it functions very nicely.

3           QUESTION: Well, I should think that future  
4 administrations might have some cause to regret you  
5 analysis of severability when they go to Congress and  
6 want legislation, because in effect Congress gives more  
7 than it otherwise would have in return for the  
8 legislative veto, and then the next day after signing it  
9 the President sends his Attorney General to court to  
10 challenge the legislative veto. So in effect the  
11 compromise is just washed out.

12           MR. LEE: What that is saying is, of course,  
13 exactly what my opponents -- this is a major theme in  
14 their briefs, that there are some practical reasons that  
15 the legislative veto has something to say for it, and my  
16 answer, of course, to that is, whatever those practical  
17 reasons may be, they have to yield to the examination of  
18 the principles --

19           QUESTION: Well, there is no question on the  
20 merits, but on the severability issue it seems to me you  
21 are being kind of piggy.

22           (General laughter.)

23           MR. LEE: If the Court will agree with me on  
24 the second proposition, that it should not reach -- our  
25 preferred approach would be never to reach the

1 severability issue, but in response to the question, how  
2 should you rule if you do, I am simply responding to  
3 that question.

4 QUESTION: Well, don't you have to reach it if  
5 you decide the merits?

6 MR. LEE: Oh, of course. If you decide the  
7 merits, then you have to reach the severability issue.  
8 It is excisable. There is the general strong  
9 presumption that you save rather than destroy. In this  
10 particular instance Congress said, we want as much saved  
11 as possibly can be saved, because there is a  
12 severability clause, and perhaps strongest of all, if  
13 our view prevails, that is, that the statute -- that  
14 this particular provision is severable, then the net  
15 result is going to be the same as has occurred over the  
16 42 years of this statute's history, in over 96 percent  
17 of the cases, whereas if the statute is not severable,  
18 then the result is going to be the same as it has been  
19 in less than 4 percent of the cases.

20 QUESTION: Mr. Lee, let me get straight, with  
21 respect to our previous colloquy, if the statute simply  
22 said, please recommend suspensions of deportation, look  
23 over the cases and recommend, but if we don't do  
24 anything at all, then there will be no suspension, that  
25 is constitutional, I take it.



1           MR. LEE: If we don't do anything at all,  
2 there will be no suspension. That one is constitutional.

3           QUESTION: Mr. Solicitor General, is there any  
4 analogy at all to the rulemaking process that we have  
5 where the judicial conference after studying criminal,  
6 civil, or appellate rules, proposes rules, and then they  
7 come to the judicial conference, then they come to this  
8 Court, then they go over to Congress, and if nothing  
9 happens over there within a specified period, they  
10 become defective? Now --

11          MR. LEE: I think it is the same basic  
12 analysis. The constitutional defect is when Congress  
13 attempts to pick a foil, if you will, some funnel, some  
14 laundromat through which they can run a policy decision  
15 and then have that policy decision reflect back before  
16 them so that they can make the policy choice absent  
17 compliance with bicameral -- with the two House and  
18 presentation requirements.

19          QUESTION: Take particular the code of  
20 evidence, which was cast in terms of rule. Congress  
21 made a significant number of changes, or at least there  
22 were significant changes, if not great in number. Was  
23 that making law?

24          MR. LEE: See, I am -- if -- I am not certain  
25 which was the evidence and which was the rules of civil

1 procedure. If Congress simply changes by legislation,  
2 that is, by going -- by running the matter by passage,  
3 the changes by both Houses of Congress and presentation  
4 to the President, then it is constitutional. If it is  
5 simply a matter of everything has to be varied only by  
6 one House of Congress or by both Houses of Congress,  
7 then it is unconstitutional, and that is also the basic  
8 defect with my opponents' reliance on the Congressional  
9 power over aliens, or their asserted Congressional power  
10 over aliens, and also the necessary and proper clause.

11           Mr. Gressman referred, for example, to  
12 Congress's vast power over aliens. That is simply just  
13 a wrong statement. It is not a Congressional power over  
14 aliens. It is a power to make laws dealing with aliens,  
15 and in order to bring that power into existence, the  
16 constitutional prerequisites for lawmaking must be  
17 observed. The same deficiency applies to Petitioner's  
18 reliance on the necessary and proper clause.

19           QUESTION: Mr. Solicitor General, perhaps you  
20 have already told us, but I have forgotten. What is  
21 your reaction to the effect, if any, of the recent  
22 marriage of Mr. Chadha?

23           MR. LEE: Oh. Mr. Morrison will deal more  
24 completely with that, because it is his client.

25           QUESTION: All right.

1           MR. LEE: But the short answer, Justice  
2 Brennan, is that it makes a very great difference to  
3 him, because he becomes a citizen about two years  
4 earlier if this Court affirms the court of appeals than  
5 if he has to go through the other procedures.

6           QUESTION: Well, what bearing does it have on  
7 whether or not we should reach the constitutional  
8 question?

9           MR. LEE: Well, it has this bearing, that he  
10 clearly does have standing to raise the constitutional  
11 issue, because he is one who is aggrieved by what the --  
12 by what the House --

13          QUESTION: Well, he's got standing, but -- but  
14 not reaching constitutional issues is prudential, isn't  
15 it?

16          MR. LEE: Well, it certainly can be done on  
17 prudential --

18          QUESTION: It isn't jurisdictional.

19          MR. LEE: But I don't know -- that is correct,  
20 but I don't know of any instance where this Court, faced  
21 with the kind of detriment, actual detriment that Mr.  
22 Chadha faces, would -- has declined to consider a  
23 constitutional issue such as the one that Mr. Chadha --  
24 that Mr. Chadha raises, because while it may be true  
25 that he now has a way around deportability, certainly

1 citizenship is a very important interest, and  
2 citizenship -- citizenship sooner is a much greater  
3 advantage than citizenship later.

4           If Mr. Gressman were correct that the only  
5 test under the necessary and proper clause was whether  
6 there were this fit between means and end, it would  
7 repeal Article I, Section 7. Article I, Section 7, does  
8 not say that Congress has the power to do anything that  
9 it deems to be necessary and proper. Article I, Section  
10 7, says -- or Article I, Section 8, says that Congress  
11 has the power to make all laws which may be necessary  
12 and proper for carrying to execution the foregoing power.

13           There is no defect more fundamental to my  
14 opponents' case than simply the fact that they have  
15 completely ignored Article I of the Constitution, the  
16 requirement in Section 1 of bicameral passage, and in  
17 Section 7 of presentation to the President, and the  
18 necessary and proper clause helps them not at all,  
19 because it gives them only the power to enact laws.

20           I simply close where I started, that there was  
21 no concern manifest by the Framers of our Constitution  
22 any greater than that that was expressed in Buckley  
23 versus Valeo, to protect the other branches of the  
24 government against an overweening Congress.

25           QUESTION: Well, Mr. Lee, in the



1 reorganization situation, where there is a -- is there a  
2 one-House veto?

3 MR. LEE: I will take the hardest case there.  
4 Where it is a two-House veto, it is still  
5 unconstitutional, because of the fact that it fails of  
6 presentment.

7 QUESTION: So the President is proposing a  
8 reorganization which is proper unless Congress --

9 MR. LEE: That is the hardest case. That is  
10 the hardest case.

11 QUESTION: And you say that is  
12 unconstitutional.

13 MR. LEE: That is unconstitutional, because  
14 that is an instance where, even though it is just as  
15 good to do it that other way, do it a way other than the  
16 Constitution prescribes --

17 QUESTION: Well, you pretty well have to take  
18 that position, I suppose, to --

19 MR. LEE: Well, in order to be -- in order to  
20 be --

21 QUESTION: -- to have it here.

22 MR. LEE: Yes, and in order to be faithful to  
23 my oath of office, faithfully to carry out the laws and  
24 the Constitution of the United States, I would have to  
25 take that position. Thank you.

1                   QUESTION: Mr. Lee, do you think the  
2 Reorganization Act is severable, so the President could  
3 just reorganize by himself?

4                   (General laughter.)

5                   MR. LEE: I think that under those  
6 circumstances, Justice Rehnquist, there might be serious  
7 severability questions.

8                   QUESTION: Despite your own.

9                   CHIEF JUSTICE BURGER: Mr. Morrison.

10                  ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.,  
11                  ON BEHALF OF APPELLEES JAGDISH RAI CHADHA ET AL.

12                  MR. MORRISON: Mr. Chief Justice, and may it  
13 please the Court, much of the debate in this case  
14 involves what Mr. Gressman referred to as a tug of war  
15 between the executive branch and the Congress. While  
16 those concerns are important, there are other interests  
17 at stake as well, and it is important not to lose sight  
18 of the fact that legislative vetoes in general, and this  
19 one in particular, affect the lives of many people  
20 subject to the laws of this country.

21                  I want to begin by answering the question  
22 posed about the effect of Mr. Chadha's marriage and the  
23 Refugee Act, something that was called an academic  
24 matter by counsel for the Congress. If Mr. Chadha's  
25 decision here is affirmed, he will be a citizen by the

1 4th of July. He has filed a naturalization petition  
2 which has been accepted by the Naturalization Service in  
3 San Francisco. He is only awaiting the issuance of the  
4 mandate before he will become a citizen. That means  
5 that he will be able to vote, he will have other rights  
6 that aliens do not have, and he will have it almost  
7 immediately.

8 On the other hand, if he has to go the other  
9 route, he will be told that his wife will then have to  
10 file a petition to adjust his status. That will take  
11 about a year or so to be acted upon in the ordinary  
12 course of business. Thereafter, he will then have to  
13 wait three additional years before he becomes a citizen.

14 QUESTION: Well, Mr. Morrison, this all  
15 happens if we do what, or don't do what?

16 MR. MORRISON: If you don't determine the  
17 merits of this case, that is, if the decision below is  
18 affirmed, Mr. Chadha will be a citizen immediately.

19 QUESTION: And if we don't?

20 MR. MORRISON: He will then have to go through  
21 this other process. He will then have to -- His wife  
22 will then have to file an application in his behalf to  
23 adjust his status. When that application is --

24 QUESTION: Well, if we don't reach the  
25 constitutional question by reason of his marriage, what

1 then will we do with the judgment below?

2 MR. MORRISON: I would assume you would set it  
3 aside, and vacate the judgment on grounds not of  
4 mootness, because the Senate and House do not contend it  
5 is moot, but on the grounds of prudential  
6 consideration. He will be told that this case, which  
7 was filed in 1977, arising out of a determination by the  
8 Immigration Service in 1974, and a veto in December of  
9 1975, all this was to nought, because while the case was  
10 awaiting decision of the court of appeals, he and his  
11 wife were married.

12 QUESTION: And what will happen to his case?  
13 It will be, what, dismissed?

14 MR. MORRISON: That is correct.

15 QUESTION: As if it were moot?

16 MR. MORRISON: I assume that is what would  
17 happen, yes.

18 QUESTION: And if we remand for exploration of  
19 the matters raised in the colloquy?

20 MR. MORRISON: Well, I don't know there is  
21 much to remand. My client readily concedes, indeed, if  
22 he loses this case on any other grounds, would have to  
23 embrace the notion that he could be -- remain in this  
24 country on the grounds of the marriage and the Refugee  
25 Act.



1           QUESTION: Did he take any actions under --  
2 Did he ask his wife to file a petition as soon as he was  
3 married, or did he take --  
4           MR. MORRISON: He did not.  
5           QUESTION: -- some actions under the Refugee  
6 Act?  
7           MR. MORRISON: He did not. He did not. We  
8 believe that --  
9           QUESTION: Could he have?  
10          MR. MORRISON: Yes, he could have.  
11          QUESTION: And would have been succeeded by  
12 now?  
13          MR. MORRISON: No, he would not be a citizen  
14 by now, because he -- the marriage took place in August  
15 of 1980.  
16          QUESTION: I see.  
17          MR. MORRISON: So this was several months  
18 before the decision, and we were concerned --  
19          QUESTION: So it would be then still maybe  
20 three more years.  
21          MR. MORRISON: Four years -- we estimate --  
22 and three years is clear from the face of the statute.  
23 The other time is a matter of some flexibility, but it  
24 is about a year, and he was advised at that time that he  
25 could be a citizen sooner, and since he very much wants

1 to be a citizen, he insisted upon pressing this case.  
2 He also feels quite strongly about this case and the way  
3 he has been -- his case has been handled, and feels that  
4 the separation of powers is an interesting concept as  
5 far as the Senate and the House and the President are  
6 concerned, but it also affects people. It has affected  
7 his life very greatly during this time.

8 QUESTION: And the House and Senate are in  
9 this case only as intervenors, aren't they?

10 MR. MORRISON: That is correct. They appeared  
11 as amicus --

12 QUESTION: The actual case is between him and  
13 the Service.

14 MR. MORRISON: That is correct. He filed his  
15 petition for review, and the Service took the position  
16 that it had no choice but to deport Mr. Chadha unless a  
17 court agreed with the Service that the provision is  
18 unconstitutional. At this point, the Service contacted  
19 the Senate and House and asked them to file amicus  
20 briefs, and then after judgment they intervened.

21 QUESTION: Mr. Morrison, perhaps I missed it  
22 in the record, but why was the submission to the Ninth  
23 Circuit withheld for over two years?

24 MR. MORRISON: I think I understand the answer  
25 to that. What happened was that during the course of

1 oral argument, the court raised a question about the  
2 jurisdiction of the court of appeals, that is, whether  
3 we were in the right court. That matter had been  
4 alluded to in the House -- in the Congress's brief in  
5 the Ninth Circuit, but had not been briefed  
6 extensively. The court asked us to file briefs, and  
7 shortly after briefs were filed, we received an order  
8 saying -- shortly after the briefs were ordered to be  
9 filed, we received an order from the court saying, the  
10 matter is withdrawn from submission.

11               Now, I don't know whether that is an internal  
12 operating procedure of the Ninth Circuit, but that is  
13 the order we received. Incidentally, one of the judges  
14 passed away while the case was --

15               QUESTION: Yes, but the withholding order was  
16 within four days of the --

17               MR. MORRISON: Yes.

18               QUESTION: -- original argument.

19               MR. MORRISON: Yes, and that is the -- the  
20 withholding order was issued at the same time as the  
21 order to submit supplemental briefs. Both sides, that  
22 is, the Senate and House, saying we were in the wrong  
23 court, and the Justice Department and I saying we were  
24 in the right court, submitted those supplemental briefs,  
25 and either through a clerical error or some other

1 reason, the matter was not ordered to be resubmitted and  
2 reinstated on the calendar.

3 That's the only -- there is nothing else in  
4 the record on that, Justice Blackmun, but those are the  
5 sequences of events from which I presume that it had --  
6 the withdrawal from the calendar had to do with that.

7 QUESTION: Was it reargued?

8 MR. MORRISON: It was not reargued.

9 In this case, Mr. Chadha succeeded in  
10 persuading the Immigration and Naturalization Service  
11 that deportation would result in extreme hardship, but  
12 that was not enough, for a year and a half later the  
13 House of Representatives meted out what the court of  
14 appeals aptly described as a summary reversal, and told  
15 Mr. Chadha and five other aliens out of 340 that they  
16 may not remain in the country. As a result, the  
17 Immigration Service had no choice but to order his  
18 deportation.

19 Despite this clear causal connection, both the  
20 House and the Senate insist that Mr. Chadha has no place  
21 being in court. They say he lacks standing, that there  
22 is no adverseness, it's a political question, and that  
23 he's even in the wrong court. Indeed, according to the  
24 Congress, one of the principal reasons why he is barred  
25 from the courthouse door is that the Attorney General,



1 the chief law enforcement officer in this country, has  
2 concluded that the veto here is unconstitutional.

3 The court of appeals fully considered and  
4 rejected each of these arguments. Our brief has replied  
5 to them also.

6 I only want to discuss the one today upon  
7 which the Congress seems to place principal reliance,  
8 and that is the issue of severability. The Congress has  
9 said that the veto is inseparable from the rest of the  
10 statute, that the veto was at the core of scheme, and  
11 that if the veto is invalid, then Mr. Chadha is not  
12 entitled to relief, therefore the hardship scheme must  
13 fall in its entirety.

14 Now, in answering this question of  
15 severability, it is vital to focus on the proper  
16 inquiry. This Court held in both Buckley against Valeo  
17 and the Champlin Refining Company that an  
18 unconstitutional provision is severable -- and these are  
19 the Court's words -- "unless it is evident that Congress  
20 would have intended to strike the constitutional portion  
21 with the unconstitutional portion."

22 Thus, under this Court's test, the burden of  
23 proof lies with the party seeking to deny severability.  
24 Moreover, the burden increases, as in this case, when we  
25 have a severability provision, as we do in Section 406.

1           QUESTION: Did the 1940 Act in which this  
2 provision originally appeared have a severability  
3 provision?

4           MR. MORRISON: It did not, Mr. Justice  
5 Rehnquist, as far as I am able to determine. The 1940  
6 Act was an amendment to an earlier provision of the --  
7 the existing Immigration Act. The 1952 amendments were  
8 a comprehensive revision of the Act.

9           QUESTION: That was the McCarran-Ferguson Act.

10          MR. MORRISON: That is correct. That is  
11 correct. I might point out that in 1962, when -- when  
12 the final change was made in Section 244(c)(2), to  
13 change the group of people who had to go through the  
14 one-House veto as opposed to the two-House approval,  
15 which still remains for some categories, that that was  
16 an amendment and there was no additional severability  
17 provision at that time, but the only severability  
18 provision is that, and we don't place great reliance on  
19 it, but we think it is some additional burden that is  
20 placed upon the party seeking to destroy.

21          Most of the discussion by the Senate and House  
22 here has been offered to show that Congress wanted to  
23 retain the veto device. Of course it did. It put it in  
24 there in the first place. It augmented the powers of  
25 Congress to have it. This is not a case in which an

1 outside group was lobbying for inclusion. This was a  
2 provision intended to increase the power of the Congress  
3 vis-a-vis the legislature and the people.

4           The proper question, we submit, and the  
5 question which is simply stated in another way in  
6 Buckley and Champlin, is what would Congress have done  
7 if it had known that the veto was unconstitutional? The  
8 question here is, and it must -- I must emphasize that  
9 it is a question that we have to ask in each specific  
10 case, and I would agree with Justice Rehnquist, for  
11 instance, that the question of severability in the  
12 Reorganization Act is a much harder case. There are no  
13 reorganization powers currently extant, so we don't have  
14 to deal with that.

15           QUESTION: Isn't that -- if you are talking  
16 about legislative intent, that is kind of a difficult  
17 inquiry to make 42 years after the Act was passed.

18           MR. MORRISON: It is possible that it's  
19 difficult. I think that that is -- that is in a way the  
20 inquiry which has been made in every one of these  
21 cases. Indeed, it is made in the case -- cases  
22 involving equal protection when we have problems of  
23 underinclusion or overinclusion, what would Congress  
24 have wanted to do if it knew -- if it couldn't have  
25 everything in the statute that it wanted to have, and

1 this Court has had to deal with it. The case cited by  
2 Mr. Gressman, the California -- Califano against Wescott  
3 had to deal with precisely the same question, and I  
4 might say dealt with it in every case after reaching the  
5 constitutional issue.

6           And I agree that it is difficult in theory,  
7 but we have to make these determinations, and in this  
8 case, however, we suggest that the legislative history  
9 is very strong, and strongly supports the conclusion  
10 that Congress would not have, if you will, thrown out  
11 the baby with the bath water, if it had been faced with  
12 that choice, and I base that on the progression of  
13 changes that were made from 1940 through 1962, in which  
14 Congress showed a pattern of increasing the categories  
15 of eligible people, of making it easier for those found  
16 eligible to obtain a hardship stay of deportation, and  
17 further from the Congress's willingness to lessen the  
18 controls over the process.

19           Indeed, if you put the options as between the  
20 private bill analogy, if you strike 242(c)(2), and leave  
21 it to the Attorney General alone analogy, Congress  
22 between 1948 and 1952 tried the private bill analogy  
23 within months after the bill was passed, and that bill  
24 required two-House approval upon a recommendation by the  
25 Attorney General. Everybody in Congress said it is



1 unworkable. They couldn't deal with the problem. And  
2 so finally, in 1952, when the Immigration Act was next  
3 amended, they did away with the two-House approval for  
4 large segments of the aliens who were seeking hardship  
5 adjustments.

6 In 1962, there was a further chipping away at  
7 that. The Congress consistently made it easier, showed  
8 that they did not want the job of going through the  
9 private bills.

10 QUESTION: Mr. Morrison, you are using the  
11 term "Congress wanted" in a rather undifferentiated  
12 meaning, it seems to me. Which Congress do we look to  
13 for intent?

14 MR. MORRISON: I would look to each of the  
15 Congresses that made a change in the law. That is, from  
16 -- the first -- the first change was made in 1940.  
17 Congress didn't like the private bill, so they gave up a  
18 little of their control. In 1948, having found that  
19 there were 21,000 of these applications that came in  
20 between 1940 and 1948, Congress decided it would try to  
21 exert a little more control, since it had vetoed none of  
22 them during that time.

23 In 1948, Congress said, we will exert more  
24 control. In 1952, and in fact before, the next Congress  
25 moved in that progression, said, that is unworkable, and

1 in 1962 they have -- they continued that even further,  
2 and I recognize that you don't have an instant -- you  
3 can't point to one -- one Congress, but even the most  
4 recent consideration by the Congress, as the Solicitor  
5 General's brief points out, Congress is now considering  
6 abandoning the matter entirely.

7           And my point is that the Court has to make a  
8 determination. It is not an easy determination to  
9 make. You have to try to figure out what Congress would  
10 have done. But the decisions of this Court make it  
11 clear that the burden is upon the party seeking to  
12 destroy, and not the party seeking to sever, and we  
13 respectfully suggest that it is not evident, as this  
14 Court has used the term, that Congress would have wanted  
15 to throw out this whole humanitarian program, and indeed  
16 perhaps call into question the legality of aliens who  
17 have already run the Congressional gauntlet, to throw  
18 this entire program out if it could not have retained  
19 the veto. It is just too small a portion.

20           As the Solicitor General indicated, the vast  
21 majority of the people who have to go through the  
22 Congress make it through. Only two people have been  
23 vetoed since 1977, and ten in the previous six or seven  
24 years. I suggest that the Congress has not made its  
25 case for lack of severability. Whatever the case may be

1 under another statute, such as the War Powers Act or  
2 Reorganization Act, it hasn't made its case here.

3           Turning to the merits, I want to say that I  
4 fully agree with the Solicitor General's position here,  
5 support his argument, support the Ninth Circuit, and  
6 also the U. S. Court of Appeals for the District of  
7 Columbia Circuit in the Consumer Energy Council case.

8           I want to focus, if I can, on the separation  
9 of powers arguments, and particularly before doing that  
10 I want to say a word about the necessary and proper  
11 clause upon which counsel for the House places such  
12 great reliance. It is no doubt true that the necessary  
13 and proper clause allowed the Congress to pass the  
14 Immigration and Nationality Act and Section 244. That  
15 is because those were passed by two Houses of Congress,  
16 with opportunity for Presidential decision.

17           The question, though, is, does the necessary  
18 and proper clause and the alienage clause in Article I,  
19 Section 8, authorize the Congress to do what the House  
20 of Representatives did in this case, not to pass a  
21 statute, but to exercise control over a decision of the  
22 executive branch, and we suggest to you that whatever  
23 powers the Congress may have, those powers are exercised  
24 by two Houses of Congress and the President, with the  
25 exception of the specific provisions of the Constitution

1 such as the treaty-making and appointments provision,  
2 which are themselves forms of one-House vetoes. The  
3 Congress has -- the Framers specifically put those in,  
4 and as I noted in my brief, this Court in Myers said, we  
5 will not lightly imply other forms of one-House vetoes,  
6 and that is what we have here. So --

7           QUESTION: Would you agree, counsel, that if  
8 the veto were to be exercised by an independent body,  
9 there would be nothing wrong with it?

10           MR. MORRISON: If by independent body you mean  
11 persons who are officers of the United States appointed  
12 by the President with the advice and consent of the  
13 Senate or otherwise officers within the meaning of  
14 Buckley against Valeo, I would agree with Your Honor  
15 that that would be constitutional. The problem here is  
16 that we have an interbranch blending of power, where the  
17 Congress -- what has happened here is that Congress is  
18 seeking to assign to one branch of it the power to  
19 control the activities of the executive branch.

20           QUESTION: What if this power to control were  
21 exercised by a body of six persons, two of whom were  
22 legislators?

23           MR. MORRISON: That would be -- well --

24           QUESTION: The irony of your position, it  
25 seems to me, is that the one class of persons who may



1 not exercise delegated legislative power are people  
2 whose primary business in government is lawmaking.

3 MR. MORRISON: That may be ironic, Mr. Justice  
4 Stevens, but I believe that that is the way our  
5 Constitution was set up. That is a terribly important  
6 aspect of what the Framers were concerned about. They  
7 were concerned, as the cases and the debates show, of  
8 blending the power to execute the law with the power to  
9 make the law. They were fearful of this concentration  
10 of power lest tyranny result, and the tyranny they were  
11 concerned with was the tyranny of the legislature,  
12 indeed, particularly the House of Representatives, and  
13 so whatever irony there may seem to be, I would suggest  
14 to you that that is an intentional irony in our  
15 Constitutional system, designed to prevent the kind of  
16 activity which took place in this case here.

17 QUESTION: So you do suggest, then, that if  
18 the -- if the body vested with the power to disapprove  
19 was the majority leader of the Senate and the Speaker of  
20 the House, it would be unconstitutional?

21 MR. MORRISON: Yes. Buckley versus Valeo  
22 teaches me that. I feel compelled -- Let me say a word  
23 -- the Senate -- the Congress's response to all of this  
24 is, there really isn't a veto here, that all we have is  
25 a recommendation going from the Attorney General to the

1 Congress. The difficulty -- there are two basic  
2 fallacies with that argument. First is, it  
3 mischaracterizes the process we have here. If four more  
4 days had taken place, had passed, Jagdish Rai Chadha  
5 would have successfully run the Congressional gauntlet,  
6 and he would now be a citizen of the United States. The  
7 fact is that Congress stepped in, not to act with regard  
8 to a recommendation, but to veto an act by the executive  
9 branch. The only thing that prevented his being a  
10 citizen now was his veto. Indeed, the House and Senate  
11 reports in 1952, when the process went back from  
12 two-House approval to one-House veto, described this  
13 process as action by the Congress of an adverse action  
14 on the alien, so it is pretty clear in terms it is not  
15 that.

16           Moreover, all doubt is removed if you consider  
17 what happened to the other 334 aliens who were up before  
18 the Congress at the same time. According to the  
19 Congress, these recommendations were approved by  
20 silence, and that silence is the equivalent in  
21 constitutional terms to legislation.

22           Thus, Justice Brennan, you asked earlier  
23 whether Congress still has a role after, for instance,  
24 the court of appeals decided something. I would say to  
25 you that nothing in the statute would change the role.

1 It appears that once -- the court of appeals would then  
2 issue a decision, it would go back to the executive, and  
3 then it would go up to the Congress.

4 Our constitutional system provides that laws  
5 shall be made by the vote of the House and the Senate,  
6 and not by the silence of its Members, yet if you accept  
7 the recommendation analysis, you would have to accept  
8 that Members can vote by their silence.

9 Thank Your Honors.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
11 The case is submitted.

12 (Whereupon, at 2:48 o'clock p.m., the case in  
13 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:  
IMMIGRATION & NATURALIZATION SERVICE v. JAGDISH RAI CHADA ET AL #80-1832  
UNITED STATES HOUSE OF REPRESENTATIVES v. IMMIGRATION & NATURALIZATION SERVICE ET AL # 80-2170; UNITED STATES SENATE v. IMMIGRATION AND NATURALIZATION SERVICE ET AL. #80-2171  
and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Lynn Connelly



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