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CHADHA

*Abner J. Mikva**

CHADHA. By *Barbara Hinkson Craig*. New York: Oxford University Press. 1988. Pp. ix, 262. \$24.95.

There is a Dickensian quality to Barbara Craig's book on the *Chadha* case. (*INS v. Chadha*, 462 U.S. 919 (1983)). At least three separate "plots" are interwoven in the book, and it makes for enjoyable reading.

First, there is the story line involving Jagdish Chadha. While other immigrants have found their way into the United States Reports (Yick Wo, Fong Yue Ting, Harisiades, Wong Wing), none has been given the star treatment that Craig gives Chadha. In many respects, Jagdish Chadha is the typical immigrant litigant trying to stay in this country. He came over on a student visa, considerably overstayed the term, was engaged to but never married an American citizen, was scheduled for deportation, and finally succeeded in persuading the Immigration and Naturalization Service to suspend the proposed deportation. All this happened before the cosmic events that transformed Mr. Chadha's efforts from a run-of-the-mill immigration case to the Supreme Court landmark which struck down more acts of Congress than all the other Supreme Court cases combined.

Chadha was a resident of Kenya, of Indian heritage; he chose not to seek Kenyan citizenship until shortly before he started his college education in the United States. He came to this country on a student visa, using a United Kingdom passport, and never left. After Kenya won independence, the U.K. was not very forthcoming about accepting East Asians who found Kenya inhospitable. On the other hand, Chadha made it very clear that the United States was his country of choice, since he did as little as possible to seek out any viable alternatives. Even his engagement to an American citizen looked a little suspect. Indeed, Chadha's is exactly the kind of situation Congress was talking about when it expressed irritation with the Immigration Service for granting permanent residence to people who were evading the student restrictions Congress had imposed.

Thus, Chadha's personal story intersects with the second story line: the tension between the American myth of a nation of immigrants, opening its doors wide to "your tired, your hungry, your poor," and the American reality of a nation whose domestic poverty

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and endemic unemployment have forced tighter and tighter immigration policies. The Supreme Court, which Chadha hailed as his savior, had over the years fashioned a very amiable response to the initiatives of Congress and the executive branch to close our borders. During the McCarthy era the Court had given a virtual *carte blanche* to Congress to pass very tough exclusionary legislation. It had given the executive branch a broad discretion in enforcing those exclusions.

As the son of immigrant parents, I sympathize with the concerns of Craig and Chadha. As a former elected official, however, I am much aware of the exclusionary instincts of our fellow citizens who are insecure financially or otherwise. I still remember the steel worker at one of my town meetings who asked me, with his accent intact, "Vot you going do about dem furriners coming in and taking away our chobs?" It is hard to talk to the hungry or the poor about other people's hunger or poverty. It is hard to retain the image of the land of opportunity for all who want to come to our shores when the unemployment rate for native-born black teenagers is almost forty percent. It is hard to convince trade unions to support liberalization of the immigration laws when they know that every immigrant poses a real and continuing threat to a unionized wage structure.

Given this exclusionary milieu, it is very hard to paint a sympathetic picture of a student who seeks permanent residency after overstaying his visa, when he may be taking the place of some other more deserving immigrant who seeks the American dream. (Under the statute Chadha was invoking, the quota of immigrants allowed to enter the United States was reduced by the number of aliens whose deportation was suspended.)

The third and most important story line is the "epic constitutional struggle" that Chadha waged to get permanent residency in America. It was a struggle that began when Congress overturned, by legislative veto, the administrative law judge's ruling recommending that Chadha's deportation be suspended and that he be allowed to remain permanently in this country. The legislative veto was a safeguard Congress had inserted when it first authorized the I.N.S. to suspend deportation. Any suspension of a deportation had to be reported to Congress by the I.N.S., and Congress could "veto" the suspension by action of either the House or the Senate. This constituted the "one-house veto" variation of the legislative veto device. Other variations allowed Congress to veto by action of both houses, by action of a committee of one house, or by the inaction of Congress for a certain period of time. All of these variations were found unconstitutional by the Supreme Court in the *Chadha* case.

Chadha challenged the veto in federal court. Then-Judge Anthony Kennedy, speaking on behalf of the Ninth Circuit Court of Appeals, agreed with Chadha's contention that the legislative veto as applied in

Chadha's case violated the U.S. Constitution: "The Executive's decision . . . was a reasoned one, rendered under the law. As such, it was an action that carried all the weight and dignity that necessarily attends [such] deliberative decisions [T]he legislative action was both disruptive of and unnecessary to the sound administration of the law." 634 F.2d 408, 432 (9th Cir. 1980).

The decision raised the ante and drew the lines far beyond the one-dimensional "immigrant gets relief" case that Chadha's first lawyers had envisioned. Chadha's change in lawyers was symptomatic of the new ball game. He went from a brand new practitioner at the administrative level to the top of the experienced line in the Supreme Court. More important, both the executive branch and Congress thought this was a good time to get a definitive call on this power-sharing dispute.

Craig gives the legislative veto a birth date of somewhere around 1930 (p. 36). It waxed and waned in popularity over the years, but probably never had as wide a usage as it did in the 1970s. One of the reasons for its growth as a legislative tactic was the presence in Congress of one Elliot Levitas, a Congressman from Georgia. Craig properly devotes a whole chapter to Levitas' impact on the battle.

The growth of administrative government had led to a substantial change in the average citizen's view of his government and its agencies. As recently as 1948, then Vice President Alban Barkley was able to arouse a roar of appreciation from the delegates to a Democratic Convention by defining a bureaucrat as "a Democrat that has a job that some Republican wants." But by the time Levitas came to Congress in 1974, bureaucrats were considered much more dangerous. President Carter had campaigned against them in 1976. Ronald Reagan would make an art form out of campaigning to "get the government off our backs." The bureaucrats that Barkley had found so loveable had grown pointy heads and were ubiquitous.

Levitas found it popular and exciting to use his forum in the Congress to crusade against the excesses, real and fancied, of the administrative agencies. He started putting a legislative veto on everything he could get his hands on. Even though White House occupants had used the same line about administrative excesses to get to the White House, their answer was to restore power to the White House, not to Congress. And so the legislative veto became the battle ground for these separate powers. To Chadha's good fortune (and to the ill fortune of the Congress and those who believe in the primacy of the first branch of government), it was the little legislative veto, which had been included in a 1952 immigration law, that became the epicenter of the struggle.

The Supreme Court decision in *Chadha* is the reason for Craig's book. However, the decision itself merits less than ten pages in the book, including a big piece of the winning counsel's exultation about

having "hit the grand-slam home run" (p. 224). (I often wonder what the winning counsel said in *Dred Scott* or *Marbury v. Madison*, since baseball hadn't been invented yet.) Since the book is aimed at a wider audience than just lawyers and judges, and since there is a lot of text devoted to the real consequences of *Chadha*, it is just as well that Craig avoided the law review syndrome of describing the case by its metes and bounds. However, as I don't have that same self-discipline, I will spend my resources on the opinions. (Law-student readers should be advised that my analysis of the case is highly subjective and will not substitute for reading the opinions in full.)

Craig describes an earlier effort to raise the legislative veto question in an immigration case (pp. 27-31). That earlier case got as far as the briefing stage in the Court of Appeals before the I.N.S. made an offer to the immigrant that she couldn't refuse: the I.N.S. promised to get Congress to withdraw its veto so that the immigrant could get the permanent residency she was seeking. Just how the I.N.S. was able to get Congress to withdraw was never determined, but obviously the government at that time was not particularly anxious to resolve the legislative veto issue. However, by the time *Chadha* arrived at the Supreme Court by way of certiorari twelve years later, it seemed that everybody wanted the question decided in the worst way. And that is exactly what happened.

One does not have to be a bleeding-heart to have sympathy for Chadha's plight. Even though he had helped bring about his situation, he clearly was in a citizenship limbo. He could be expected to make a law-abiding and even desirable resident. More important, there is something very bizarre about the legislature reviewing a proceeding that looks exactly like a judicial proceeding — where testimony is taken, the decisionmaker wears a black robe and is called "Judge," and the parties participate in an adversarial process. In the legislative forum, the decisionmakers were political actors, and the decision was made on the fly by members of Congress who knew nothing about Mr. Chadha's plight or the facts or the law. Indeed, there wasn't even a formal vote on Chadha — his deportation was to be reinstated by "unanimous consent," a procedure that is summary and undeliberate. Had the Supreme Court responded to any of these stimuli, there would not have been much stir about the *Chadha* case.

Chief Justice Burger made *Chadha* a *cause célèbre* by taking the broadest road to decision. He struck down the very *concept* of the Congress' reviewing any actions taken by administrative agencies. He declared that the legislative veto blatantly sidestepped the constitutional protections afforded the executive branch and that Congress could act against an administrative decision only by passing a bill through both houses and presenting it to the President. Written in the lofty language of separation of powers, the majority opinion almost

makes one forget that the rights of an individual are involved. The facts revolve more around the causes of the American Revolution than around Jagdish Chadha. Bicameralism and presentment are the code words, not deportation and residency.

To reach the merits, the normally restrained Chief Justice had to overcome several threshold questions. First of all, he had to find an aggrieved party. Mr Chadha had received all the relief that he had sought from the Court of Appeals. The I.N.S., part of an executive branch that didn't like the legislative veto in the *Chadha* case or anywhere else, also had no complaint about the Court of Appeals decision. It successfully had taken the position there, as it did in the Supreme Court, that the legislative veto was unconstitutional. So, where was the case or controversy that Article III requires? At least by the time the case got to the Supreme Court, all the parties below were very happy with the way things turned out.

To surmount this seemingly insurmountable jurisdictional problem, the Chief Justice seized upon the Johnny-come-lately intervenors, the House and the Senate, as the parties whose opposition to the Court of Appeals decision provided an Article III controversy. The House and Senate were neither plaintiffs nor defendants; they had been invited by the Ninth Circuit to be *amici curiae*, and then petitioned for status as intervenors after the Ninth Circuit decision. The Chief Justice buttressed this ground with another: any agency is aggrieved when any part of its substantive statute is declared unconstitutional, even when it agrees with the decision and had actively sought to secure it. Not surprisingly, the Chief Justice essayed no opinion about how ardent such a contented agency would be as an adversary.

Congress might be expected to be ardent, but not about whether Chadha was to be deported. Congress wanted a big win: the right to slice the powers that it delegated any way it saw fit. No one was left with any impetus to focus the case on the questions actually presented by the facts of the *Chadha* dispute. No one was left who would argue only about *this* kind of legislative veto, the case that was actually before the Court, and win or lose only that case. All the real players wanted to hit a home run. More important than any technical jurisdictional quibbles, the Chief Justice, in order to reach the broad constitutional question that the two political branches wanted resolved, gave the shortest of shrift to the core policy that only a real case or controversy may be decided by the federal courts. He reached.

There were other thresholds — questions that in other cases had caused the Chief Justice great concern as to whether the Supreme Court was needlessly reaching out for controversies. Chadha had by this time married a different American citizen than the one he was engaged to earlier in the drama. As an “immediate relative” of the American citizen, Chadha became eligible for permanent residence

through other sections of the very statute in question. Congress had also passed the Refugee Act of 1980, which probably made Chadha eligible for asylum and permanent residence. But those possibilities, said the Chief Justice, were speculative, and did not preclude a decision on the merits.

Still another hurdle existed. The questions that the Court was being asked to consider looked very much like the "political questions" that some members of the Court had previously found barriers to hearing cases. In this case the barriers were lifted.

Other jurisdictional challenges were made. No matter. Citing no less an authority than Chief Justice Marshall, the Chief Justice reminded us that "[q]uestions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." 462 U.S. at 944 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). The march to the merits was inexorable.

Justice Powell was wholeheartedly in favor of Chadha's cause. He just didn't see why the Court had to reach so far to solve the problem. With the moderation that was his trademark, he cited Chief Justice Marshall in another case and context: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." 462 U.S. at 967 (Powell, J., concurring) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)). That was the route Justice Powell wanted to follow: Chadha was entitled to relief because Congress was pretending to judicial capacities by reviewing and overturning the administrative, quasi-judicial decision in Chadha's favor. The "conceptual" dispute about the existence of the legislative veto as a congressional device did not have to be addressed in Powell's view.

Justice White was not as gentle. He dissented vigorously and said that the holding had a "destructive scope." 462 U.S. at 1002 (White, J., dissenting). The decision, he said, "reflects a profoundly different conception of the Constitution than that held by the courts which sanctioned the modern administrative state." 462 U.S. at 1002. After pointing out that the Court's decision in *Chadha* struck down provisions in more laws than the Court had invalidated in its entire history, he delivered the crushing blow to those Justices who insisted that others, not they, were activists: "I fear it will now be more difficult to 'insur[e] that the fundamental policy decisions in our society will be made . . . by the body immediately responsible to the people.'" 462 U.S. at 1002-03 (quoting *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part)).

The *Chadha* decision was given the full treatment by press and bar. Newspaper reporters and editorial writers, unsure of the long-range

significance of the holding, praised the Court for its courage. Since all of the official parties to the case were on the same side of the issue, the lawyers for the parties had a love-in with each other and with the Court. The only dissidence came from the Hill. Congress was unhappy. Cruel fate had caused Congressman Levitas to lose his seat in the 1984 election, so he was not present for the entire aftermath. He was in Congress long enough, however, to tell his colleagues (and the Court) what he thought about Chief Justice Burger's handiwork:

We find ourselves in a position where our system of government as it has evolved is involved in a train wreck We are going to have to be innovative and imaginative because in the last analysis Congress cannot lose in this struggle The Supreme Court's decision, however, is not the last word on this subject. [p. 233]

The Congressman was certainly right about the last word. But not everyone, even in the Congress, agreed with his estimate of the degree of wreckage.

Joseph Moakley, a senior Congressman from Massachusetts and chairman of the subcommittee of the Rules Committee that has jurisdiction over the legislative veto, thought the Court decision was in response to the excessive use of the legislative veto by the Congress. Since he had been one of Levitas' adversaries on this subject, his views were expected, but they still carried weight. They continue to have influence, since Moakley is still a member of the House. His subcommittee has held extensive hearings about the problems caused by the *Chadha* decision, and about ways for Congress to be "innovative and imaginative."

Some of the legislative solutions have proved to be improvements on the legislative veto. On government salaries, for example, Congress has fashioned a procedure that calls for the President to make recommendations to the Congress that will automatically go into effect in thirty days unless Congress passes a bill to the contrary within that period. Because there is a legislative enactment, presented to the President, the procedure passes *Chadha* muster. It nevertheless remains a way for Congress to keep its hand in a subject on which it has delegated major power to the executive branch. Parts of the War Powers Act, requiring notice to the Congress of military expeditions by the President, follow this general pattern. (There are other parts of the law that would seem to run afoul of the mechanistic approach set forth in *Chadha*, but even former Chief Justice Burger would have difficulty finding parties with standing to bring such a dispute to resolution.) Maybe *Chadha* can be a "designated plaintiff" in all those suits where the separation of powers is involved, and he can be found to have standing under the tradition and precedent of *Chadha*. That would be a lot easier than trying to untangle all the precedents under which the Court imposed strict standards on the federal judiciary to see that a

truly aggrieved plaintiff is jousting with a real defendant in a real controversy — and to reconcile those procedures with *Chadha*.

Chief Justice Burger said that the *Chadha* case would have to be ranked as one of the fifty most important cases of all time (p. 232). That may be, simply because it affected so many laws and materially changed the way Congress does business. However, if the measuring-stick is advancement of the political process, I'm not so sure. Whatever the ranking, if one wants to understand how the judicial process intersects with that political process, and how these landmark, home-run cases come to pass, Craig's book is a superb guide.