

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 80-1832; 80-2170 & 80-2171

TITLE IMMIGRATION AND NATURALIZATION SERVICE,
v. Appellant
JAGDISH RAI CHADHA ET AL.;
UNITED STATES HOUSE OF REPRESENTATIVES,
v. Petitioner
IMMIGRATION AND NATURALIZATION SERVICE ET AL.; and
UNITED STATES SENATE,
v. Petitioner
IMMIGRATION AND NATURALIZATION SERVICE ET AL

PLACE Washington, D. C.

DATE December 7, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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2 IMMIGRATION AND NATURALIZATION :
3 SERVICE, :
4 Appellant :
5 v. : No. 80-1832
6 JAGDISH RAI CHADHA ET AL.; :
7 :
8 UNITED STATES HOUSE OF REPRE- :
9 SENTATIVES, :
10 Petitioner :
11 v. : No. 80-2170
12 IMMIGRATION AND NATURALIZATION :
13 SERVICE ET AL.; and :
14 :
15 UNITED STATES SENATE, :
16 Petitioner :
17 v. : No. 80-2171
18 IMMIGRATION AND NATURALIZATION :
19 SERVICE ET AL. :
20 - - - - -x
21 Washington, D.C.
22 Tuesday, December 7, 1982
23 The above-entitled matter came on for oral argument
24 before the Supreme Court of the United States at
25 10:58 a.m.

1 APPEARANCES:

2 EUGENE GRESSMAN, ESQ., Chapel Hill, N.C.; on behalf of
3 Petitioner, the United States House of Representatives.

4 MICHAEL DAVIDSON, ESQ., Washington, D.C.; on behalf of
5 Petitioner, the United States Senate.

6 REX E. LEE, ESQ., Washington, D.C.; on behalf of
7 Appellant/Respondent, the Immigration and
8 Naturalization Service.

9 ALAN B. MORRISON, ESQ., Washington, D.C.; on behalf of
10 Respondents Chadha et al.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Next we will hear argument in Immigration and Naturalization Service versus Chadha. Mr. Gressman, I think you may proceed when you are ready.

ORAL ARGUMENT OF EUGENE GRESSMAN, ESQ.,
ON BEHALF OF PETITIONER, THE UNITED STATES
HOUSE OF REPRESENTATIVES

MR. GRESSMAN: Mr. Chief Justice and may it please the Court:

I speak again on this reargument on behalf of the House of Representatives. This time I proceed directly to the two critical arguments or contentions of those who seek invalidation of Section 244(c)(2) of the Immigration and Nationality Act. Those two arguments are:

One, that the legislative review device in that section collides with the presentment clauses of Article I, Section 7. The second contention is that the use of this device violates the general separation of powers doctrine.

These arguments must be examined in light of House Resolution 926, an Act adopted in 1975 by which Section 244(c)(2) has been implemented in this case. That examination, I suggest, will show that these two

1 critical contentions in the context of this case are
2 illusory and misplaced, and that the faults in these
3 arguments are so pervasive as to implicate Article III
4 justiciability problems.

5 Now, turning to the first argument, the
6 presentment clause argument, one finds that that
7 argument is undermined and indeed destroyed by the
8 negative nature of House Resolution 926.

9 QUESTION: Where do we find the text of that
10 resolution, Mr. Gressman?

11 MR. GRESSMAN: The resolution is incorporated,
12 I think, at page 69A of the appendix to the Government's
13 jurisdictional statement. It reads in whole: "That the
14 House of Representatives does not" -- "does not approve
15 the granting of permanent residence in the United States
16 to certain named aliens," including Mr. Chadha. That is
17 the total text of House Resolution 926.

18 Now, on its face as well as in its legal
19 effect it contains a number of significant negative
20 propositions. Let me count the ways in which it is
21 negative:

22 One, it does not order the deportation of Mr.
23 Chadha. Mr. Chadha came into this Section 244
24 proceeding conceding that he is deportable because he
25 had earlier violated the statute which -- by overstaying

1 his student visa by which he entered this country, and
2 under the statute that overstaying of a visa renders him
3 deportable. That is not an issue and never has been in
4 this case.

5 Two, House Resolution 926 does not alter Mr.
6 Chadha's legal status quo, which is one of
7 deportability. It has no effect on it.

8 Three, it does not adjust Mr. Chadha's status
9 to that of a permanent resident alien, which is what he
10 requested.

11 Three -- or four, this resolution does not
12 alter or affect any of Mr. Chadha's personal or
13 individual rights. It is long established that an
14 alien, a deportable alien who applies for this kind of
15 relief comes to that proceeding with no rights. It is a
16 -- as we pointed out last argument, this is essentially
17 a plea for mercy, a plea for grace on the part of the
18 alien who seeks to get his status changed by
19 dispensation.

20 QUESTION: Is it not true that had the
21 resolution not passed all four of the consequences
22 you've described would have taken place?

23 MR. GRESSMAN: That is true, but that is not
24 this case. This is a negative. This is a legislative
25 no to all of these consequences that might well ensue.

1 That would be a different case, Your Honor. If either
2 house had disapproved this application, then certain
3 things would have ensued. Then we would have had,
4 presumably, some kind of alteration in the legal status
5 quo.

6 But the critical point here is that by saying
7 no, none of those consequences occurred and there is no
8 change in the legal status quo. To put it differently,
9 there is certainly no kind of enactment of positive law
10 which results from the House action saying no.

11 Now, it is significant, I think, that the
12 opponents of this legislative review device, as well as
13 the court below, have been unable to identify any kind
14 of positive law change that occurred as a result of the
15 adoption of House Resolution 926, and that a
16 determination of a positive law change, an
17 identification of it is absolutely essential to the
18 presentment clause argument. And I think they have
19 utterly failed to demonstrate that there is any positive
20 law change here.

21 You simply cannot change a legislative no into
22 a legislative yes. Now, this goes straight to what
23 Justice White was speaking about in his opinion in
24 Buckley against Valeo, where he said that the power of
25 either house to vote to disapprove is not the equivalent

1 of legislation or to an order, resolution or vote within
2 the meaning of Article I, Section 7, which requires the
3 concurrence of both houses. Nor does a one-house no
4 require any kind of presentment to the President.

5 This is non-legislation. This is what happens
6 every day across the street when a house votes down a
7 proposal made by one of its members.

8 QUESTION: Well, if it's non-legislation I
9 suppose you would have to say it happens across the
10 street 365 days a year --

11 MR. GRESSMAN: That's right.

12 QUESTION: -- whether Congress is in session
13 or not.

14 MR. GRESSMAN: That's right. This no is the
15 equivalent of non-legislation, and it cannot bring into
16 operation the presentment clauses.

17 QUESTION: What is the consequence of 926 on
18 the action of the Service and of the Attorney General?

19 MR. GRESSMAN: Well, the statute provides, not
20 House Resolution, but the statute provides that upon the
21 disapproval by one house the Attorney General is
22 directed by statute to execute the lawful order of
23 deportation.

24 QUESTION: Then I'm confused about your
25 statements which I thought I heard that this didn't

1 alter Chadha's rights.

2 MR. GRESSMAN: That is true, Your Honor.

3 QUESTION: You mean he had no rights in the
4 first place?

5 MR. GRESSMAN: He had no rights to get this,
6 an affirmative vote granting him status as a permanent
7 resident.

8 QUESTION: Well, did he have a right to have
9 the Attorney General grant the dispensation?

10 MR. GRESSMAN: No. That -- Jay versus Boyd
11 clearly demonstrated that he comes into the application
12 at the initial stage before the Attorney General having
13 absolutely no rights to get a favorable determination.
14 It's purely discretionary on the part of the Attorney
15 General, as well as discretionary on the part of the
16 Congress or either house when it considers that. So it
17 can be -- it's a privilege at the most, not a right that
18 he seeks.

19 QUESTION: Mr. Gressman, if the bill --
20 instead of having the resolution having been agreed to,
21 supposing the majority had voted down the resolution.
22 Would that have been an act of legislation or
23 non-legislation?

24 MR. GRESSMAN: If they had agreed to --

25 QUESTION: If this resolution had been

1 submitted but it had failed, and the vote and the action
2 in not passing the resolution, in your view would that
3 have been legislation or non-legislation?

4 MR. GRESSMAN: And the other house had not
5 disapproved as well?

6 QUESTION: No, they just never submitted it to
7 the other house. It just was this particular bill had
8 failed.

9 MR. GRESSMAN: Well --

10 QUESTION: That would have resulted in a
11 change of status, would it not?

12 MR. GRESSMAN: Under the statute you get a
13 change of status only if both -- neither house
14 disapproved.

15 QUESTION: Well, there's no action presented
16 to the Senate.

17 MR. GRESSMAN: Right.

18 QUESTION: And the only thing that is
19 presented is a House resolution is presented and it
20 fails. Now, does the vote on that result in legislation
21 or non-legislation?

22 MR. GRESSMAN: I don't think that is -- that's
23 incomplete legislation.

24 QUESTION: Well, it would have resulted in a
25 change of status, though, wouldn't it, assuming no

1 action in the Senate?

2 MR. GRESSMAN: Well, no action in the Senate,
3 yes, then it would have achieved that, certain
4 consequences which would change his status and permit
5 him to remain in this country.

6 QUESTION: And my question is --

7 MR. GRESSMAN: If either house disapproved or
8 took any action --

9 QUESTION: -- would that have been legislation
10 or non-legislation?

11 MR. GRESSMAN: That is a form of legislation.
12 Now, that is not this case. That is the critical
13 point.

14 QUESTION: So it depends on whether the
15 resolution carries or not --

16 MR. GRESSMAN: Of course.

17 QUESTION: -- as to what the character of it
18 is?

19 MR. GRESSMAN: That is true. That's true with
20 any bill that's proposed over there. If it fails,
21 that's the end of it as far as legislative change of
22 legal status quo is concerned.

23 Now, the other critical point I want to
24 mention is that House Resolution 926 has three
25 characteristics which reflect a unique sovereign power

1 vested exclusively in the Congress and therefore there
2 can be and is no violation of the separation of powers
3 doctrine.

4 First, this Court has repeatedly held, and as
5 recently as three weeks ago in *Landon* against *Placencia*,
6 that the power to admit or exclude aliens is a sovereign
7 prerogative that implicates many of our problems with
8 foreign countries and involves consideration of our
9 political and economic circumstances at the time. And
10 virtually all of that sovereign power is vested in the
11 Congress, and Congress has in effect created a kind of a
12 public right or a public privilege here which it can
13 dispense in accordance with what it sees most
14 desirable.

15 The second point is that House Resolution 926
16 is essentially a negative answer to a political
17 question. Ever since the *Fong Yue Ting* decision in
18 1893, this Court has repeatedly said that the exercise
19 of this power over aliens, this sovereign power,
20 involves answering political questions, in the best
21 sense of that term. And this Court has frequently
22 referred to the purely political nature of the
23 legislative power over aliens. So that when Congress
24 was saying no or when the House was saying no, it was
25 saying -- giving a negative answer to a political

1 question.

2 Finally, House Resolution 926 is saying no
3 within the traditional area of legislative discretion,
4 discretion that is built into 244(c)(2), and is inherent
5 discretion in a legislative body to say no.

6 So we suggest that a combination of these
7 circumstances will, an understanding of what these
8 arguments entail, suggests that both the presentment
9 clause argument and the separation of powers doctrine
10 simply do not apply under the circumstances of this
11 particular case and this particular statute.

12 QUESTION: Let me ask you a question, without
13 charging your colleague for the time, Mr. Gressman. You
14 are familiar with the statutory provision in which the
15 Congress has delegated to the district courts the trial
16 of cases for contempt of Congress. Suppose one of those
17 cases is delegated to the District Court of the District
18 of Columbia Circuit and it tries it and finds the man
19 not guilty of contempt. Can the House reverse that, or
20 the Senate, or both of them together?

21 MR. GRESSMAN: Reverse a judicial
22 determination on contempt? No, I would think not, Your
23 Honor. I think that, having invoked the judicial power,
24 that's something --

25 QUESTION: Having delegated --

1 MR. GRESSMAN: -- that would be a violation of
2 the specific separation --

3 QUESTION: But it wasn't a judicial power in
4 the first instance.

5 MR. GRESSMAN: No.

6 QUESTION: It was a power that belonged to the
7 House and the Senate individually.

8 MR. GRESSMAN: That is true. But I suppose
9 that is again a kind of a public right, which Congress
10 may or may not delegate to the courts as it sees fit.

11 QUESTION: Now, I assume --

12 MR. GRESSMAN: Once it does delegate that
13 function, that kind of a trial to the courts, then it
14 becomes involved with the whole inherent judicial power
15 over cases or controversies.

16 QUESTION: Now, one of the reasons, if not the
17 dominant reason, for Congress taking that action was
18 that it was too much of a burden on the Congress to
19 undertake to try contempt cases --

20 MR. GRESSMAN: Precisely.

21 QUESTION: -- because it interfered with their
22 business.

23 MR. GRESSMAN: Precisely. But that is basic
24 to the whole public rights concept, that if it is
25 something that Congress creates then it has a great deal

1 of discretion in farming out some of those functions to
2 the other branches as it may see fit. Once it does farm
3 out or delegate to the courts a matter which properly
4 may be said to be a case or controversy, then Congress
5 loses all kind of control to review a judicial
6 decision.

7 But that is not what has happened in this
8 case.

9 QUESTION: Thank you, Mr. Gressman.

10 QUESTION: Mr. Gressman, may I inquire also
11 whether historically the Congress has used its sovereign
12 power over aliens to enact specific legislation to
13 deport specific individuals?

14 MR. GRESSMAN: I believe that -- I'm not aware
15 that they've ever used that power. Now, they have had a
16 number of private bills in the past to give them relief
17 from --

18 QUESTION: To give them relief --

19 MR. GRESSMAN: That is right.

20 QUESTION: -- or give them status as permanent
21 residents.

22 MR. GRESSMAN: That is true.

23 QUESTION: But not to deport.

24 MR. GRESSMAN: But not to deport. I'm not
25 aware. That might bring into play a bill of attainder

1 operations. At least that kind of an objection might be
2 made to that. But I'm not aware that they have ever
3 used that kind of private legislation.

4 QUESTION: Mr. Davidson, you have 15 minutes,
5 without being charged with any of our recent colloquy.

6 ORAL ARGUMENT OF MICHAEL DAVIDSON, ESQ.,
7 ON BEHALF OF PETITIONER, THE
8 UNITED STATES SENATE

9 MR. DAVIDSON: Thank you. Chief Justice and
10 may it please the Court:

11 Justice O'Connor, in response to your
12 question, in our reply brief we describe the incident in
13 1940 in which the Congress considered legislation to
14 deport Harry Bridges. Attorney General Jackson roundly
15 denounced that effort as totally unprecedented and a
16 violation of all cardinal constitutional principles, and
17 the Congress did not enact that legislation. And this
18 was at the very time that Attorney General Jackson had
19 been advising the President that he may sign the Alien
20 Registration Act of 1940, which initiated these
21 procedures that are now under review.

22 Last term I stated Petitioner's argument why
23 the judgment of the Court of Appeals should be reversed
24 because of the inseverability of the statute or vacated
25 because of the availability of alternative relief. It

1 remains our conviction that this is not an appropriate
2 case in which to decide the merits of legislative
3 review.

4 However, it is also the view of the Senate
5 that it will serve the public interest to obtain, in an
6 appropriate case or cases, the judgment of this Court on
7 the constitutionality of legislative review procedures.
8 To that end, the Senate yesterday docketed in this Court
9 an appeal from the en banc judgment of the District of
10 Columbia Circuit in the Federal Trade Commission case.

11 The statute in that case authorizes the
12 Congress to disapprove trade regulation rules of the
13 Federal Trade Commission by concurrent resolutions of
14 the Congress. That statute is severable and the
15 Congress in the Federal Trade Commission Improvements
16 Act of 1980 established a special procedure to obtain
17 judicial review and the judgment of this Court on its
18 constitutionality.

19 We are therefore asking in that case that the
20 Court reach the merits and decide the constitutional
21 questions presented.

22 QUESTION: You're adhering to your position
23 here in this particular case that the statute is not
24 severable?

25 MR. DAVIDSON: That is correct, and because it

1 is not severable there is no relief which may be
2 provided to the Petitioner and the issue should be taken
3 up in a case in which effective judicial relief under
4 Article III may be provided.

5 In determining whether to ask the Court to
6 resolve the disagreement between its coordinate branches
7 over legislative review, Petitioner has weighed
8 competing considerations. On the one side is the need
9 for stability in the structure of government which has
10 been developed in recent years by the political
11 branches. The executive paints a history of legislative
12 overreaching and we have described a history of
13 executive acquiescence or agreement.

14 But in fairness and in some detachment, I
15 believe we can all step back and agree that the
16 political participants have joined in the creation of
17 these contemporary governmental arrangements and share
18 responsibility for that. Although the branches may be
19 contending for relative advantage now, the ultimate
20 interest is that of the Government of the United States
21 as a whole in cautiously approaching the devices which
22 are presently used to mediate political powers over arms
23 sales, budget authority, and numbers of other matters to
24 which legislative review has been applied.

25 These procedures serve important governmental

1 purposes even when they do not result in actual
2 disapproval, because they establish a framework for
3 consultation and agreement between the political
4 branches. It is one of the ironies of this case that
5 the Senate may be more in agreement with the Ninth
6 Circuit than are the Respondents. That court saw the
7 need for restraint and the need to limit its decision in
8 preference to a precipitous redistribution of present
9 political power and responsibility.

10 The need for caution must be balanced,
11 however, against the need for authoritative
12 constitutional guidance. The Congress may be expected
13 to turn again to legislative review to solve new
14 problems, and it is critically important to know whether
15 such resolutions can be founded securely on procedures
16 for legislative review or whether the Congress and the
17 executive should look to other ways to accommodate their
18 differences.

19 Therefore, when a controversy is presented in
20 which the severability of the statute or the lack of
21 alternative relief makes a judgment on the merits
22 appropriate, the Senate will ask the Court, as in the
23 Federal Trade Commission case, to decide the merits of
24 the constitutional issue on appropriately narrow
25 grounds.

1 On the merits of the present case, the claim
2 is made that Section 244 abridges the President's role
3 in the legislative process and his responsibility to
4 faithfully execute the laws. However, the history of
5 the statute and an examination of its text shows that
6 the statute preserves the balance between the branches
7 while, in Representative Celler's words in 1940,
8 "providing a humane and reasonable solution to an issue
9 over which the Congress and the executive have been at
10 impasse."

11 A case which brings into question the process
12 of legislation must begin with a decision made through
13 that process to limit immigration. But from the outset
14 that basic legislative decision has been the subject of
15 stresses resulting from the openness of borders and the
16 nation's hospitality to tourists and students and
17 others.

18 QUESTION: Well, is anyone challenging the
19 plenary power of Congress over these broad matters of
20 immigration?

21 MR. DAVIDSON: No, but what is being asked in
22 this case is to transmute a very limited effort to
23 provide relief into a general authority on the part of
24 the executive to confer amnesty subject to no review.
25 And what I would like to do is to describe to the Court

1 the nature of the legislative decision that was made, to
2 see --

3 QUESTION: Doesn't that bear on your
4 severability argument, too?

5 MR. DAVIDSON: Oh, it bears very directly, and
6 it is indeed very difficult to separate the severability
7 point from our analysis on the merits. Our analysis on
8 the merits is to demonstrate that this particular
9 sharing of power -- and it is a sharing of power -- is
10 quite unique under the laws; and the two parts of it,
11 the discretion of the Attorney General to make
12 recommendations and the power of the Congress to allow
13 an alien to change his status from deportable under the
14 laws to lawful permanent residence, are integrally
15 related.

16 One response to the tensions which have
17 resulted from restrictions on immigration has been the
18 periodic consideration of amnesty, and from time to time
19 the Congress has granted discretion to the executive to
20 register as permanent residents aliens who had entered
21 the United States prior to statutorily designated dates,
22 and we are now at a critical moment in the consideration
23 by the Congress of the broadest grant of amnesty ever.

24 Section 244 began in the 1930's as an
25 executive request to the Congress for the power to

1 confer amnesty. The proposal encountered all the
2 problems which amnesty proposals have since
3 encountered. It is difficult to strike a balance
4 between the compelling circumstances of individuals and
5 the strong national desire to enforce the legislative
6 decision to limit immigration.

7 In the course of the seven-year debate which
8 ensued, the Congress considered but could not obtain
9 agreement on various of the alternatives which the
10 Solicitor General has properly described as
11 constitutional. For example, the Solicitor General
12 correctly suggests that Congressional control may be
13 maintained by a legislative decision to limit a
14 delegation of authority to a specified period of years.
15 The House bill in 1937 would have done that, by limiting
16 the availability of relief for a period of four years.
17 But that proposal failed in the Senate, which had been
18 opposed to the grant of any discretion to the executive
19 to grant permanent residence to deportable aliens.

20 Or, as the Solicitor General indicated last
21 term, the statute might have been passed to authorize
22 the executive to recommend cancellations of
23 deportations, but to require legislation to actually
24 cancel those deportations. Indeed, the House-passed
25 bill in 1939 would have established that very

1 procedure. But the Administration rejected that as
2 inadequate.

3 At that point the Congress could have
4 determined that neither bicameral agreement nor
5 agreement with the executive branch to a relief
6 procedure was possible. It could have declared that it
7 had done its constitutional best and simply let the
8 affected class be deported.

9 But by that time it was May and June of 1940
10 and an alternative to deportation in time of a world at
11 war was deemed essential. The Congress persisted in its
12 effort to resolve the seven-year impasse and invoked
13 those procedures which contribute to successful
14 political resolutions.

15 First the Congress consulted with the
16 executive. Professor Mansfield relates in a
17 contemporary account that the Senate Judiciary Committee
18 substituted a Labor Department draft, and Senator
19 Connally described to the Senate how the Judiciary
20 Committee had called on the Department of Justice "and
21 had the Solicitor General with us."

22 I cannot say what attention the Solicitor
23 General paid to the relief provisions of the Alien
24 Registration Act, as there were other important
25 provisions. But that Act is not lengthy, and Senator

1 Connally further stated, "We went over all the existing
2 laws and worked the new provisions into existing laws so
3 as to make a harmonious whole."

4 Important in this respect, Congress
5 incorporated into the Immigration Act the legislative
6 review procedures of the Reorganization Act of 1939,
7 which Presidents continued to support and which the
8 Department of Justice has supported for decades, until
9 disowning it in this litigation.

10 And then, after fashioning this statute in
11 consultation with the executive, the bill received
12 bicameral support and was presented formally to the
13 executive for the approval of the President, which it
14 received.

15 Section 244 establishes a procedure to grant
16 permanent residence. It is not a deportation statute.
17 The only status which may be changed by Section 244 is
18 from deportability to lawful permanent residence. Under
19 these arrangements, the legal authority for the Attorney
20 General to record the permanent residence of a
21 deportable alien derives from the Act, which had been
22 approved through the process of bicameral agreement and
23 presentation.

24 The procedures of Section 244 preserve the
25 balance among the three participants in the legislative

1 process, the two houses and the executive. Each must
2 concur in the form established by the statute for there
3 to be a change in the legal status of an alien from
4 deportable to lawful resident.

5 QUESTION: How does the executive get into the
6 process at the stage of Resolution 926?

7 MR. DAVIDSON: The executive precedes it.
8 This is an arrangement which changes the order of
9 decision but preserves the role of each branch. The
10 legal status of a deportable alien may not be changed
11 unless the executive initiates the request to the
12 Congress and unless the two houses, through the mode of
13 acquiescence or, in the case of criminal aliens, through
14 a positive resolution of approval, concur.

15 And in fact, that was one of the purposes of
16 the statute in 1939 and '40, which was to take the
17 burden from the alien of initiating private relief
18 procedures by finding a member who would introduce a
19 bill and conferring that burden on first the Department
20 of Labor and then the Attorney General to screen, to
21 recommend, while leaving effective control in the
22 Congress to determine whether the law may be suspended.
23 And that's a significant element of this case.

24 We're not talking about the creation of new
25 rights through the process of resolution. We are

1 talking about the suspension of existing mandates of the
2 Congress to deport individuals who meet certain
3 standards or who fail to meet them. And in order to
4 give that individual a new status, the status of a
5 permanent resident with eligibility for citizenship, it
6 was determined fundamentally important that all
7 participants in the legislative process take part, even
8 though the order of consideration would change, the
9 initiative would come from the executive and
10 consideration then be had by the Congress.

11 The concurrence by the Congress in the grant
12 of permanent residence to a deportable alien only
13 confirms the view of the executive that permanent
14 residence should be granted, and is of course totally
15 beneficial to the aliens whose status is changed. And
16 therefore, even if questions may be asked about
17 legislative review in other contexts, there is no one
18 before the Court who may claim to be injured by the
19 procedures for granting permanent residence through
20 Section 244.

21 I would like to reserve the balance of my time
22 for rebuttal.

23 CHIEF JUSTICE BURGER: Mr. Solicitor General.

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

25 ON BEHALF OF APPELLANT/RESPONDENT, THE

1 IMMIGRATION AND NATURALIZATION SERVICE

2 MR. LEE: Mr. Chief Justice and may it please
3 the Court:

4 The power to legislate is the power to make
5 law, to change people's rights and obligations. It is
6 the most important power of government and in the view
7 of those who wrote the Constitution it has the greatest
8 potential for abuse.

9 The Constitution is unusually explicit
10 concerning how this legislating power, this power to
11 make laws, is to be accomplished: either passage by
12 both houses of Congress and presentation to the
13 President for his approval or, in the event of veto by
14 the President, passage by two-thirds of both houses of
15 Congress over his veto.

16 In recent times Congress has invented a device
17 which circumvents these basic constitutional
18 requirements, eliminates the President from his
19 constitutionally guaranteed participation in the
20 lawmaking process, and switches the authority to
21 legislate, to make changes in the legal rights and
22 obligations that people would otherwise have, to
23 Congress acting alone by majority vote or to a single
24 house or committee of Congress.

25 The legislative veto in this case suffers from

1 the same defect as the legislative veto in any other
2 case. Whatever labels one may choose to attach to it,
3 no label can obscure the fact that a legislative veto is
4 something that Congress does. It is an official
5 governmental act by Congress.

6 If it is not legislative, if it is, as Mr.
7 Gressman said, non-legislation, then Congress doesn't
8 have the authority to do it, because as this Court made
9 clear in Buckley versus Valeo and Springer versus
10 Philippine Islands, the legislative power is the power
11 to make laws. And if it is legislative in character,
12 then it must comply with the constitutional
13 prerequisites for legislation, passage by two houses and
14 approval by the President.

15 Whether it's a legislative no or a legislative
16 yes is beside the point. Congress has in any event made
17 law. It has affected people's rights. Absent what the
18 House did to Mr. Chadha in this case, his status would
19 have been adjusted from deportability to a lawful
20 permanent residence, a very important change, and today
21 he would be a citizen of the United States.

22 It is true, as Mr. Davidson says, that he had
23 no right to have the Attorney General change his status
24 prior to enactment of the original legislation, the
25 Immigration and Nationality Act of 1952. But that

1 legislation made law, made it in the proper way,
2 two-thirds passage over President Truman's veto. That
3 statute gave to the Attorney General the authority to
4 make law as to Mr. Chadha and others like him, and from
5 that point forward he did have the right to have the
6 dispensation that the Attorney General gave to Mr.
7 Chadha and others like him in this particular case.

8 In those few instances in which the
9 Constitution authorizes Congress to act other than
10 through legislation, the textual authorization is
11 explicit and narrow. Examples are treaty ratification
12 and appointment confirmation by the Senate and the
13 proposal of constitutional amendments. When the framers
14 intended to authorize exceptions, they knew how to do so
15 and they did so in narrow and explicit terms. Other
16 than those exceptions, the authority granted to Congress
17 is, as this Court said in Buckley and Springer, the
18 authority to make laws.

19 QUESTION: Well, what makes you think that
20 you're going to find explicit provision for everything
21 the Congress can do in the Constitution? The President
22 certainly has issued innumerable executive orders since
23 the beginning of the nation and I don't think there's
24 anything in Article I that talks about executive orders
25 -- Article II.

1 MR. LEE: The difference is, Justice
2 Rehnquist, of course that the Constitution is explicit
3 on this one point, and that is that if Congress is to
4 act other than in a non-legislative fashion, such as
5 dealing with adjournment, ratification of treaties and
6 so forth, it must present its work product to the
7 President for his approval.

8 On one day the framers passed clause 2 of
9 Article I, Section 7, in which they said that all bills
10 must be presented to the President, and then in explicit
11 fear that Congress might be able to act to affect
12 people's rights other than by a bill, they added the
13 next day clause 3 of Article I, Section 7, which
14 expanded that to all orders, votes and resolutions.

15 The Senate also suggests that the legislation
16 requirement was met in this case by the original
17 legislation when the Immigration and Nationality Act
18 first became law in 1952. This is nothing less than an
19 invitation to rewrite the Constitution in its most
20 fundamental respect. It would mean that Congress,
21 acting all by itself by a two-thirds vote, could remove
22 both the bicameralism and the presentation requirements
23 from all future lawmaking efforts.

24 And in fact, this case involves nothing less
25 than that issue. If one house of Congress can lawfully

1 change the otherwise applicable law establishing Mr.
2 Chadha's rights as it did in this case, then I know of
3 no intellectually defensible way to distinguish a
4 statute in which Congress makes every action, rulemaking
5 or adjudication, by every department or administrative
6 agency in the Government subject to veto by one or both
7 houses or even one committee.

8 The President would surely veto the original
9 scheme, but by a two-thirds vote overriding that veto
10 Congress could eliminate the President's
11 constitutionally vested power to participate in
12 lawmaking and thereby bring to pass the very result that
13 was the framers' most deeply held separation of powers
14 concern. And from that point on Congress would be home
15 free with a new power not recognized in the
16 Constitution, and all that it took to bring that about
17 is a two-thirds vote by Congress itself.

18 Mr. Gressman refers again to the unique
19 sovereign power vested exclusively in Congress to deal
20 with aliens. The Constitution does in fact grant broad
21 power over matters of alienage, but it is not a power
22 that belongs to Congress alone.

23 When this Court ruled in our favor in the
24 Placencia case just a few weeks ago, it was dealing with
25 a statute that was enacted by the legislative process:

1 both houses of Congress with the approval of the
2 President. The power to deal with aliens is a power,
3 therefore, that belongs to a majority of both houses
4 with the concurrence of the President or to a two-thirds
5 majority of both houses acting together, following the
6 President's disapproval. And for the same reason, the
7 necessary and proper clause gives by its own terms the
8 power to make all laws which shall be necessary and
9 proper.

10 We deal here with constitutional commands
11 which are unusually explicit and concerning whose
12 purposes the framers left no doubt. No. 73 of the
13 Federalist Papers referred to the propensity of the
14 legislative department to intrude upon and absorb the
15 powers of the other departments. And this Court in
16 Buckley versus Valeo observed, quoting from -- excuse me
17 -- observed that the debates of the Constitutional
18 Convention and the Federalist Papers are replete with
19 expressions of fear that the legislative branch of the
20 national government will aggrandize itself at the
21 expense of the other two branches.

22 That is a correct statement. Anyone who reads
23 those debates and the Federalist Papers comes away with
24 the unmistakable conclusion that there was no concern
25 that more dominated the debates of that summer of 1787

1 and the period of passage and ratification between 1787
2 and 1789 than that which Justice White characterized in
3 his separate opinion in Buckley versus Valeo as an
4 overweening Congress.

5 And it is equally clear what the framers did
6 in response to that concern, that with specific regard
7 to that very concern they built into the Constitution
8 two requirements: the first, that laws be passed by two
9 separate houses of Congress; and second, that any
10 Congressional attempt to make law, to change people's
11 rights and obligations, must be presented to the
12 President.

13 Let me say just a brief word about separation
14 of powers. The Immigration and Nationality Act is a
15 massively complex Act, with literally hundreds of
16 provisions. Congress assigned the responsibility of
17 carrying out most of those provisions to the Attorney
18 General. But in the case of Section 244(c)(2) it
19 assigned the enforcement job to itself, acting through
20 either House.

21 The fact that Congressional law enforcement
22 occurs only after executive enforcement, and then only
23 in the event that either house disagrees with the
24 executive, helps not at all. It lies outside the power
25 of Congress to say, we will wait and see how you execute

1 this law we have passed and if we don't like the way you
2 have done it we will take over the job ourselves.

3 Congress has also squarely usurped the
4 judicial function. In this very case, Congressman
5 Eilberg explained the reason for this particular veto.
6 It was that Chadha and five others "did not meet the
7 statutory requirements." Plain performance of a plain
8 judicial function.

9 QUESTION: General Lee, as I recall it the
10 Ninth Circuit's opinion rested both on the usurping or
11 interference with the executive power and also on
12 interference with the judicial power. Do you assert
13 both of those grounds here?

14 MR. LEE: Yes, I do. Yes, I do.

15 In this particular instance it was a clear
16 exercise of the judicial power. Congressman Eilberg
17 explained the reason that Congress should take the
18 particular position that it did.

19 QUESTION: Well, who had exercised the
20 judicial power that was being interfered with?

21 MR. LEE: Well, it is well settled and has
22 never been a matter of dispute that the Attorney General
23 initially has the authority in implementation of the
24 statute to make the determination that he makes.

25 QUESTION: Well, that isn't a judicial

1 determination.

2 MR. LEE: That is correct. That is an
3 executive determination. But in this particular
4 instance, it was Congress itself rather clearly that
5 said, we conclude that he did not comply with the
6 judicial standards -- or excuse me, did not comply with
7 the statutory standards.

8 Now, if that were the case that's an issue
9 that should have been raised in court, either by Mr.
10 Chadha in the event that he contended -- if it had gone
11 the other way it could have been raised in court by Mr.
12 Chadha.

13 QUESTION: Well, but it didn't go the other
14 way.

15 MR. LEE: That is correct, and for that reason
16 Congress in effect stepped in and in effect appealed
17 from that determination, and necessarily exercised a
18 judicial power.

19 QUESTION: Congress' overriding of the
20 Attorney General's executive decision is an interference
21 with the judicial power?

22 MR. LEE: It is an -- it is an interference
23 with the executive power by exercising a judicial power,
24 which was to interpret the statute.

25 QUESTION: Would it not be more accurate to

1 describe the Attorney General's power, whatever it is,
2 as something in the nature of a quasi-judicial power?

3 MR. LEE: He does exercise something like
4 judicial authority. He exercises a conglomerate of
5 authority that is necessary to his implementation of the
6 statute and that necessarily also includes --

7 QUESTION: Are there other areas where that
8 kind of quasi-judicial power is delegated to the
9 Attorney General?

10 MR. LEE: I know of few instances of either
11 adjudication or rulemaking, particularly rulemaking,
12 that do not require some exercise of a judicial type
13 power.

14 Finally, notwithstanding the framers' concerns
15 and the unusual precision with which they required not
16 only passage by two houses, but also that all bills,
17 orders, votes be presented to the President, the House
18 and the Senate consistently suggest that legislative
19 vetoes ought to be sustained because our system needs
20 them. They are, we are told, hybrids that work.

21 Parenthetically, it would appear from the only
22 empirical study on the subject and from the experience
23 of the American Bar Association that that premise is in
24 fact lacking. But the real defect is that whether
25 correct or incorrect the argument is irrelevant.

1 Constitutional defects cannot be cured by practical
2 expediency.

3 In this case and two others now pending on
4 petitions for certiorari and appeals before this Court,
5 eleven members of two separate Courts of Appeals have
6 unanimously concluded that the Constitution means what
7 it says. Those eleven judges were correct and the
8 judgment of the Ninth Circuit Court of Appeals in this
9 case should be affirmed.

10 CHIEF JUSTICE BURGER: Thank you, Mr.
11 Solicitor General.

12 Mr. Morrison.

13 ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.

14 ON BEHALF OF APPELLEES JAGDISH RAI CHADHA ET AL.

15 MR. MORRISON: Mr. Chief Justice and may it
16 please the Court:

17 In defending against the presentation clause
18 and separation of powers arguments made by Respondents
19 here, the Senate and House argue most clearly perhaps in
20 the House of Representatives supplemental brief that
21 what is at issue here is the power of Congress over
22 aliens. We submit that that is no more true here than
23 was the question of the power of Congress over elections
24 at issue in Buckley against Valeo, or the power of
25 Congress over bankruptcy at issue last term in the

1 Marathon Pipeline case.

2 The question is not, we submit, what is the
3 power of Congress, but by what means must Congress
4 exercise that power over aliens in this case. Any time
5 it wants, Congress, that is two houses and the President
6 concurring together, can change the law. They can
7 eliminate Section 244 entirely. They can make us go
8 back to the days of private bills. They can import new
9 standards of flexibility. They can have more or less of
10 it as Congress chooses.

11 What Congress cannot do, what the Constitution
12 forbids it from doing, is to delegate to one house of
13 Congress the power to make those changes in the law and
14 to perform those functions regarding aliens.

15 Now, Congress tries to avoid this argument and
16 by avoiding the argument of the requirements of Article
17 I by saying that we don't have action by Congress here
18 and that all that happened was that the Attorney General
19 had made a recommendation to Congress and that
20 recommendation failed passage in the House of
21 Representatives, and therefore like so many other
22 recommendations that fail it does not implicate the
23 requirements of Article I, Section 7, of the
24 Constitution.

25 The difficulty with that argument is that it

1 neither comports with the operation of Section 244 nor
2 does it deal with or fit in with our constitutional
3 requirements under Article I for lawmaking. This is
4 best illustrated, I suggest, by examining the entire
5 matter that was before Congress in 1975 when Mr. Chadha
6 and five others were vetoed. 340 aliens had the
7 Attorney General's approval. Only six, Mr. Chadha among
8 them, were disapproved by House Resolution 926.

9 Viewed alone, that might be seen simply as
10 saying that they failed of approval like other
11 recommendations failed of approval. This, however,
12 doesn't account for the fact that 334 other aliens who
13 were sent up in the same general time frame as Mr.
14 Chadha became three days later than the House Resolution
15 926 was passed entitled to have their status adjusted,
16 simply because of the passage of time and the fact that
17 no resolution of disapproval had been introduced in
18 either house for them.

19 So that we have a situation in which 334
20 aliens had their status adjusted, according to the
21 Senate and the House, by the passage of time and
22 acquiescence by silence, and Mr. Chadha and five other
23 unfortunate aliens had their status referred back to
24 deportability by the action of a single house of
25 Congress.

1 QUESTION: Would you say that that silence
2 equated to non-legislation?

3 MR. MORRISON: Well, I have trouble with the
4 non-legislation versus legislation. It seems to me that
5 what silence means is much more clearly in terms of it
6 defining what the action meant. That is, that the
7 action was adverse action to Mr. Chadha and five others
8 and it wasn't simply the failure of recommendation,
9 because silence under our Constitution, Article I,
10 Section 7, does not enable a law to be passed. Laws are
11 passed by two houses of Congress with the concurrence of
12 the President or a two-thirds vote overriding his veto,
13 and that is not what happened with respect to any of the
14 334 aliens.

15 Therefore, I conclude that the description as
16 mere failure of approval of Mr. Chadha and five others
17 is wholly inaccurate, as it would be inaccurate and
18 unconstitutional to say that the other 334 could have
19 successfully had their status changed simply by the
20 passage of time.

21 In fact, of course in this case the reason
22 that Mr. Chadha's status was adjusted was because of the
23 veto, and this veto is not something that's authorized
24 by the Constitution. Ours is a system of limited
25 powers. The framers did not provide for one-house

1 vetoes over aliens, although they did provide for two
2 one-house vetoes in the Constitution itself, both of
3 them by the Senate, over the power of the President to
4 make treaties and the President's powers of
5 appointment. Those are explicit one-house vetoes.
6 They're contained in the Constitution, and their absence
7 here makes it more compelling that the Court should not
8 imply that Congress is authorized through one house to
9 veto actions of the executive.

10 It is for this reason that we contend that the
11 action by the House of Representatives here is
12 unauthorized under the Constitution and hence is not
13 proper within the meaning of the necessary and proper
14 clause so heavily relied upon by the House and Senate.
15 In defining the scope of the term "proper" in the
16 necessary and proper clause, this Court in Marbury
17 versus Madison required that the legislation be both
18 necessary and proper and, in terms of propriety, that it
19 meet both the letter and spirit of the Constitution.

20 Not only does this veto run contrary to the
21 specific requirements of the Constitution, but it also
22 violates its spirit. The veto here is nothing more than
23 a legislative shortcut, and because of the legislative
24 shortcut it eliminates the role of the President and the
25 other house. But it also runs counter to the entire

1 process by which we -- the framers established our
2 lawmaking, under which deliberation was the keynote, and
3 the precipitous action by a single house prevented --
4 would not comport with the need to have well-considered
5 deliberative decisions made.

6 This point about the need for deliberative
7 decisions relates to another point I want to make, and
8 that is that although the activities here are portrayed
9 as an interbranch struggle, this case illustrates that
10 the lives of individuals are very much at stake in
11 controversies such as this. That is, that the
12 legislative veto is more than a battle between the
13 President and the Congress.

14 Similarly, our constitutional system was
15 established not simply to have a bicameral system with
16 each house being individually represented and the
17 President assured of a role as a means of satisfying
18 three separate power blocs. It was not given to do the
19 lawmaking in order to assure that each had a share of
20 the legislative pie.

21 The framers were concerned with the avoidance
22 of unwise, oppressive, discriminatory or hasty
23 legislation, and in order to do that they established
24 procedures with sufficient checks and balances built
25 into them to make it far more difficult for Congress to

1 act in a precipitous manner. And it is these
2 institutional checks against unwarranted and unwise
3 action, as much as the formal requirements of the
4 Constitution, that the veto transgresses.

5 This case is a perfect example of it. The
6 Attorney General, after carefully considering the facts
7 of this case, the statutes, the precedents, concluded in
8 a formal proceeding that Mr. Chadha was entitled to an
9 adjustment of status and to remain in this country.

10 QUESTION: How do you characterize the
11 Attorney General's power that was delegated to him, Mr.
12 Morrison?

13 MR. MORRISON: I believe it is a power to
14 carry out the laws and to administer the laws, an
15 executive power. I believe that the violation here can
16 very well be seen as either lawmaking by the Congress
17 through the House of Representatives or it can be viewed
18 as improper interference with the executive carrying out
19 of the function.

20 In the Senate supplemental brief they make
21 four separate references to this desire to share the
22 responsibility for carrying out the laws. That is
23 precisely what the Constitution forbids. So if you view
24 what the House did as lawmaking, it runs afoul of
25 Article I, Section 7.

1 On the other hand, if you view it as sharing
2 the responsibility, it runs afoul of the separation of
3 powers principles which are throughout our
4 Constitution. Congress makes the law; it does not carry
5 out the law.

6 Finally, to the extent that you could view
7 what Congress did here -- and in part because of the
8 very hasty proceedings and the rather cryptic remarks by
9 Congressman Eilberg, it's impossible to tell precisely
10 what was in the minds of even Congressman Eilberg, let
11 alone the rest of them. If you view that as an action
12 in which they were judging, as Article III judges would
13 judge, whether the Attorney General had complied with
14 the statute, then once again the Congress is performing
15 a judicial function.

16 It is not, Mr. Justice Rehnquist, so much as
17 though they are interfering with any Article III judge,
18 but that members of Congress would be performing a
19 function which our Constitution has reserved for Article
20 III judges.

21 The point is important because it gets out of
22 the conundrum of trying to figure out how to label the
23 action of Congress. In our view, it doesn't make any
24 difference what the House of Representatives was doing.
25 If it was engaging in judicial activities or executive

1 activities, then it runs afoul of separation of powers.
2 On the other hand, if it was engaged in legislative
3 activities it failed to meet the requirements of Article
4 I, Section 7.

5 So that viewed in any of these ways the
6 legislative veto is improper. Indeed, it makes it clear
7 that it's improper whether or not the agency performing
8 the function being vetoed was an executive agency or an
9 independent regulatory commission, as it is in the two
10 other cases that are pending.

11 Similarly, it makes no difference whether the
12 activity was adjudication, either formal or informal
13 adjudication, or whether it was rulemaking, formal or
14 informal. The focus in the challenge here and in the
15 other cases is on the legality of what the House of
16 Representatives or the two houses of Congress acting
17 without the President did.

18 It makes no difference what the particular
19 activity that the executive performed was, because we
20 are questioning here the legality of what the Congress
21 did. And for that reason, a decision here would carry
22 with it a decision that all of the vetoes are
23 unconstitutional for the same analytical reasons that
24 we've suggested here. And it is for that reason that we
25 say that the attempt to postpone the decision is not, an

1 attempt to postpone the decision on this case, is one
2 that ought to be accepted.

3 This case presents precisely what is wrong
4 with the veto -- a Congressional interference in a
5 non-lawmaking capacity with what the executive branch
6 has done. And for that reason, under either of the
7 three analyses I've set forth the veto is
8 unconstitutional and should be set aside.

9 Thank you, Your Honor.

10 CHIEF JUSTICE BURGER: You have one minute
11 remaining, Mr. Davidson, if you wish to use it.

12 ORAL ARGUMENT OF MICHAEL DAVIDSON, ESQ.

13 ON BEHALF OF PETITIONER,

14 THE UNITED STATES SENATE -- REBUTTAL

15 MR. DAVIDSON: To reiterate a point of the
16 last argument, the question of severability in this case
17 is very much a question of separation of powers also.
18 The entire history of this effort to reach
19 accommodations between the two branches from the 1930's
20 on has involved at critical points requests by the
21 executive for new and enhanced authority, which as this
22 history demonstrates often would not have been granted
23 without --

24 QUESTION: Mr. Davidson, if you lose this case
25 Congress can recapture all the powers that it wants to

1 recapture, just repeal the provision that's at issue.

2 MR. DAVIDSON: It would in any case have to
3 recapture that power over the veto of the President.
4 Our point is it should return, if at all, to the status
5 quo ante and establish a new basis for shared power
6 after that.

7 CHIEF JUSTICE BURGER: Thank you, gentlemen.
8 The case is submitted.

9 (Whereupon, at 11:59 a.m., the case in the
10 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:

No. 80-1832

IMMIGRATION AND NATURALIZATION SERVICE, Appellant v. JAGDISH RAI CHADHA ET AL.;

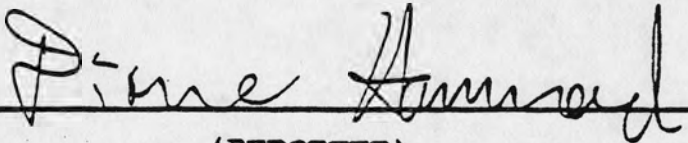
80-2170

UNITED STATES HOUSE OF REPRESENTATIVES, Petitioner v. IMMIGRATION AND NATURALIZATION SERVICE ET AL.; and

80-2171 - UNITED STATES SENATE, Petitioner v. IMMIGRATION AND NATURALIZATION SERVICE ET AL.

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