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I. Introduction

"On July 31, 1789, the first Congress of the United States authorized the President to appoint an administrative official to 'estimate the duties payable on imports'." (Heffron and McFeeley, 1983:1) This modest delegation of power marked the inception of a phenomenon which has become one of the most prominent and controversial aspects of American government. Over the past few decades Congress has delegated vast powers and discretion to administrative agencies. Administrative decisions, standards and rules—which have the same impact as laws—currently govern such issues as: meat standards, air quality, workplace conditions, the supply and distribution of health facilities, highway standards, educational curricula, and housing standards. In fact, "The federal bureaucracy currently issues approximately 7,000 rules and policy statements a year, 2,000 of which legally bind the citizenry." (Carter, 1983:1) In addition there are now over 1,100 federal administrative law judges as compared to the approximately 710 regular federal trial judges. By the early 1960s the United States district courts disposed of a total of 11,000 criminal and civil cases while the federal administrative courts adjudicated over 81,000 cases. What is clear from these statistics is that "the legislative and judicial output of administrative agencies has long since outstripped in both volume and scope the legislative and judicial output of Congress and the courts." (Heffron and McFeeley, 1983:7)

These developments emphasize the need to understand the proper functions, role, and authority of bureaucracy in our modern society. This analysis will address the legal and political interaction between Congress and bureaucracy in an attempt to explain how this relationship affects our notions of democratic accountability. Questions of central importance are: 1) Why has Congress delegated such a broad array of powers to administrative agencies? 2) What are the boundaries of the legal authority vested in these administrative agencies? 3) What are the political, legal, and constitutional implications of this modern shift in governmental power? and 4) How can administrative agencies be held accountable?

II. The Advent of the Administrative State

The notion of governmental bureaucracy is not new. The Chinese developed an administrative body governed by a civil service as early as 196 B.C. (See Harris, 1980) However, the prominent role and influence of bureaucracy—especially in the United States—is a product of the twentieth century. Our Constitution provides scant reference and little guidance in regard to the structure, lines of accountability, and responsibilities of bureaucracy. Administrative law scholars have noted that the Constitution provides more questions than answers. (See Robinson, Gellhorn, and Bruff, 1986) These legal ambiguities did not
pose major problems for the early operation of our government because the role of government at this time was limited and the function and the size of the bureaucracy was accordingly very small. In 1800 the entire federal government consisted of about 3,000 civil officials (3/4 of which were postal workers) and it grew to only 20,000 by 1830. (Dodd and Schott, 1986)

By the late nineteenth century and into the early twentieth (1880-1920s), however, the size and influence of bureaucracy expanded dramatically. A number of factors contributed to this growth including the industrial revolution, urbanization, and a changed economic ideology. These developments marked the transformation of the United States from an individualistic to a collective society, whereby it became apparent that one individual's actions had direct consequences for the well-being of others. Symptomatic of this new reality were public concerns over monopolistic and oligopolistic economic practices, public health epidemics, and water and air-pollution. Based upon these developments, the public demanded increased governmental intervention and protection. The national government began to take a "more active role in American society and its economy - a momentum that was soon translated into a significant expansion of the executive branch. It is here that one perceives the dawn of the modern American administrative state." (Dodd and Schott, 1986) This era witnessed the passage and establishment of some of the most prominent features of the regulatory state: the Sherman Antitrust Act of 1890, the Federal Trade Act of 1914, the Interstate Commerce Act of 1887, the Pure Food and Drug Act of 1906, and the Federal Reserve Act of 1913. The impact of increased national government activity during this period is illustrated by the growth of federal bureaucracy and expenditures. "The aggregate population of the United States little more than doubled from 1880 to 1920, yet the number of federal executive branch employees tripled from 1880 to 1920 and had increased sixfold by 1920." (Dodd and Schott, 1986:23)

From the early 1940s to the present, another large expansion in the size and scope of bureaucracy occurred. This growth has been attributed to the exponential growth of technology in fields as diverse as communications, medicine, weaponry, agriculture, and chemistry. New technological capabilities and applications have been found to bear profound implications for almost every aspect of society. General environmental conditions are being seriously threatened, both directly and indirectly, by our intervention. Direct threats now abound through the new and new-found omnipotence of our technology (nuclear power, DDT, recombinant DNA), and indirect threats result as a by-product of the changing energy consumption needs that they generate. Never before has mankind had the imminent capability to achieve such radical constructive and destructive alterations of society. (See Desario and Langton, 1987)

The developments of the twentieth century have had profound implications for Congress and its relationship with bureaucracy. Congress, as a result of its growing responsibilities, has been overwhelmed by burgeoning demands and increased social complexities. By 1970 over 29,000 measures were introduced in Congress. (Oleszek, 1989) Legislators found it impossible to address the diversity of issues
presented to them or comprehend the obscure side effects and specialized formula for a host of technologies that were developing in areas such as agriculture, energy, transportation, medicine, and electronics. The enormity of their task led Congress to establish large, specialized, professional bureaucracies and grant them rulemaking powers. As the twentieth century has progressed, these bureaucracies have grown in size and importance. Administrative agencies have increasingly been delegated broad authority to determine public standards. Bureaucracies have clearly become an integral part of our public decision making system. This has been viewed with alarm by many because it seemingly disrupts the constitutional foundations of our government and our traditional notions of democratic accountability.

Democratic accountability is one of the most fundamental concerns of our political system. The United States clearly embraces a democratic political philosophy. The term democracy originated in Greece around 500 B.C. and its literally defined as "rule by the people." From the founding of our nation the constitution, the courts, and the other branches of our government have attempted to define, promote, and preserve democratic principles. The large acquisition of public authority and discretion by administrative agencies represents the latest challenge to these notions. Legal interpretations and definitions of the relationship between Congress and bureaucracy will have important implications for the operation of our democratic society.

In the context of a modern society democracy is assured through political and public accountability. Stuart Langton has defined public accountability as "purposeful activities in which citizens take part in relation to government." (1975:17) This traditional notion of democracy suggests that citizens should and must have a direct role in defining public policies. The requirements of this approach can be satisfied by either public involvement in public decision making or by being able to exercise direct control over government officials responsible for these decisions. The latter approach to public accountability is often referred to as government by consent. Political accountability, by contrast, suggests that governmental actors are entrusted with the power to direct and exercise oversight over the activities of the other governmental decision makers or branches of government. This approach to democratic accountability provides a limited and indirect role for public action. Much of the legal scholarship analyzing the problem of bureaucratic accountability has focused on the more limited notion of political accountability. A major theme which emerges from this paper is that while we should maintain political accountability we must not disregard the benefits of direct public accountability. In fact, in light of recent Supreme Court holdings and the political realities of bureaucratic behavior, public accountability may be the only effective method of assuring democratic processes.

III. Legal Justifications for Bureaucratic Decision Making

In light of the concerns outlined above, this section will attempt to analyze the legal parameters of bureaucracy. Specifically it will
address the questions: What gives administrative agencies their power to govern us? and What are the legal boundaries of administrative discretion? These are questions which legal scholars have recognized as not having "received a definitive and satisfactory answer, despite the obvious reality that the administrative state has arisen and does in fact govern us." (Robinson and Gellhorn, 1986:28) Legal determinations of essential governmental powers and relationships are based upon constitutional text, context, and interpretations. However, constitutional ambiguities have created difficulties in clearly defining the legitimate role of bureaucracy and its exact relationship to the other branches of government.

Recent Supreme Court decisions have held that the Constitution is explicit about the separation of powers and the fact that only Congress may legislate, the Supreme Court may adjudicate, and the President may execute. Yet administrative agencies have been provided with legislative, adjudicative, and executive functions. This convergence has occurred because agencies are "empowered and constrained principally by statutes rather than by direct constitutional grants and limitations of powers." (Robinson and Gellhorn, 1986:31) Congressional delegation of power has been justified by constitutional silences about bureaucratic functions and the belief that Congress, pursuant to its explicit authority to adopt any law "necessary and proper" for carrying into execution the powers of government, could establish these agencies. However, general constitutional principles and directives are still viewed as setting the parameters for what the legislature may authorize agencies to do.

The definition of these boundaries has generated a great deal of debate among scholars and the justices of the Supreme Court. In fact, many analysts have rejected the separation of powers framework for a more flexible checks and balances approach which would preserve legislative techniques of political accountability. These distinctions will be detailed later in the text when reviewing and critiquing current judicial interpretations of bureaucratic power. In any regard, over the past fifty years the Court has had to determine the degree of power Congress may delegate to bureaucracies and the constitutional justifications for bureaucratic rule making. In other words, is bureaucratic rule making an executive, judicial, or legislative act? Or do bureaucracies represent an innovative hybrid of governmental activity not governed or constrained by these traditional concepts? The legal complexities posed by the advent of the administrative state are best expressed by Justice Jackson in the case of FTC v. Ruberoid Co:

They have become a veritable fourth branch of the Government, which has deranged our three branch legal theories much as the concept of the fourth dimension unsettles our three-dimensional thinking. Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions with the separation-of-powers scheme of the Constitution. The
mere retreat to the qualifying "quasi" is a smooth cover which we draw over our confusion as we might use a counter-pane to conceal a disordered bed. (1953:487)

Judicial efforts to resolve these fundamental issues of government structure have produced a set of concepts and legal methodologies which guide bureaucratic activities. The soundness of these interpretations is still being debated. This debate suggests that current applications may not endure. Central to all critiques of bureaucratic activity are the issues of political and public accountability. However, there is also disagreement over the question of how democratic accountability can and should be legally and effectively achieved. The nondelegation doctrine provides broad boundaries for defining this issue.

A) The Nondelegation Doctrine

Although bureaucracies exercise a great deal of power it must be emphasized that administrative actions must be justified by a statutory authorization of Congress. In "principle under Article I of the Constitution Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard." (Breyer, 1984:788) This principle has been stated in recognition of the fact that Congress is the ultimate repository of lawmaking power. Therefore, congressional statutes not only create agencies but also define the procedural and substantive boundaries within which they operate. However, as has been recognized, any statutory delegation of power confers some discretion to the administrator, leaving the question of the degree of discretion Congress may grant to "an agency without abdicating its constitutional responsibility for lawmaking." (Robinson, Gellhorn and Bruff, 1986:51)

The nondelegation doctrine (or as some refer to it - delegation doctrine) was designed to address this issue. Originally, the purpose of this doctrine was to prevent broad delegations of power to bureaucracy. However, this original intent has been greatly revised. The origins of the nondelegation doctrine are traced to 1813 and The Brig Aurora in which the Supreme Court upheld a delegation by the Congress to the President to lift trade embargoes when the United States' neutrality in commerce was again observed by France and England. The Court held that Congress could use its discretion in delegating the definition of contingencies relevant to legislation. The noncontroversial nature of the issue and the courts' general treatment of the issue did not provide a great deal of direction for the future.

The Supreme Court, as a result of the limited role of bureaucracy throughout the eighteenth century, did not again address the issue of the delegation doctrine until 1892. In Field v Clark, (143 U.S. 649, 1901) the Court, while maintaining that "Congress cannot delegate legislative power" ... upheld the constitutionality of a statute which gave the President the power to suspend a provision for free import of certain goods into the country if he determined that the United States was not being accorded reciprocally equal and reasonable treatment of its exports into the importing country. The Court reached this deter-
mination based upon their belief that the statute in this case merely
gave the bureaucracy the responsibility of identifying the event
specified which gave force to Congressional will. Implicit within this
decision was the belief that the bureaucracy was not in reality exer-
cising a lawmaking function.

The first expression of what is referred to as the "modern test of
delegation" was stated in Buttfield v Stranahan, (192 U.S. 470, 1904).
In this case the Secretary of the Treasury's power to establish uniform
standards of purity, fitness, and quality for imported tea was upheld
by the Court. The new rationale for the delegation of power was
whether "the legislature sets 'standards' to delimit the scope of
agency discretion." (Robinson, Gellhorn, and Bruff 1986:51) After
decision, the Supreme Court heard a number of cases in which it
held that bureaucracy has the discretion to fill in the details of
statutes which provide general frameworks of power. This judicial
interpretation provides administrative agencies the authority to issue
standards, rules, and regulations having the same impact as law.
Therefore, the role of bureaucracy has been legally transformed by
these judicial conceptions from that of a value neutral administrative
body to one empowered to make important normative executive and law-
making decisions.

During the 1930s two cases were decided by the Supreme Court which
temporarily restrained the liberal application of the nondelegation
doctrine. Both of these cases found that Congress made unconstitu-
ionally broad delegations of power to the President. Chief Justice
Hughes, in the first case, Panama Refining Co. v Ryan (1933), while
delivering the opinion of the majority, invalidated the power of the
President to regulate the transportation in interstate and foreign
commerce of petroleum products. This conclusion was reached based upon
a finding by the Court that the legislation passed by Congress gave "to
the President an unlimited authority to determine the policy and lay
down the prohibition or not to lay it down, as he may see fit ... In
every case in which the question has been raised, the Court has recog-
nized that there are limits on delegation which there is not constitu-
tional authority to transcend ... As to the transportation of oil
products in excess of state permission, the Congress has declared no
policy, has established no standard, has laid down no rule." (Panama
Refining Co. v Ryan, 1933:430)

The second case decided in 1935, A.L.A. Schecter Poultry Corp. v
United States, found that the rule making authority provided by Con-
gress to the executive to devise a poultry code was also unconstitu-
tional. Chief Justice Hughes, again writing for the majority, re-
affirmed the belief that "the sweeping delegation of legislative powers
finds no support in the decision upon which the Government relies."
(Schecter Poultry Co. v United States, 1935:539)

Since the court's decision in Schecter, Congress has continued to
broadly delegate vast amounts of power to the bureaucracy. Recently,
however, legislative directives as vague as the setting of "reasonable
rates", serving the "public convenience, interest, or necessity",
"stabilizing prices", and stopping "unfair" business practices have
been consistently upheld by the Court. (Breyer, 1984:788)
current unwillingness to enforce the nondelegation doctrine is generally attributed to the Court's holding in Yakus v United States. In this case, Chief Justice Stone, writing for the majority, upheld Congress' right to delegate price fixing standards for various commodities to the Office of Price Administration. The Court's new conception of the constitutionality of the delegation doctrine was reflected by the following passage: "Only if we could say that there is an absence of standards for the guidance of Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation." (Yakus v United States, 1944:447)

The Yakus test, as applied in Amalgamated Meat Cutters v Connally, is now the accepted constitutional standard of delegation applied by the courts. In recognition of the evolution of judicial interpretations of legislative delegation, administrative law scholars Glen Robinson, Ernest Gellhorn, and Harold Bruff have written: "After Yakus most observers have been convinced that the doctrinal constraint on the delegation of legislative functions was practically if not legally dead... Panama and Schecter are frequently regarded as aberrations in an otherwise unblemished record of judicial affirmance of Congressional delegation." (1986:62) Any doubts about this proposition should be refuted by the expansion of the logic in Yakus to congressional silences in the Chevron case. In Chevron, U.S.A. Inc. v National Resources Defense Council Inc., the Supreme Court failed to find any explicit congressional intent in regard to a regulatory approach for establishing national air quality standards. Yet, in response to this silence, Justice Stevens, writing for the majority, upheld the EPA's "bubble approach" claiming that if "...the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (Chevron v Natural Resources Defense Council, 1984:843)

Based upon these holdings it is clear that there are few legal restrictions upon the congressional delegation of power to administrative agencies. Over the past few decades Congress has broadly delegated decision making authority to a growing complex of professional bureaucracies. This phenomenon has been the subject of intense debate. Critics of the administrative state emphasize that bureaucracies are now empowered to make laws which bind the citizenry, yet these administrators are not accountable to the public and are only minimally accountable to Congress. This political and structural independence is seen as heightening the potential for the misuse of power. Within this context Kenneth Davis has characterized the nondelegation doctrine as a failure:

It has not prevented the delegation of legislative power. Nor has it accompanied its later purpose of assuring that delegated power will be guided by meaningful standards. More
importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power... The non-delegation doctrine can and should be altered to turn it into an effective and useful tool... The focus of judicial inquiries thus should shift from statutory standards to administrative safeguards and administrative standards. (1969:728-729)

 Supporters of broad delegation emphasize the benefits of this approach. A primary motive for establishing bureaucracy was to provide an expert and nonpartisan decision making body. After all, it has been recognized by a number of analysts that Congress in many cases does not have the expertise or political fortitude to make controversial decisions. In the face of intense political debate Congress often prefers to delegate rather than decide. If Congress were forced to provide specific agency directives and standards it is conceivable that intense ideological debate would ensue, making it difficult to enact any legislation. Numerous political scientists have recognized that the structure of Congress makes it much easier to defeat rather than pass legislation. (See Vogler, 1980 and Ripley and Franklin, 1987) In fact, due to this structure, it is possible for only a few congressional opponents to insure the demise of popular legislation. In our society, where quick governmental action is often essential, the prospect of legislative stalemate is not desirable. The Supreme Court, in Chevron recognized that vague statutes are often the result of political compromise or technical uncertainty. Commenting on the lack of direction provided by Congress to the Environmental Protection Agency in regard to methods of achieving national air quality standards it was recognized: "Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so... and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency." (Chevron v Natural Resources Defense Fund, 1984:865) Administrative discretion therefore can be viewed not only as desirable but in many cases politically inevitable.

These realities have contributed to the growth of large professional bureaucracies and their acquisition of vast amounts of power and discretion. This trend toward expertise is reflected by the fact that the number of scientists employed by the federal government increased by 49% from 1960 to 1970 and the number of social scientists increased by 52%. (Nelkin, 1981) By the early 1960s the proportion of professional type positions in bureaucracy exceeded 50%. In accordance with their supporters' beliefs, these experts have been conferred this authority because of their recognized mastery over scientific techniques and knowledge. It has generally been believed that this specialized training provides experts with the ability to "calculate an unambiguously correct answer." (Mazur, 1973:28) Recent experience, however, indicates that scientific approaches have failed to solve social problems and often contributed to them. This result can be
attributed to the fact that scientific methodologies are not effective for solving normative issues and that experts have been found to possess their own unique social biases and values. (See Krimsy, 1984) The ineffectiveness of these methodologies have resulted in policy decisions often being based upon the values of the administrative expert. As a consequence, our society is faced with the prospect of being bound by laws issued by a largely uncontrolled political body whose values do not necessarily reflect those of the public. Concerns raised by this process have led legal and political critics to examine alternative methods of political control to restore some measure of public accountability. The ineffectiveness of the nondelegation doctrine has prompted many to call upon representative institutions to establish their own indirect methods of overseeing and ratifying administrative decisions. Significantly, these reform efforts have neglected to consider methods for promoting direct public involvement and accountability.

IV. The Fourth Estate and Legislative Control - Political Accountability?

The broad delegation of power by Congress to bureaucracy has heightened the significance of political controls which can be exercised to insure administrative compliance with legislative intent. Theoretically, Congress has an impressive array of powers at its disposal to insure bureaucratic accountability. Among its more prominent techniques are the confirmation of appointees, legislative oversight and investigation, direct preemption, appropriation powers, specific delegation, revision of jurisdiction, and the legislative veto - which was recently held unconstitutional by the Supreme Court. In reality most of these strategies--aside from the legislative veto--are neither efficient nor effective. They all represent general sanctions and many of them require the enactment of formal legislation in order to confer the requisite authority. None of these controls--except for the legislative veto--provide the specific, authoritative, and continuous guidance required to insure effective oversight of an administrative establishment which enacts thousands of rules annually. Efforts to provide specific delegations or preemptions require subject matter expertise, invoke political controversy - an original motivation for broad delegation, and result in the "hopeless task of writing with the requisite specificity to cover endless circumstances." (Levitas and Brand, 1984:87) Hearings, investigations, and confirmations are processes which raise specific issues but they are not vested with the authority to require even limited compliance.

Given the ineffectiveness of these alternatives and the fact that the legislative veto was designed and is recognized as the most direct and effective guarantee that delegations will not undermine congressional authority, it is not surprising that the Supreme Court's decision to invalidate this technique has gained the attention of analysts concerned with the notion of political accountability.

The legislative veto is a clause written into a statute which maintains that an executive holding, rule, or standard will only take
effect if Congress decides not to veto it within a specified period of time—usually 60 to 90 days. These vetoes were generally exercised by a two-house, one-house, or even committee vote, depending upon the provisions of the enabling statute. (Fisher, 1987) The legislative veto originated in 1932 as a compromise suggested by President Hoover to the Congress. As noted by Justice White, President Hoover requested the authority to reorganize the government in 1929. The president "coupled his request that 'Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive' with a proposal for legislative review. He proposed that the Executive 'should act upon approval of a joint committee of Congress'..." (I.N.S. v Chadha, 1983:968) Congress agreed to President Hoover's compromise and passed the Reorganization Act of 1932 which delegated authority to the executive subject to direct legislative review. This technique seemed to provide an effective accommodation, between the executive and Congress. It reconciles the executive's desire to attain the broad delegation of authority needed to accomplish governmental objectives, with assurances that Congress can exercise effective oversight to ensure compliance with legislative intent.

Although the legislative veto originated in 1932, it was not extensively used until the 1960s and 1970s. "Between 1932 and 1982, Congress included some 318 legislative veto provisions in 210 statutes." (Bryner, 1983:76) Well over half of these statutes were enacted during the last decade of its existence. Prior to the Supreme Court decision over 1,100 legislative veto resolutions were introduced in Congress and 230 of them were approved.

It was against this background that the Supreme Court in the 1983 case of Immigration and Naturalization Service v Chadha announced its holding determining the fate of the legislative veto. The principles and methodology contained in this decision provide the major boundaries for future debate about the constitutional relationship between bureaucracy and Congress. The decision, written by Chief Justice Burger, dealt with a case which involved a quasi-judicial proceeding held by the Immigration and Naturalization Service on January 11, 1974. During this judicial proceeding an immigration judge held that Chadha's deportation should be suspended. Pursuant to section 244(C)(1) of the Immigration and Nationality Act the judge reported this decision to Congress which had reserved the power to veto such holdings. On December 12, 1975 the House of Representatives voted not to support the suspension of deportation. Chief Justice Burger's opinion based upon these facts not only overturned the use of the legislative veto in this case but announced a sweeping invalidation of legislative vetoes in general. In support of this approach the majority provides some interesting distinctions, definitions, and assumptions. The basis for this holding rests upon the belief that congressional actions in this case were subject to Article I dictates and that a separation of powers analysis is properly applied to political disputes between Congress and bureaucracy.

Chief Justice Burger imposed Article I requirements after finding that the Congressional Resolution involved was legislative in nature. The characterization of this action as lawmaking requires Congress to
conduct the process in accord with Constitutional dictates which mandate bicameral consideration and the presentment of resolutions to the President. Although the Court recognized that not every action taken by either House is subject to the bicameralism and presentment requirements of Article I, he justified this holding by asserting that this action was essentially legislative because it "had the purpose and effect of altering the legal rights, duties and relations of persons..." (I.N.S. v Chadha, 1983:952) Of interest is the Court's emphasis on the need for Presidential involvement in lawmaking because it reflects "the Framer's careful efforts to check whatever propensity a particular Congress may have to enact oppressive, improvident or ill-considered measures." (I.N.S. v Chadha, 1983:947-48) Ironically, the demise of the legislative veto allows bureaucracy to enact rules without congressional or presidential approval as long as they are acting within the broad discretion provided by the delegation doctrine. This outcome seems to threaten even our more limited notion of democratic control over bureaucracy through political accountability.

The second major component of the Supreme Court's holding was its application of a rigid separation of powers analysis. The logic of this analysis was based upon the Court's belief that the "Constitution sought to divide the delegated power of the new federal government into three defined categories, legislative, executive, and judicial, to assure, as nearly as possible, that each Branch of the government would confine itself to its assigned responsibility." (I.N.S. v Chadha, 1983:951)

Implied within this perspective is the belief that Congress was acting in accord with its legislative function and the idea that the actions of the Immigration and Naturalization Service are synonymous with those of the President and the exercise of executive power. Each of these assumptions are highly problematic and will be carefully analyzed.

This opinion represents a return to a simplistic bright line application of formalistic, separation of powers analysis. Its logic and practical implications have been widely assailed by Justice White and a large number of constitutional law scholars. Both of the Court's major justifications can be critiqued. This analysis will first review the contention that Article I requirements were mandated by the facts of this case, before turning to the Court's logic and application in its separation of powers approach.

Justice Burger maintained that legislative functions must be performed in compliance with Article I dictates and that the House Resolution in this case, and legislative vetoes in general, can be characterized as lawmaking. It is difficult to accept the simple assertion that a legislative veto applied to a previously enacted law which merely expresses disapproval and restores the status quo, is a legislative activity in any functional sense. Rather, it seems clear that the veto is intended to provide effective legislative oversight so as to assure administrative compliance with congressional intent. However, the Court claims that the legislative nature of an action can be determined by indicating whether it alters legal rights and specifying the identity of the governmental actor involved. Neither of these
features seems to capture the essence of the lawmaking function and results in a number of judicial and logical contradictions. It is widely accepted that actions taken by the judicial and executive branches regularly alter legal rights yet they have not been subjected to Article I requirements. Despite denials to the contrary it seems that a strict adherence to the Court's logic would call in to question the constitutionality and thus very existence of administrative law-making.

Within this context it is difficult to explain how Congress' mere oversight of this deportation decision can be deemed legislative while the Immigration and Naturalization Services' actual determination is not. In commenting on these difficulties Peter Strauss notes that the Court seems to repudiate "the now deeply ingrained proposition that Congress' legislative authority may be exercised conditionally yet that proposition was the initial engine by which delegation of legislative powers was effected." (1983:796-797) Based upon these assumptions, Strauss argued that a determination of whether an action is legislative is a function of its characteristics rather than the identity of the actor responsible for the action.

Furthermore, the existence and the Court's validation of formal legislative oversight functions also poses some dilemmas for their conceptualization of the legislative veto. While exercising of legislative oversight functions Congress can compel the presence of witness- es and attach legal consequences for noncompliance - clearly altering "legal rights." Yet bicameral approval and presentment to the President are not required for these activities. This power has been legitimated, although not specifically addressed by the Constitution, based upon the view that it is a "unnecessary and inevitable adjunct to the legislative process." (Strauss, 1983:804)

The ambiguities and contradictions of the Court's conceptualiza- tion of lawmaking stress the need to reject the identity of the actor as an important detriment and to develop a more elaborate functional approach to legislative, executive, and judicial activity. In reality this task is not as large as it may seem because the Court had been moving in that direction in the 1960s and 1970s when it embraced more of a checks and balances approach and stressed governmental function rather than formality. This issue will be discussed in more depth when analyzing the court's application of separation of powers analysis. It is clear that if the Court would have utilized a more sophisticated functional analysis it may have avoided the difficulty of describing the House Resolution as legislative while suggesting that the action of the Immigration and Naturalization Service wasn't, and it would not have indirectly called into question the constitutionality of adminis- trative lawmaking.

Even more fundamental for the constitutional relationship between congress and bureaucracy is the appropriateness of the Court's separation of power analysis. The first major problem with this approach, as applied by the court, is its implicit assumption that bureaucracies are executive bodies and that these executive bodies are imbued with the same constitutional prerogatives as the President. The second problem presented by this analysis is the strict structural demarcation applied
by this separation of powers analysis. It is my contention that neither of these initial set of presumptions are accurate and that the strict demarcation applied is neither practical nor constitutionally essential.

A reading of the majority opinion in Chadha clearly conveys the belief that bureaucracies are part of the executive branch and that they may avail themselves of many of the constitutional protections afforded the President. In reality it has been recognized that the "important fact is that an agency is neither Congress nor President nor Court, but an inferior part of government." (Strauss, 1983:579) This portrayal reveals that bureaucratic action is not synonymous with presidential action and that bureaucracies may most accurately be viewed as inferior political bodies which are not necessarily executive, legislative, or judicial bodies. Bureaucracy defined in this manner provides us with the ability to avoid legal inconsistencies and to insure proper governmental balances. Agencies are not protected by the same Constitutional safeguards applied to the president and therefore the lawmaking characteristics of rulemaking can be recognized and legitimated. These conceptual refinements have led Peter Strauss to recognize that the decision which was subjected to legislative review in Chadha cannot be characterized as the President's. Rather it was made by a civil servant protected against political interference and required to act by Congressional statute. Based upon this insight Strauss contends:

The difference between decisions that are explicitly presidential and those that are not is that the compartmentalization inherent in the separation-of-powers idea is an essential element of the framer's plan only for the former. Special questions are raised when the acting body is one of the named actors of the Constitution - Congress, President, and Supreme Court - who occupy the apex of power and whose excesses are for that reason the most greatly to be feared. ... For the inferior parts of government, subject to law and webs of control woven by all three of the named heads, the same risks do not arise... (1983:636)

Bureaucracy defined in this manner provides us with the ability to avoid legal inconsistencies over its activities and to insure the proper balance between agencies and the other branches of government. These realizations suggest that the strict demarcation applied in Chadha was inappropriate.

The recognition of bureaucracy as not being synonymous with the President but instead an inferior political body places the Court's invalidation of the legislative veto in Chadha into question. The Court in Chadha based its decision upon the belief that the Immigration and Naturalization Service was an embodiment of the executive branch and its desire to impose a strict compartmentalized view of the branches. The inaccuracies of this approach do not suggest that the legislative veto must be upheld, rather it suggests that "the separation-of-powers concerns implicated when Congress overrides presidential actions
are different from those implicated when it nullifies quasi-legislative actions taken by a legally or functionally autonomous agency." (Mikva, 1986:119) The most appropriate way to evaluate this issue is to evaluate whether the legislative veto rearranges power. This view, advocated by Justice White, seems more consistent with the Court's recent analysis of separation-of-powers and checks and balances issues than the majority's approach in Chadha. Prior to Chadha the Court "seemed to be moving away from the idea of 'airtight' categories and toward a Madisonian view, stressing function rather than formality." (Strauss, 1983:804) When applying this approach the central issue would be whether an action interfered with the core functions of another branch. Michael Saks provides an interesting interpretation of the relative benefits of a structural versus a core functions approach when he argues: "Structuralism is based on a compartmentalized reading of the Constitution. Accountability, I believe, serves the higher goal of ensuring popular control of government." (1984:53) According to this argument, accountability is more central to our democratic tradition than structuralism. Where a structural approach conflicts with accountability, structuralism must fall.

These conceptual refinements should provide a consistent legal interpretation of the role of bureaucracy. It may even provide for more political oversight. However, as a practical matter it is doubtful as to whether it will improve public accountability or democratic accountability in general. Even if the legislative veto were restored some have argued that it is counterproductive when applied to agency rulemaking. The major explanation for this outcome is that the oversight functions required by the legislative veto are exercised by congressional committees or subcommittees. For the 101st Congress, (1989-1990), the Senate had 16 committees and 86 subcommittees while the House had 22 committees and 138 subcommittees. The result of this decentralization is that committees are less representative of the nation as a whole and provide easier access to concerned interest groups. Generally, it has been found that small, vested interest groups with a direct interest in a regulation--such as business groups--are the most effectively mobilized. (See Olsen, 1971) The result of this process is that regulatory processes are often unduly influenced or even captured by the regulated industries. (See Stone, 1982) Therefore, the goal of public accountability is subverted by political realities.

V. Future Option for Bureaucratic Accountability—
Toward Public Accountability

The political realities of the legislative veto force us to continue to search for viable methods of insuring democratic accountability. The most effective and direct solution to the objective of achieving accountability is to develop specific and precise administrative standards and procedures which can be imposed upon bureaucratic rule making. These procedures can mandate greater public involvement and oversight. The procedural approach has received significant public attention as far back as the 1930s. President Roosevelt, in response
to growing concerns over unchecked administrative power, established
the Brownlow Commission to search for solutions. The Brownlow Com-
mission's recommendations served as the basis and impetus for the
unanimous passage of the Administrative Procedure Act of 1946 by
Congress. (See Warren, 1988)
The Administrative Procedure Act (APA) represents the "most
comprehensive, authoritative, and enduring legislation governing
administrative practice in the United States today." (Warren, 1988:200) In regard to the issue of the democratic character, the APA has
required that an agency provide for public notice of proposed rule
making. After notice is provided, the agency also must give interested
persons an opportunity to submit their views and opinions.

Despite these requirements administrative rule making still is
made by agencies with minimal input by the general public. The APA
provides a large number of exceptions and loopholes which can severely
limit its application. The narrow application of APA requirements is
illustrated by the fact that "80 percent to 90 percent of agency
decisions [are] not formally reviewable under APA procedures..."
(Rosenbaum, 1978:86) Furthermore, the ineffectiveness of these stan-
dards are even more apparent based upon findings that suggest even when
APA procedures do apply they are easily circumvented and citizen input
is generally and legally ignored. It has been found that the public
hearings that are provided are not well attended and that individuals
who do become involved tend to represent well financed special inter-
est. (See Warren, 1988 and Ethridge, 1987) Citizen involvement, when
it does occur, is disproportionately derived from high socio-economic
groups. Although, citizen involvement in administrative rule making is
inadequate at the national level the problem is even worse at the state
and local level. Some states don't even have administrative procedure
acts and most local governments do not have any laws governing adminis-
trative procedure. (See Warren, 1988)

The failures of the APA are a product of the fact that this act is
based upon inarticulate goals, objectives, and theories. Only a small
portion of the APA focuses on rule making procedure. This section is
vague, provides administrators with a great deal of discretion, and
doesn't provide any overall objectives or direction. The APA implicit-
ly assumes that public involvement should be limited to motivated and
aware citizens and that involvement should be confined to the last
stages of the administrative process.

A statutory amendment to the APA must be made in an effort to
provide for more effective accountability through direct citizen
participation in administrative decision making. The dilemma posed by
this suggestion is to determine the appropriate role of experts and
citizens and to develop procedures which would insure and maximize
their contributions.

This desire makes it essential to devise a "metapolicy" for the
future. Metapolicy, defined as "policy on how to make policy", would
be expected to specify the most appropriate methods of reaching public
decisions. (See Dror, 1971) Within this context, metapolicy would
have to identify the relative, optimal contributions of citizens and
experts. This determination will have a profound impact upon the
issues of effectiveness, rationality, responsiveness, accountability, and efficacy.

Before actual decision making methods that reflect a metapolicy can be suggested, a number of critical questions must be resolved: 1) What is the proper interaction between citizens and experts? 2) What types of policy considerations or issues are most appropriate to citizen versus expert decision making? 3) What are some of the procedures and methods that facilitate citizen versus expert participation?

The most fundamental issue to the development of effective metapolicy is the identification of the appropriate roles of citizens versus experts. A number of criteria must be developed and applied to policy decisions to help us clarify these contributions. Clearly, the need for and desirability of citizen and expert involvement varies a great deal across social programs. Therefore, the "type of decision" to be made is an important initial determinant of the relative role of each group.

As a framework for developing a metapolicy Kantrowitz suggests that policy considerations involve three issues: technical decisions, value decisions, and mixed decisions. When viewed in this way, policymakers, scientific experts, and concerned citizens can better appreciate the unique resources each group can bring to each of these three types of decisions. (Kantrowitz, 1975)

Technical decisions are those that are based solely on the application and extrapolation of scientific issues. They are usually phrased as "what is" or factual questions. Policy issues which are purely technical considerations should remain essentially the domain of experts.

Value decisions are those that are concerned solely with the resolution of important normative or societal issues. Generally they involve issues of social behavior and do not require a commitment of social expenditures or resources. They are best referred to as moral "what should be" questions.

The mixed decision has become increasingly prevalent as a result of our technological society. These decisions represent issues that have both a technical and value component. The dual nature of these policies makes them the most complex to resolve. Should experts or citizens be entrusted with final authority? Why? Important mixed decisions have been the source of great social antagonism due to the lack of a well-defined process which logically specifies the appropriate planning contributions of each group. The demands of mixed decisions require joint participation by citizens and experts.

The contributions of citizens versus experts may vary considerably depending on the nature of each policy consideration. Citizen influence may range from a position of policy dominance (value decisions) to one of minimal or noninvolvement (technical decisions). These variations indicate the importance of designing and/or identifying decision making structures which can reflect desired contributions and assure public accountability. The concepts of citizen courts, citizen advisory councils, and federal public referenda must be recognized and required by statutory reforms to the APA.
References


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Panama Refining Co. v Ryan, (1935) 293 U.S. 388


