CHADHA: THE SUPREME COURT AS UMPIRE IN SEPARATION OF POWERS DISPUTES

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I. INTRODUCTION

Our constitutional structure, as Chief Justice Burger stressed in *Immigration and Naturalization Service v. Chadha*,[1] was built upon the fear that accumulation of power in a single branch of government would lead to tyranny.[2] That fear was expressed by Madison when he observed in *The Federalist* No. 47 that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[3] To prevent such tyranny, the Framers provided for three branches of a federal government and separated powers among those branches.

The Framers, however, failed to designate an umpire to resolve disputes among the branches and determine when a branch exceeded its delegated powers. Perhaps an umpire was unnecessary. It certainly is possible to conceive of a system in which disputes could be settled by allowing the decision of the first branch that addressed an issue to be conclusive on the other two. Or, a second alternative might allow each branch to decide constitutional issues regardless of a determination by another branch. Even Learned Hand, who was wary of extending too much power to the judicial branch, found these alternatives unacceptable:

> [T]he first alternative would have meant that the interpretation of the Constitution on a given occasion would be left to that "Department" before which the question happened first to come; and such a system would have been so capricious in operation, and so different from that designed, that it could not have endured. Moreover, the second alternative would have been even worse, for

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1. 103 S. Ct. 2764 (1983).

2. *Id.* at 2784.

3. THE FEDERALIST No. 47, at 300 (J. Madison) (all citations to *The Federalist* are to the 1895 edition by Henry Cabot Lodge).

> under it each "Department" would have been free to decide constitutional issues as it thought right, regardless of any earlier decision of the others.[4]

A solution was provided early in our history when Chief Justice John Marshall assigned the role of umpire to the federal courts in *Marbury v. Madison*.[5] However, even armed with the power of judicial review, the federal judiciary, at least initially, was viewed as the least dangerous branch in the tripartite arrangement. "The judiciary," as Hamilton wrote in *The Federalist* No. 78, "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[6] Possessed of neither "FORCE nor WILL, but merely judgment,"[7] the judiciary must depend on the executive for the efficacy of its judgments.

It is, of course, no secret that the federal judiciary has emerged as anything but the weak sibling among the three branches. The federal courts have exercised considerable power in the years since Hamilton wrote *The Federalist* No. 78. The judiciary's force may depend ultimately on the extent to which it is perceived as a legitimate institution.[8] Nevertheless, that moral force has operated as a powerful and effective weapon in checking the other branches and perhaps preventing the tyranny of power feared by the Framers.

The Burger Court has not been reluctant to exercise its power, at least with regard to separation of powers disputes. Indeed, the Court appears to have developed a basic philosophy that relies heavily on structural arguments relating to separation of powers.[9] The concern of this philosophy is not the scope of a constitutional right but rather the identification of the proper institution for making the substantive determination.

Chadha is a product of this judicial philosophy and serves as the latest example of the Court's willingness to avoid substantive questions in favor of structural ones. It is arguable that *Chadha* could have been decided without reaching the constitutionality of

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4. L. Hand, The Bill of Rights 13-14 (1958).
5. 5 U.S. (1 Cranch) 137 (1803)
6. The Federalist No. 78, at 483 (A. Hamilton).
7. *Id.*
8. *See* Bickel, The Least Dangerous Branch (1962).
9. *See infra* text accompanying notes 22-44.

the legislative veto. More important, *Chadha* reveals an interesting irony about the evolving separation of powers doctrine. The Court there construed the limit of the legislature's power in its dealings with the executive branch. In so doing, it adopted a rather strict, textual approach, rejecting policy arguments in support of the one-house veto. By contrast, in a recent case[10] that raised questions regarding congressional power over the judiciary, the Court applied a different standard, disregarding constitutional text in favor of policy considerations. It appears that when umpiring games in which it is also a direct participant, the Court has paid less allegiance to the rulebook and, as a result, has been usurping power for itself.

II. *Chadha*: A Narrower Grounds for Decision

First, let us examine the proposition that the Court might have decided the case without addressing the separation of powers question. To do so, it would be helpful to recall the specific facts. Chadha, an East Indian, was lawfully admitted to the United States in 1966 on a student visa. That visa expired on June 30, 1972, and in October 1973, the District Director of the Immigration and Naturalization Service (INS) ordered Chadha to show cause why he should not be deported for having remained in the United States for a longer period than permitted. Chadha conceded that he was deportable for overstaying his visa but filed an application for suspension of deportation under section 244(a)(1) of the Immigration and Naturalization Act.[11] That provision allows the Attorney General to suspend deportation if the alien (1) has been physically present for seven years; (2) is of good moral character; and (3) is a person whose deportation would result in extreme hardship to the alien, or a spouse, child, or parent who is a citizen.

On February 7, 1974, the immigration judge held a hearing on Chadha's application. Based on evidence introduced at the hearing, affidavits, and a character investigation conducted by INS, the immigration judge found that Chadha met the requirements of section 244(a)(1). Accordingly, he suspended deportation and, as required by the statute,[12] a report of the suspension was transmitted

10. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).
11. 8 U.S.C. § 1254(c)(1) (1982).
12. *Id.*

to Congress.

Congress, however, did not act on the report for nearly a year and a half. Finally, on December 12, 1975, Representative Eilberg introduced a resolution opposing the granting of permanent residence to six aliens, including Chadha. That resolution was referred to the House Committee on the Judiciary which had before it the names of 340 persons whose deportations had been suspended. Four days later, on December 16, 1975, the resolution was discharged from the Committee and submitted to the House of Representatives for a vote. The resolution was not printed nor made available to other members of the House. The record[13] reveals that the only explanation for this resolution consisted of Eilberg's statement that after reviewing 340 cases, it was the Committee's feeling that the six persons did not meet the statutory requirements, particularly those relating to hardship. Without debate or recorded vote, the resolution was passed. As a result, the immigration judge reopened Chadha's case and on November 8, 1975, ordered that he be deported.

This dramatic change in circumstances occurred without any protection whatsoever for Chadha or the five other individuals singled out for deportation. They were not given any opportunity to be heard before the House Committee, to present evidence, or to contest the Committee's factual conclusion that no hardship would result from their deportation. Nor did the Committee even attempt to buttress its determination with a written report. Moreover, because Congress waited to act until three days before the end of the limitations period, it abandoned its normal procedure for considering resolutions. In short, the action of the House appeared ill-considered and arbitrary.

In these circumstances, it is difficult to discern why the result in *Chadha* should have depended on the fact that the House used the legislative veto to deprive Chadha of his right to remain in this country. Assume the identical facts in *Chadha* but that legislation reversing the INS decision had been passed by both houses and signed by the President. Would such a statute directed at six specific individuals withstand constitutional attack?[14]

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13. *See Chadha*, 103 S. Ct. at 2771.

14. The Court expressed no opinion as to whether such legislation would violate any constitutional provision. *See id.* at 2785 n.17.

The Court might have taken the opportunity in *Chadha* to examine substantive limits on congressional power to order deportation of aliens who, as found by INS after a hearing, would suffer extreme hardship if deported. Does the fifth amendment due process clause, or perhaps the bill of attainder clause, serve as a limit on congressional authority in such circumstances? Prior to *Chadha*, no federal court had reversed an agency determination suspending deportation and certainly no decision addressed the question whether Congress could arbitrarily reverse such a determination.[15] My purpose here is not to examine the extent of any constitutional protections for those like Chadha, but rather to suggest that the Court could have explored those issues and avoided the broader question regarding the constitutionality of the legislative veto.

Only Justice Powell directly confronted the apparent arbitrariness of the congressional conduct. Even he, however, expressed his concern in separation of powers terms and argued that Congress improperly performed a function assigned to the judiciary under article III.[16] Technically, perhaps, the majority had the better argument on that point.[17] Review of an order suspending deportation would not be entrusted to the federal courts. Under article III, a judicial function can be performed only when there is a case or controversy involving adverse parties.[18] An INS order suspending deportation and allowing an alien to remain in this country does not give rise to a case or controversy because there are no adverse parties—neither the agency nor the alien is injured by the order. Accordingly, review of an order suspending deportation is not a judicial function under article III.

Nevertheless, Justice Powell's focus on the unfairness of the congressional action, rather than on the general issue of the constitutionality of the legislative veto, seems appropriate. As he concluded, the impropriety of the House's conduct "raises the very danger the Framers sought to avoid—the exercise of unchecked power."[19] When Congress prescribes rules of general applicability

15. *Id.* at 2787 n.21.

16. *See id.* at 2791 (Powell, J., concurring).

17. *See id.* at 2787 n.21.

18. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

19. 103 S. Ct. at 2792 (Powell, J., concurring).

it is accountable politically. But when, as in *Chadha*, "it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.' "[20] In such circumstances, limits on congressional power should be found perhaps in the fifth amendment[21] or bill of attainder clause. While Justice Powell spoke in separation of powers terms, his argument might well have been framed under either of those provisions.

III. The Burger Court and Separation of Powers Principles

It is not surprising that the majority ignored the question whether Congress had denied Chadha any constitutionally protected individual rights. First, the issue was not raised by the parties or passed on by the lower courts.[22] Second, only one of the many briefs in the Supreme Court even alluded to the due process issue.[23] Finally, prior to *Chadha*, the Burger Court had displayed an eagerness to embrace separation of powers principles.[24]

In *Hampton v. Mow Sun Wong*,[25] for example, plaintiffs challenged the constitutionality of a policy adopted by the Civil Service Commission and certain other federal agencies that excluded aliens from employment. Plaintiffs alleged that the policy was arbitrary and violated the due process clause of the fifth amendment. The Court agreed that the policy deprived plaintiffs of liberty without due process and held it invalid.[26] For our purposes, the interesting aspect of *Hampton* is the reasoning adopted by the Court. Rather than using a traditional due process analysis, the majority interjected a separation of powers analysis.

The defendants had argued that the exclusion of non-citizens was justified because it (1) facilitated the President's negotiations

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20. *Id.*

21. Congressional power over aliens is not unlimited. *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976).

22. *See* Illinois v. Gates, 103 S. Ct. 2317, 2321-23 (1983)(court will not review questions that were neither raised by the parties not passed on by the lower courts).

23. The Council on Administrative Law of the Federal Bar Association argued that exercise of the legislative veto was unfair to Chadha and jeopardized the integrity of the deportation process. *See* Brief for Council on Administrative Law, INS v. Chadha, 103 S. Ct. 2764 (1983).

24. *See* L. Tribe, American Constitutional Law § 17-2, at 1143 (1978); Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975).

25. 426 U.S. 88 (1976).

26. *See id.* at 116-17.

of treaties with foreign powers; (2) provided an incentive to aliens to qualify for naturalization; (3) was in accord with the practice of most foreign countries; and (4) was an administratively convenient way of excluding disloyal people from sensitive positions.[27] The Court viewed the issue as "whether the national interests which the Government identifies as justifications for the Commission role are interests on which that agency may properly rely in making a decision implicating the constitutional and social values at stake . . . ."[28] The Court concluded that the Commission could not rely on the first three justifications to support the exclusions of aliens because "[t]hat agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies."[29] Such responsibility rests with Congress or the President and may not be usurped by an agency. As Professor Tribe observed, *Hampton* is perhaps the leading case supporting the following separation of powers proposition:

> An agency exercising delegated authority is not free, as is Congress itself, to exercise its authority to pursue any and all ends within the affirmative reach of federal authority. Rather, an agency can assert as its objectives only those ends which are connected with the task that Congress created it to perform. The open-ended discretion to choose ends is the essence of legislative power; it is this power which Congress possesses but its agents lack.[30]

The Burger Court's reliance on the separation of powers doctrine is not limited, of course, to cases involving rights of aliens. For example, the reformulation[31] of the standing doctrine is similarly derived from a desire to maintain a proper division of power at the federal level. The prudential limitations on the class of persons who may sue in federal court have been expressed in various forms.[32] But, ultimately, these restrictions are based on a single

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27. *Id.* at 104.

28. *Id.* at 113-14.

29. *Id.* at 114.

30. L. TRIBE, *supra* note 24, §§ 5-17, at 285.

31. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Braveman, *The Standing Doctrine: A Dialogue Between the Court and Congress*, 2 CARDOZO L. REV. 31, 34 n.25 (1980).

32. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-75 (1982).

concern for the proper role of the federal courts in a tripartite form of government. Justice Powell, the Court's chief spokesman on the standing doctrine, urged that relaxation of standing requirements would lead to the expansion of judicial power.[33] He feared that absent limitations on the parties who could bring suit, the federal courts would be "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions."[34] The result, he argued, would be a reallocation of power at the national level with a shift away from the elected branches to the nonrepresentative, insulated judiciary.[35] The fear that expanded standing will lead to government by the judiciary is largely unfounded.[36] Nevertheless, whether or not justified, the restrictive reformulation of the standing doctrine, as viewed by the Burger Court, is rooted firmly in separation of powers principles.

So too, the desire to avoid a perceived redistribution of federal power serves as the foundation for the Burger Court's invocation of the political question doctrine. In *Gilligan v. Morgan*,[37] for example, students at Kent State University sought to challenge the National Guard's use of force on the campus during the tragic events in May 1970. The complaint alleged that the guard had caused the death of several students and injury to many others. The guard's conduct, it was claimed, had subjected plaintiffs to the deprivation of rights secured by the Constitution. The complaint requested declaratory and injunctive relief restraining future misconduct and requiring adoption of standards for guard training and the use of force.

The Court, however, refused to address the serious substantive issues presented in *Gilligan*. It concluded instead that the complaint, particularly the relief requested, raised nonjusticiable, political questions over which the federal courts have no jurisdiction.[38] The legislative and executive branches, the Court observed, are charged by the Constitution with the responsibility to super-

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33. *See* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

34. Warth v. Seldin, 422 U.S. 490, 500 (1975).

35. *See Richardson*, 418 U.S. at 188 (Powell, J., concurring).

36. *See* Braveman, *supra* note 31, at 60.

37. 413 U.S. 1 (1973).

38. *See id.* at 11-12.

vise the National Guard.[39] Chief Justice Burger underscored the Court's desire to maintain the division of power intended by the Framers:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.[40]

Additional evidence of the Court's eagerness to rely on principles of separation of powers is provided by the cases that adopt a strict standard for implication of private causes of action.[41] Chief Justice Marshall declared in *Marbury* that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[42] Yet, the present court has been reluctant to provide remedies for those injuries and has retreated from an earlier, more relaxed standard for implying a remedy where one is not explicitly provided by statute.[43] The articulated basis for the retreat is, once again, the need to maintain the proper distribution of power among the branches of government. In this instance, the perceived evil is that a relaxed standard allows the judicial branch to engage in lawmaking, a function reserved by the Constitution for the legislature.[44]

The examples discussed here are not intended to be exhaustive but simply to illustrate that the Court's eagerness to decide *Chadha* on structural, rather than substantive, grounds is not unique. *Chadha* is fully consistent with a Burger Court philosophy that places heavy emphasis on separation of powers principles. Under that philosophy, the judiciary's role as umpire is limited to

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39. *See id.* at 7.
40. *Id.* at 10.
41. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).
42. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
43. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).
44. *See* Cannon v. University of Chicago, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

designation of the proper institution for making a substantive determination. After making that designation, the judiciary then abandons the umpire's role and joins the spectators in the bleachers.

IV. Problems with a Structuralist Approach to Separation of Powers

It may be difficult to quarrel with a general concern for separation of powers principles because "[o]ur system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution."[45] Nevertheless, frequent reliance on those principles presents a serious problem. A decision based on the separation doctrine may identify the proper institution charged with responsibility for resolving an underlying substantive question. Such a decision, however, offers no judicial guidance on how the substantive determinations should be made.[46]

Chadha illustrates this difficulty. The Court found that the House acted in a legislative capacity and, thus, was subject to the bicameralism and presentment requirements of article I. These requirements, the Court observed, "are integral parts of the constitutional design for the separation of powers."[47] Because the House bill requiring deportation of Chadha was not passed by the Senate and presented to the President, it was unconstitutional. To be sure, *Chadha* identified the proper structure for enactment of legislation that directs the Attorney General to deport aliens whose deportations had been suspended by the INS because of extreme hardship. It offered no guidance, however, on whether properly enacted legislation would be constitutional. Could a legislator, consistent with his oath to uphold the Constitution, vote for such a bill? Could the President, also bound by the Constitution, sign that legislation? *Chadha* was noticeably silent on these questions and provided no assistance on how they might be resolved.

The Court's separation of powers analysis presents a second difficulty as well. Quite simply, the Court has failed to develop a consistent approach to the resolution of questions involving the proper distribution of federal power. This inconsistency is revealed

45. Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978).
46. *See* L. Tribe, *supra* note 24, § 17-2, at 1142-43.
47. *Chadha*, 103 S. Ct. at 2781.

by comparing *Chadha* with the recent decision in *Fair Assessment in Real Estate Association v. McNary*.[48]

The Court in *Chadha* was called upon to umpire a dispute between the legislature and the executive. Both the House and the Senate intervened as parties[49] to defend the constitutionality of the legislative veto from challenges raised by the executive branch. To resolve that dispute the Court adopted a rather formalistic approach: Because the action taken by the House was legislative, it was subject to the constitutionally mandated bicameralism and presentment requirements. The Constitution, observed the majority, contains only four exceptions to these requirements.[50] The exceptions "are narrow, explicit, and separately justified; none of the authorize the action challenged here [in *Chadha*]."[51]

In reaching this conclusion,[52] the Court recognized, but refused to rely on, important policy considerations. Chief Justice Burger observed, for example, that the legislative veto might well lead to a more efficient government. Reliance on such policy factors to resolve separation of powers questions, however, was deemed inappropriate. Writing for the majority, the Chief Justice said:

> There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.[53]

Allegiance to carefully "crafted constitutional restraints" was absent in *Fair Assessment*. There the Court was presented with the question whether a federal district court had jurisdiction to entertain a damage action under section 1983 of the Civil Rights

48. 454 U.S. 100 (1981).

49. *See* 103 S. Ct. at 2773 n.5.

50. *See id.* at 2786.

51. *Id.* at 2787.

52. The constitutionality of the legislative veto is not as clearcut as the majority suggested. *See id.* at 2797 (White, J., dissenting).

53. *Id.* at 2788; *see also id.* at 2781.

Act[54] against state tax officials who allegedly acted in an unconstitutional fashion. Although Congress has conferred jurisdiction on federal courts to hear cases authorized by section 1983,[55] the defendants in *Fair Assessment* moved to dismiss the complaint on the ground that the Tax Injunction Act[56] barred suit. The district court granted the motion[57] and the Supreme Court eventually affirmed the judgment of dismissal for lack of subject matter jurisdiction. If the Court had held that the Tax Injunction Act prevented the district court from hearing the case, the decision would have had little relevance to our discussion here. The Court, however, expressly avoided deciding that issue.[58] It held instead that considerations of comity[59] prevent the federal court from exercising power to entertain such cases.

At this point the reader might protest that even the actual holding in *Fair Assessment* has no bearing on questions regarding separation of powers at the federal level. On the surface, *Fair Assessment* and *Chadha* indeed may appear as very different cases. The former involved the exercise of federal judicial power against state officials. In contrast, *Chadha* focused on the distribution of power between Congress and the executive.

In fact, lurking beneath the surface of *Fair Assessment* is a rather significant question regarding the proper distribution of power among the federal branches. The Constitution grants *Congress* the power to ordain and establish lower federal courts and to invest them with jurisdiction.[60] The federal courts plainly have a duty to respect the congressional decision and accept jurisdiction when statutorily mandated.[61] As the Court previously stated:

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54. 42 U.S.C. § 1983 (1976 & Supp. V 1981).

55. *See* 28 U.S.C. §§ 1331, 1343 (1976 & Supp. V 1981).

56. 28 U.S.C. § 1341 (1976). The Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Id.*

57. Fair Assessment in Real Estate Ass'n v. McNary, 478 F. Supp. 1231 (E.D. Mo. 1979), *aff'd by equally divided court*, 622 F.2d 415 (8th Cir. 1980) (en banc), *aff'd*, 454 U.S. 100 (1981).

58. *See* 454 U.S. at 105.

59. *See id.* at 116. I have examined elsewhere the Court's reliance on the comity principle. *See* Braveman, *Fair Assessment and Federal Jurisdiction in Civil Rights Cases*, 45 U. PITT. L. REV. 351 (1984).

60. U.S. CONST. art. III; *see* Palmore v. United States, 411 U.S. 389, 401 (1973).

61. *See, e.g.*, Zwickler v. Koota, 389 U.S. 241, 248 (1967); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909).

> [T]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . ."[62]

Notwithstanding that Congress, in unqualified terms and pursuant to constitutional authorization, had conferred power on federal district courts to hear suits like *Fair Assessment*, the Supreme Court held that the federal judiciary may disregard the congressional mandate and renounce jurisdiction. In making that determination the Court engaged in raw usurpation of power that the Constitution assigns to Congress. Indeed, as Chief Justice Marshall observed over 150 years ago, the federal judiciary has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."[63]

Thus, in *Fair Assessment*, the Court served again as an umpire in a separation of powers dispute. Unlike *Chadha*, however, it was also a direct participant in the conflict. And, interestingly enough, it settled the dispute by paying less than complete allegiance to the Constitution's "carefully crafted" delegation of power.[64] Relying on the very approach rejected in *Chadha*, the Court in *Fair Assessment* allowed policy considerations to justify a departure from constitutional text.

V. Conclusion

It is not my purpose here to discuss in depth whether there is

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62. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964) (quoting Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)).

63. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

64. It might be argued that the Court's frequent reference to prudential limits on its power, *see supra* text accompanying notes 31-36, and its reluctance to imply remedies, *see supra* notes 41-44 and accompanying text, also constitute a usurpation of, rather than respect for, congressional power. The Court in such instances refuses to fully exercise the power conferred by Congress.

a principled basis for the different approaches in *Chadha* and *Fair Assessment*. This essay merely was intended to raise some questions that deserve more detailed examination. It is readily apparent that the Court is eager to invoke separation of powers principles and is developing a judicial philosophy that relies heavily on those principles. Further research might focus on whether frequent reliance on the separation of powers doctrine unjustifiably diverts the Court's attention from substantive determinations. Such research might also examine whether the Court has adopted a consistent approach to resolving separation of powers disputes, or whether consistency is even necessary. While *Chadha* may have signaled the end for the one-house veto, it provides a useful starting point for discussion of the broader issues.