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Book Review: Chadha: The Story of an Epic Constitutional Struggle. by Barbara Hinkson Craig.

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BOOK REVIEWS

CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE. By Barbara Hinkson Craig.[1] New York: Oxford University Press. 1988. Pp. ix, 262. $24.95.

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No other part of the constitutional system seems as deeply set in the American consciousness as the separation of powers. Because millions of Americans easily remember its tripartite nature and its enveloping system of checks and balances, it has become a bedrock of our civic culture. No matter that those famous checks and balances do not capture the realities of the struggles among the three branches in the late twentieth century. The realities are messy and indeterminate, for the branches' boundaries are indistinct and their relations feature accommodation as well as conflict. Reality aside, however, the neat simplicity of the formal view makes it easy to grasp and easy to honor as immutable truth.

That false simplicity has bedeviled the doctrine of the separation from the very beginning. It was conceived in Montesquieu's understanding of evolving English institutions—one might say in his imposing a very French order, balance, and precision where none in fact existed. Among the constitution makers of the late eighteenth century, the separation satisfied the yearning for scientific laws with which to design good and effective government. Our Constitution's framers were typical of their era in their pursuit of the "divine science of politics," as John Adams called it. What could have been more rewarding in that search for the laws of good government than the discovery of a system of forces and counterforces that held the three branches in a Newtonian equilibrium? So from the beginning the separation was framed in a mechanical simplicity and law-like certainty.

Partly mythical though it was, the separation was at the very core of the institutional arrangements of the Constitution. It is not surprising that from time to time it has surfaced as an issue of constitutional debate. That was certainly so in the 1930s when acts of

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Congress delegating "legislative" power to administrative agencies were struck down by the Supreme Court, and in these last few decades the separation has reemerged as a major constitutional issue. Professor Barbara Hinkson Craig's full-length study of *Immigration and Naturalization Service v. Chadha* documents one of the major landmarks in that reemergence, for it was in *Chadha* that the Supreme Court abruptly ended Congress's increasing reliance on "legislative vetoes" over the rules and decisions of executive agencies.

Professor Craig merges her study of the demise of the legislative veto with Jagdish Chadha's personal battle to avoid deportation and obtain permanent resident status in the United States. The book begins with Chadha's decision to leave his native Kenya and begin undergraduate study at Bowling Green State University in September, 1966. It ends with his reflections on his victory in the Supreme Court and his eventual naturalization in 1984. Interwoven with Chadha's story is a wider narrative about the litigation politics of the legislative veto. Along the way, other dramatis personnae make major appearances: former Representative Elliot Levitas, the congressional protagonist of the legislative veto; Alan Morrison of Public Citizen Litigation Group, Chadha's attorney before the Supreme Court; and Larry Simms, organizer of opposition to the legislative veto within the Justice Department. The book also includes detailed records of debates in Congress over the veto, and above all there are descriptions of the strategies, testimony, arguments, briefs, and opinions in the court cases themselves.

Lucidly and stylishly written, this is nevertheless a serious and comprehensive work, both the story of a celebrated case and a study of an ill-fated innovation in legislative-executive relations. Craig explores the legal arguments at great length, and does not hesitate to digress for didactic purposes—to explain to the lay reader theories of constitutional interpretation or the role of the courts of appeal, for example. The book is, in short, intended for a general audience, but also valuable to specialists.

It is also a book of many felicities, serendipities, and excursions fruitfully taken. Craig casts a good deal of light, for example, on the advantages of group litigation and, conversely, on the helplessness of the lonely plaintiff and the inexperienced attorney. She also documents once again the imperatives of public office as two presidential administrations, both sympathetic initially to the legislative veto, came to realize its threat to the interests of the executive.

I have, however, two related reservations about this splendid book. First, in Craig's account the case against the legislative veto

overpowers the case for it. In part that imbalance results from the book's emphasis on the perils of Jagdish Chadha. One finds oneself cheering the arrival of the judicial cavalry to save a decent man from deportation to a country (Great Britain) which he had never known and of which he was not a citizen.

Related to that problem is a more fundamental one. Since this is a study of litigation, it is cast largely in conventional legal categories. Accordingly, Craig treats the separation in terms that the courts and popular myths have long favored: terms of encroachment and conflict rather than accommodation and compromise, of a neat and discrete exercise of powers rather than an overlapping and approximate one. The result is to load the case against the legislative veto in particular and more generally against adaptive views of the separation.

Chadha may have been a good decision, but it was a closer case than Craig suggests. Indeed, both the legislative veto and its demise raise complex and troublesome questions about the nature and future of Congress. Put in traditional constitutional terms, the legislative veto is an aggrandizement of congressional power at the expense of the equal and coordinate executive branch and an attempt to "pass" legislation without the required approval of the president. In reality, of course, it is a sign of Congress's problems and troubles—of its crowded and deadlocked agenda, of the increasingly complex demands of constituents and contributors, of its inability to hold its own against both a media-based, imperial presidency and the regulators in executive agencies.

There is, in other words, a powerful political case for the legislative veto which is slighted here. It is a case one has to reckon with, at least to understand why the legislative veto did not die with *Chadha*.[3] The truth is that Congress continues to pass legislative vetoes and variants of legislative vetoes, and they remain in force because it is in both branches' political interest to do so and not be challenged. They survive because they are part of a grand bargain in which Congress acquiesces in the vesting of greater and greater discretionary authority in the hands of agencies in the executive branch. They are, indeed, a part of the bargain that makes the administrative state of the late twentieth century politically acceptable to the Congress.

Interestingly, the Ninth Circuit, in an opinion by Judge Anthony Kennedy, disposed of *Chadha* on grounds that were un-

3. Readers who want to explore the survival of the legislative veto and its cousins post-*Chadha* should consult Louis Fisher's richly authoritative article, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705 (1985).

characteristically narrow for a separation case: legislative encroachment on the judiciary's role in reviewing the adjudications of the Immigration and Naturalization Service. That ground, the court acknowledged, left open the possibility that in other settings the legislative veto might pass constitutional muster. It was precisely the kind of restrained decision that stamped Judge Kennedy as an appropriate successor to Justice Powell.

The Supreme Court rejected this approach, choosing instead to strike down all legislative vetoes. Any legislative action taken by Congress, wrote Chief Justice Burger, must conform to the constitutional requirements of bicameral passage and presentment to the president:

> Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.[4]

The majority thus swept aside possible distinctions among various types of legislative vetoes. *Chadha* reflected the traditional and formal view of the separation.

Chadha also raises questions concerning the role of the Court in interpreting the Constitution. Attorney General Meese tried to rally American lawyers and judges around a standard of "original intent;" it is but one of a number of interpretive theories (plain meaning of the words, neutral principles, etc.) that seek to define a limited judicial role. Most legal scholars have rejected Meesism in favor of an interpretive stance that would reflect contemporary meanings, that would address contemporary issues, that would keep the text alive by contemporary standards—that would, in short, justify more expansionist interpretations and greater constitutional change and adaptability in order to protect individual rights against modern dangers and in light of modern values. The Bork hearings, moreover, indicated that those views are very widely held. They certainly seem to be held by most of the Justices, in practice if not always in theory.

But just a minute. What about the need of the *institutions* established by the Constitution to adapt to twentieth-century demands and pressures? What of the problems of government itself as it is transformed both by mass, popular democracy, and the weight and power of the welfare state? Are we to live by an expansionist interpretive creed for the Bill of Rights and by the narrow norm of

4. INS v. Chadha, 462 U.S. 919, 954-55 (1983).

original intent for the rest of the Constitution? Do we promote constitutional health by accommodating change in what government does without accommodating change in how it does it?

Of course, greater sophistication about the separation would not necessarily entail disapproval of the result in *Chadha*; the legislative veto can be criticized on other, less formalistic grounds. Even so, the formalism of the *Chadha* opinion may have affected the results in subsequent cases. To be sure, *Chadha* was not the first in the recent spate of judicial invalidations of congressional acts based (in at least substantial part) on the separation of powers; *Buckley v. Valeo*,[5] for example, was an earlier decision. *Chadha* has been the progenitor of the recent separation cases, perhaps because the issue was much more central to its facts and judgment, and its offspring show the same signs of a traditional, formal, conflict-centered view of the separation as does *Chadha*.

Take, for instance, *Bowsher v. Synar*,[6] the successful challenge to the central role of the Comptroller General in the emergency budget-cutting procedures of Gramm-Rudman-Hollings. Writing for an eight-Justice majority, Chief Justice Burger settled the matter in phrases of magisterial certitude: "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control [i.e., the Comptroller General] what it does not possess."[7] The separation, thus understood, is remarkably clear, simple, and unreal. It ignores all of the ways in which Congress does in fact participate in executing the laws—see the civil rights and voting rights acts of the 1960s—just as the delegation decisions have long ignored the extent to which executive agencies exercise the very essence of legislative powers.

After this explication of the separation, and a substantial obeisance to *Chadha*, Chief Justice Burger dismissed the policy reasons for a permissive interpretation of the separation as mere arguments of "convenience" and "efficiency." In Burger's analysis, all of the issues of flexibility and change in a two hundred year old document are seen as transitory, if not trivial, easily yielding to fundamental principles.

The Supreme Court's decision in *In re Sealed Case*,[8] upholding the independent counsel ("special prosecutor"), may portend a

5. 424 U.S. 1 (1976).

6. 478 U.S. 714 (1986).

7. *Id.* at 726.

8. In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub. nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

more flexible view of the separation. In any event, the parade of separation issues will not stop. On June 13, 1988, the Court agreed to decide the constitutionality of the new federal guidelines for sentencing convicted criminals, without waiting for appeals from district court cases to wend their ways through the courts of appeals.[9] At the time it granted jurisdiction, one newspaper estimated that more than eighty federal district courts had held the rules unconstitutional while about sixty had ruled them constitutional.[10] Many of those eighty invalidated the guidelines because they believed that the United States Sentencing Commission, which wrote them, was composed in ways that violated the separation, either because Congress directed the president to include at least three federal judges among the members of the Commission or because it delegated excessive and undirected power to it.

In short, we are in the very middle, the epicenter if you will, of the greatest storm of constitutional litigation on the separation of powers in the nation's two hundred years. After all, in the battles over congressional delegations of rulemaking power in the 1930s, the Court relied on separation grounds only twice.[11] Why then has the separation now become so prominent in constitutional adjudication? Part of the explanation, perhaps, is the high tide of judicial activism which has made it seem appropriate for the Court to settle great issues of power and procedure. No doubt it also reflects the long periods of control of Congress and the presidency by different political parties. The Democrats have controlled at least one house of Congress continuously for the two decades between 1968 and 1988, while the Republicans have held the presidency for sixteen of the twenty years. From such basic political facts do great contentions arise; an interventionist Court has made them constitutional issues.

For an introduction to all of this, Barbara Craig's *Chadha* is warmly welcome. It describes the constitutional terrain and the battles fought on it. It does so with a wealth of detail and color, and with a firm grasp of the politics of constitutional litigation. But these reportorial strengths are also the book's weaknesses. It plays by the rules of the judicial forum and judicial rhetoric, and thus it largely accepts the traditional judicial view of the separation—the struggles and competitions among three completely separated branches—and the assumptions and formalisms behind it. Craig's

9. Mistretta v. United States, 109 S. Ct. 647 (1989), *aff'g* Johnson v. United States, 682 F. Supp. 1033 (W.D. Mo. 1988).

10. N.Y. Times, June 14, 1988, at A24, col. 5.

11. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

purposes do not include a challenge to the traditional rhetoric or a full explication of the realities of separation, the hard bargains of wary accommodation between the branches, and the transformations wrought by the realities of positive government in an advanced industrial nation. By observing the tradition of formulaic discourse on the separation, this book marks the extent to which that tradition dominates our jurisprudence and the extent to which we have become its willing prisoners.

LAW & LITERATURE: A MISUNDERSTOOD RELATION. By Richard A. Posner.[1] Cambridge: Harvard University Press. 1989. Pp. 384. $25.00.

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The stated purpose of this book is to "attempt a general survey and evaluation of the field of law and literature." Judge Richard Posner recognizes at the outset, however, that there is a substantial question whether any such field of study can be meaningfully defined, any more so than, say, law and biology. Indeed, Judge Posner's main reason for assembling this group of disparate materials, some previously published, seems to be to demonstrate that literary criticism and literary theory really have very little to contribute to the study and understanding of law—except perhaps to improve the writing of judicial opinions. Even less surprisingly, he also concludes that legal scholars have little to contribute to the understanding and appreciation of literature.

Posner finds five important connections between law and literature. First, many literary works—for example, *The Merchant of Venice, Bleak House, The Brothers Karamazov, The Stranger, The Trial, The Caine Mutiny*—are about or at least involve law or legal proceedings. "The legal matter in most literature," however, Posner concludes after examining several such works, "is peripheral to the meaning and significance of the literature." A related conclusion is that "legal knowledge is often irrelevant to the understanding and enjoyment of literature on legal themes."

Second, and much more promising it might seem, literary scholarship is like legal scholarship in that both are concerned with

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