

Sec. 1—The President

Clause 1—Powers and Term of the President

subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.”⁵⁴

The Court in *Chadha* and *Synar* ignored or rejected assertions that its formalistic approach to separation of powers may bring into question the validity of delegations of legislative authority to the modern administrative state, sometimes called the “fourth branch.” As Justice White asserted in dissent in *Chadha*, “by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.”⁵⁵ Moreover, Justice White noted, “rules and adjudications by the agencies meet the Court’s own definition of legislative action”⁵⁶ Justice Stevens, concurring in *Synar*, sounded the same chord in suggesting that the Court’s holding should not depend on classification of “chameleon-like” powers as executive, legislative, or judicial.⁵⁷ The Court answered these assertions on two levels: that the bicameral protection “is not necessary” when legislative power has been delegated to another branch confined to implementing statutory standards set by Congress, and that “the Constitution does not so require.”⁵⁸ In the same context, the Court acknowledged without disapproval that it had described some agency action as resembling lawmaking.⁵⁹ Thus *Chadha* may not be read as requiring that all “legislative power” as the Court defined it must be exercised by Congress, and *Synar* may not be read as requiring that all “executive power” as the Court defined it must be exercised by the executive. A more limited reading is that when Congress elects to exercise legislative power itself rather than delegate it, it must follow the prescribed bicameralism and presentment procedures, and when Congress elects to delegate legislative power or assign executive functions to the executive branch, it may not control exercise of those functions by itself exercising removal (or appointment) powers.

A more flexible approach was followed in the independent counsel case. Here, there was no doubt that the statute limited the President’s law enforcement powers. Upon a determination by the Attorney General that reasonable grounds exist for investigation or prosecution of certain high ranking government officials, he must notify a special, Article III court which appoints a special counsel.

⁵⁴ 478 U.S. at 734.

⁵⁵ 462 U.S. at 985–86.

⁵⁶ 462 U.S. at 989.

⁵⁷ 478 U.S. at 736, 750.

⁵⁸ 462 U.S. at 953 n.16.

⁵⁹ 462 U.S. at 953 n.16.