

The Burger Court Opinion Writing Database

INS v. Chadha

462 U.S. 919 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 10, 1982

Re: 80-1832 - INS v. Chadha
80-2170 - U.S. House of Representatives v. INS
80-2171 - U.S. Senate v. INS

MEMORANDUM TO THE CONFERENCE:

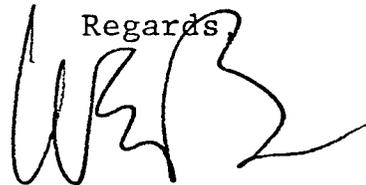
I stated at the recent Conference that a special conference was needed in this case and I propose to call one.

However, I have a statutory duty which will engage me all day Thursday and Friday and possibly Saturday morning, although the later could be avoided.

I do not propose to assign the case until we have the special conference.

I will make myself available for a special Conference on Saturday from 9:00 a.m. onward.

Regards





Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 12, 1982

MEMORANDUM TO THE CONFERENCE:

It appears there is no occasion for a Conference
on Saturday, March 13.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 15, 1982

RE: (80-1832 - INS v. Chadha
(
(80-2170 - U.S. House of Representatives v. INS
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(80-2171 - U.S. Senate v. INS

MEMORANDUM TO THE CONFERENCE:

I did not get to review the exchanges in connection with this case until after the close of the Judicial Conference late Friday.

As I indicated at our original Conference on this case, I think it is one of the most difficult we have had in a long time, and this is why I felt that a further Conference would be useful. Neither of the dispositions, which seemed quite clear to five or six members of the Court, seemed that clear to me, and this reaction was shared by the three of us who deferred voting on the case.

I find it difficult to understand why there is any time pressure in this matter. I suspect that if we were to consult Mr. Chadha's views on the subject, he would hardly be anxious for a swift disposition of his case, since he remains in the United States until he hears from this Court.

Under the circumstances, I will vote to set this case for reargument. If that can be done in conjunction with another case, particularly the case out of the D.C. Circuit, so much the better. If the case is reargued, we can address the questions that John raised in his memo sometime before the date of reargument.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1982

Re: (80-1832 - INS v. Chadha
(
(80-2170 - U.S. House of Representatives v. INS
(
(80-2171 - U.S. Senate v. INS

Dear Harry:

I have your memo of June 25 regarding the above. There were five votes at Conference to put this case over; whether to call this "formal" or "final" vote, I am uncertain. It seems clear that everyone has assumed the case is to go over. You may recall I suggested a special conference be held to discuss the matter and there were no "takers."

You are, of course, aware that appeals have been filed in the four cases on this subject decided by the CADC. See 81-2008, 81-2020, 81-2151 and 81-2171. They will be on the September Conference List. We will then likely consider whether and how we relate these cases to the above.

Regards,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 25, 1982

Re: I.N.S. v. Chadha (No. 80-1832)

Dear Lewis:

I do not think that I can agree with your note of this morning to the Chief suggesting that we might explore whether a finding of lack of severability could be an appealing way of avoiding decision of the constitutional issue. Although such an expedient finding could arguably dispose of this case, such expedience would not be just to Chadha if it resulted in his immediate deportation. But also, it would not settle the persisting controversy between the Executive and the Congress concerning the lawfulness of these one-house veto provisions. We surely have not reached the stage at which the likelihood that no private party will have standing to challenge a particular legislative or executive action in an Article III court, authorizes the political branches to disregard their own constitutional duty to consider the constitutionality of their actions.

As the position taken by the Executive in this case surely indicates, the Executive Branch has a direct and immediate interest in this controversy. For example, if we were to declare the veto provision nonseverable from the rest of 244, and the Executive persists in its view that the veto was unconstitutional, what is the Executive to do with the many hundreds of applications it receives each year under 244? In light of our holding that the veto is nonseverable, must not I.N.S. then refuse to hear those applications on the logical view 244 is unconstitutional in its entirety by virtue of the veto provision?; clearly even Congress wants these cases heard in the first instance by the Executive. Or, suppose the Executive was willing to disregard its own understanding of its constitutional duties and continued to hold hearing pursuant to 244; surely, now that the issue has been brought to the fore, some Art. III court will soon declare that the existence of this Congressional revisory power precludes its own Art. III jurisdiction to review the decisions of the I.N.S. under our ruling in Waterman, 333 U.S., 113-114.

These problems highlight for me the essential correctness of treating severability as an aspect of remedy, rather than as some sort of preliminary jurisdictional question. That has, of course, been our continuing practice, and, for me it is the only logical way in which a court may conduct its business. If we take the route of deciding severability first, how could we justify our practice of reaching the constitutional issue whether some statute is violative of equal protection as underinclusive without first deciding whether the proper remedy would be to expand the class to encompass the plaintiff within its benefits, or to abolish the program entirely, in which case the plaintiff may take nothing. Cf., e.g., your opinion in Califano v. Wescott, 443 U.S. at 93. Such an approach to problems of remedy as "preliminary questions" thus presents a potentially uncontrollable doctrine that could effectively halt all constitutional determination in Art. III courts.

Sincerely,

Justice Powell

Copies to the Conference

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 10, 1982

RE: No. 80-1832 - INS v. Jagdish Rai Chadha
80-2170 - U.S. House of Representatives v. INS.
80-2171 - U.S. Senate v. INS.

Dear Chief:

I feel just as strongly as Harry that, for the reasons he stated in his memorandum to you, this case should be decided this Term.

Sincerely,



The Chief Justice
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 11, 1982

RE: No. 80-1832 - INS v. Chadha
80-2170 - U.S. House of Rep. v. INS
80-2171 - U.S. Senate v. INS

Dear Chief:

I have difficulty seeing what purpose a Saturday conference would serve. As Harry's memorandum stated, the proceedings in your former court in the FERC cases have not yet been completed. Accordingly, there is neither a petition for certiorari nor a jurisdictional statement bringing those cases here. It would not be at all unusual that the Court of Appeals would delay acting on the motion for rehearing until after we have decided Chadha. In any event, I don't see how we can vote on a motion to reargue Chadha and set it with cases not yet here. Frankly, a Saturday session to discuss such a motion seems to me a waste of time.

Sincerely,



The Chief Justice

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 28, 1982

RE: No. 80-1832 INS v. Chada
No. 80-2170 U.S. House of Representatives v. INS
No. 80-2171 U.S. Senate v. INS

Dear Chief:

I too would like to be noted on the public record as dissenting from the Order putting these cases over for re-argument.

Sincerely,
Bill

The Chief Justice
Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 11, 1982

Re: 80-1832 - INS v. Chadha
80-2170 - U.S. House of Rep. v. INS
80-2171 - U.S. Senate v. INS

Dear Chief,

I shall be out of the city on Saturday and will not be back until Wednesday. But if there is a special conference on these cases, please record me as voting for the motion to reargue and set with the CADC case.

Sincerely yours,



The Chief Justice
Copies to the Conference
cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 11, 1982

Re: Nos. 80-1832 - INS v. Chadha
80-2170 - U.S. House of Representatives v. INS
80-2171 - U.S. Senate v. INS

Dear Chief:

I see no reason to reargue these cases along with other cases not yet decided.

I see no reason for a special conference on these cases.

Sincerely,

T.M.
T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

March 10, 1982

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Re: No. 80-1832) - INS v. Chadha
No. 80-2170) - U.S. House of Representatives v. INS
No. 80-2171) - U.S. Senate v. INS

Dear Chief:

I write to express basic disagreement with Lewis' suggestion that these cases be set for reargument next Term. The following are my reasons:

1. Chadha's deportation proceeding began on January 11, 1974. On June 25, 1974, his deportation was ordered suspended. Since then, the suspension of his deportation was vetoed by the House (December 16, 1975), he was ordered deported again (November 8, 1976), he petitioned for review to the CA9 (March 24, 1977), his case was argued and submitted to the CA9 (April 10, 1978), submission to the CA9 was withheld pending supplemental briefing (April 18, 1978), the case was finally decided by a different CA9 panel two and one-half years after oral argument (Dec. 22, 1980), and the case was argued here (February 22, 1982).

The CADC case was decided on January 29, 1982, barely three weeks before oral argument in this case. I understand that one party below already has petitioned for rehearing and rehearing en banc. Thus, the time period for filing any cert petition or jurisdictional statement in that case will run from the date the CADC denies rehearing en banc. That period will be followed by a 30-day period in which responses may be filed. Thus, the CADC case may not be here until June or July, and might not be grantable until the October Conference. In that case, the two cases would not be heard until November 1982 at the very earliest. Even if the CADC case should get here sooner, is granted at the end of this Term, and the two cases are set for argument in October, probably no decision would come down regarding Chadha until January 1983 at the earliest.

Thus, if the case is reargued, Chadha will not receive a ruling until nine years after his deportation proceeding began and eight and one-half years after his deportation was first ordered suspended. Lewis correctly observes that this issue is important to the relationship between the Executive and Legislative Branches. But Chadha has waited a long, long time for a ruling on the merits of his claim. I see no reason why he should be denied a prompt ruling. We are here to decide cases and he and the Government deserve answers to the issues that are raised.

2. Lewis' March 9 letter states that the Court may require further briefing and argument to decide whether the veto at issue in Chadha should be treated differently from the one at issue in the CADC case. It is not at all clear to me, however, how extra briefing and argument will educate the Court further about the merits of this case.

The principal briefs in the CADC were filed by Eugene Gressman (for the House), Michael Davidson (for the Senate), Alan Morrison (for the petitioners), and Acting Assistant Attorney General Larry Simms (for the Justice Department). Those four were the main authors of the principal briefs in Chadha. Since the Solicitor General probably would argue the CADC case for the Government if that case were granted and set for argument next Term, the cast of oral advocates would be identical to the cast in Chadha. Presumably, none of these advocates would renounce his earlier position in Chadha, even if that case were set for reargument and argued back-to-back with the CADC case. Thus, it is highly unlikely that the Court will receive any new briefing or argument in the Chadha case.

If the Court were to decide Chadha narrowly this Term, leaving open the question of the constitutionality of legislative vetoes of agency rulemaking, then the advocates would at least have the benefit of the Court's Chadha opinion when arguing the CADC case here. Without a Court opinion, we have no reason to believe that the parties would adopt positions different from those that they took before the CADC. In any case, those positions are fully illuminated by the massive 104 page CADC slip opinion. Furthermore, the chambers assigned to write the Chadha opinion would be free to refer to the parties' briefs before the CADC to determine whether Chadha could be decided on a narrow ground which did not foreclose a different decision in the CADC case. It is perhaps of interest that a Note in 81 Colum. L. Rev. 1721 (1981), which arrived today, argues that Chadha can be decided without settling the question of the constitutionality of the legislative veto in all contexts.

3. As Bill Brennan pointed out in his letter of February 25, 1982, to Lewis, postponing decision in Chadha leaves the INS in the anomalous position of proceeding under a statute declared unconstitutional by both the Executive Branch and the CA9. The proposal for reargument in Chadha would preserve that anomalous position for at least another year.

Bill also pointed out that even if the INS continues to conduct proceedings under a statute it deems unconstitutional, an Article III court might take the position that it is powerless to render advisory opinions and therefore refuse to review the results of the INS' "unconstitutional" proceedings.

It is this Court's duty to resolve promptly just this type of uncertainty about the constitutionality of federal statutes. Allowing uncertainties about a particular statute to linger seems plainly inconsistent with that duty.

4. Finally, Lewis states that Chadha and the CADC case present

"different subject matter types of vetoes. Whether the validity of vetoes may be answered differently, depending upon whether the function reserved normally would be executive or judicial, rather than legislative, is a question that I am not prepared to answer at this time."

The short answer is that the Court is not being asked to answer that question at this time. The issue in Chadha is not whether different legislative vetoes infringe differently on the functions of other branches, but whether this veto does. If a majority of the Court concludes that this veto does not violate Article I or the separation of powers doctrine, then it should reverse. If a majority of the Court believes that this veto does violate either Article I or the separation of powers doctrine, then it can, and should, promptly affirm.

I strongly feel that this case should be assigned for opinion writing and should be decided this Term.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1982

Dear Chief:

Your announcement schedule, with its postscript, covers, I believe, all pending cases except No. 80-1832, INS v. Chadha, and its companion cases, No. 80-2170 and No. 80-2171.

These cases have never been assigned for opinion writing. While no final vote has been taken at conference, I have assumed that it is the intention to have them set over for reargument. If and when they are placed on an order list with this disposition, I wish to be shown on the public record that I dissent. If anyone should suggest that this has never been done, I cite Crist v. Cline, 434 U.S. 980 (1977).

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

80-1832
80-2170
80-2171

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 25, 1982

80-1832 INS v. Chadha

Dear Chief:

I have not seriously considered the severability issue, as I assumed we would reach it only after addressing the merits. From the discussion at Conference, I understand that both Byron and John think we properly could reach this issue in advance.

I share the concern expressed by you and others about having to decide the one-house veto issue. The Executive and Legislative Branches have lived with it for decades - even though uncomfortably at times. If there were a principled way to avoid the issue, I would welcome it. Severability, if we could reach it first, may be a possibility. But even if we avoided the merits in this case, I doubt that we could justify denying certiorari in the CADC case. The present case seems easier to me, and possibly the two cases would be decided differently.

In any event, it seems to me that the issue is of sufficient national importance to merit further discussion, perhaps at a Conference after we come off the bench March 8.

Meanwhile, perhaps we could be enlightened on the severability issue. Also, I would not foreclose the possibility of carrying this case over for reargument next Term back to back with the CADC case.

In sum, although I adhere tentatively to the view I expressed yesterday on the merits, my preference is to have a further discussion at a time when we are not pressed with any other business. The issue merits it.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 9, 1982

80-1832 I.N.S. v. Chadha

Dear Chief:

In thinking further about this worrisome case, I am now inclined to think a reargument next Term is desirable.

I would grant the CADC case and set the two for back-to-back argument. The two cases present different subject matter types of vetoes. Whether the validity of vetoes may be answered differently, depending upon whether the function reserved normally would be executive or judicial rather than legislative, is a question that I am not prepared to answer at this time.

On an issue such as this where the fundamental structure of our government is implicated, it may be desirable to have more time for consideration, and also to have the benefit of arguments in both of these cases.

In order to come to some decision, I will move that we set Chadha for reargument.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

MEMBERS OF
JUSTICE WILLIAM H. REHNQUIST

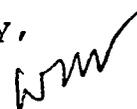
March 11, 1982

Re: No. 80-1832) INS v. Chadha
No. 80-2170) U.S. House of Representatives v. INS
No. 80-2171) U.S. Senate v. INS

Dear Chief:

While I like to think that I am fully sensible of the weight of the arguments which Harry advances against the setting of this case for reargument, on balance I come down to favor it. I think the question is one of such unusual importance -- and one which so little lends itself to disposition on the basis of abstract, deductive type of reasoning -- that we would fulfill our responsibilities better in the long run by having the two cases argued together. I therefore vote in favor of Lewis' motion made in his letter of March 9th.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1982

Re: 80-1832) - INS v. Chadha
80-2170) - U.S. House of Representatives
v. INS
80-2171) - U.S. Senate v. INS

Dear Chief:

Although I am a firm believer in not reaching out to decide constitutional questions prematurely, I think Harry is correct in pointing out that there is no legitimate basis for refusing to decide this case this Term. If we are to have another conference on the case, it should be held as soon as possible because it will be difficult to complete the opinion writing before adjournment in all events.

The case will not get any easier by having it reargued with an even more difficult case.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 11, 1982

Re: 80-1832 - INS v. Chadha
80-2170 - U.S. House of Representatives
v. INS
80-2171 - U.S. Senate v. INS

Dear Chief:

If the reargument question is to be resolved by written responses rather than a Conference, my vote is not to reargue.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 11, 1982

Re: 80-1832) - INS v. Chadha
80-2170) - U.S. House of Representatives
v. INS
80-2171) - U.S. Senate v. INS

Dear Chief:

Saturday at 9:00 a.m. (or earlier) will be convenient for me, but I have a commitment which will require me to leave at noon.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 12, 1982

Re: 80-1832) - INS v. Chadha
80-2170) - U.S. House of Representatives
v. INS
80-2171) - U.S. Senate v. INS

Dear Chief:

If the motion to reargue carries--as apparently it will--does this mean that all of the questions argued the first time around are to be briefed and argued once again? If not, will there be an opinion disposing of some of the underbrush, or do we simply return to square one?

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 11, 1982

No. 80-1832 INS v. Chadha
No. 80-2170 U.S. House of Rep. v. INS
No. 80-2171 U.S. Senate v. INS

Dear Chief,

In response to the flurry of memos concerning this case, I agree we should discuss it again. Saturday will not be possible for me due to a previous commitment.

With regard to having Chadha reset next Term, it seems to me Mr. Chadha would not be unduly inconvenienced because he is in no danger of deportation in the meantime, and there is no intervening national election in which he might otherwise be able to vote. Although the case has proceeded slowly, I believe neither Chadha nor any of the parties have wanted to expedite it.

The decision in this case would not necessarily resolve the issue in other cases involving different types of "legislative vetoes." I would be willing to grant and consolidate it with another appropriate case should one be here in time to do so. Regardless of that, I am willing to consider resetting this one next Term if our discussion indicates the wisdom of that course. I do not believe it is essential that it be decided this Term.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference