

Dudingston patrolled the waters of Narragansett Bay in command of the ship the *Gaspée*. He was authorized to search every vessel, thereby impeding the flow of smuggled molasses, potentially wrecking the trade in rum, and upsetting local Rhode Island families such as the Browns and the Greens (including one Nathanael, later to trade in his ledgers for a uniform as Washington's youngest general and a most trusted commander).

On the evening of June 9, 1772, the colonists rushed the *Gaspée* and burned it to its waterline. In this they were ably assisted by the British, who had refused to pay for coastal pilots. The *Gaspée* gave chase to the smaller *Hannah*, which scooted past a sandbar, and the *Gaspée* grounded in two feet of water to await the tide. *Hannah* arrived in Providence "in time for supper," and a group of angry raiders consisting of the "maritime elite" of Providence (including members of the Brown and Greene families) set off in long boats bolstered by a legal opinion from Rhode Island Chief Justice Stephen Hopkins. Hopkins held that the *Gaspée's* captain was acting unlawfully, as he had failed to show the governor his orders and his commission from the king, which Bunker reports made the *Gaspée* in the colonists' eyes "little better than a pirate ship herself."

And you never heard of this event that occurred a full 18 months before the Boston Tea Party? What may be missing from today's history curricula was certainly yesterday's headline on both sides of the Atlantic, and, remember, Bunker is a journalist at heart. News traveled quickly between Providence and Boston, and across the Atlantic, where the British were appalled at the utter gall of the colonists. Some would declare the burning of the *Gaspée* as an act against the Crown, an act of treason that foreshadowed the even more treasonous Boston Tea Party.

Treason? Yes; enter the lawyers and a superb reason for lawyers to read this book. It seems that, even in the 18th century, governments and businesses made few moves without consulting their attorneys. Bunker tells us that, "[t]hroughout the American crisis, the British cabinet asked for legal advice about every decision they made." Try as it might to bring the Providence, and later the Boston, rabble to trial, reality intervened: "If the men who destroyed the *Gaspée* were publicly deemed to be traitors, then Great Britain had to bring them to trial and hang them...." A move to direct Adm. Montagu to detain suspects in the *Gaspée* incident

failed, as "the law did not permit the military to arrest civilians on land without a warrant from a judge."

The crown's attorney general, Edward Thurlow, also addressed the question of venue. Because colonial witnesses would be presumed to be liars, and a colonial jury could not be trusted to convict, the raiders (if ever actually identified) could be hauled into an English court, tried, presumably convicted, and hanged. When the American newspapers got hold of the plan "to ship a suspect away to face a hostile English court, packed with loyal supporters of King George," the outrage not only reached the rebels in Boston, but it also "put an end to the peace and quiet" in Virginia and eventually found its way into the writings of Thomas Jefferson. (Thurlow would later put an end to moves to prosecute the Boston Tea Party participants for treason as relying too heavily on hearsay.) The stage was set for further colonial acts of disobedience.

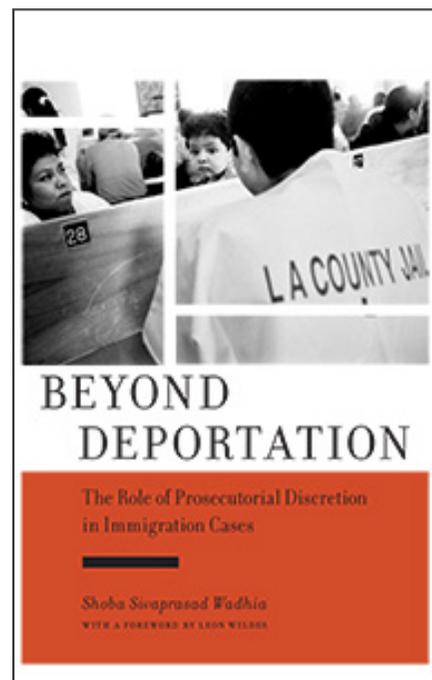
Bunker tells us that the "clumsy" response to the *Gaspée* incident steeped Americans in animosity and distrust until the atmosphere boiled over into the Boston Tea Party. Perhaps the greatest revelation to me is that the Boston Tea Party really was about the tea, and Bunker relies on his understanding of the banking world well as on Admiralty and Treasury documents to make his argument. It is a tribute to Bunker's writing style and firm grasp of global economics that the several chapters tying together European weather patterns, the British East India Company, contraband cargoes, and tea as a commodity and an economic force are informative and easy to digest.

Bunker buries his lead in a footnote on page 403, revealing just why the history lesson goes down so well: "The approach adopted in *An Empire on the Edge* has involved not only a re-examination of the British political papers ... and the addition of new ones, but also a close reading of the newspapers of the period. In order to trace the interaction of events on each side of the ocean as the war drew near, one has to reconstruct the flow of news as accurately as possible and this can be done using the press reports that survive." This fresh take on old news makes this work an enjoyable and informative read.

I was fortunate to hear Bunker speak about his book when he received the George Washington Book Prize in May 2015 at Mount Vernon. His enthusiasm for the sub-

ject, his ability to engage the reader (and the listener), and his storytelling turn analysis of 18th-century economics, cross-Atlantic hegemony, and tea into a page-turner of political intrigue, colorful personalities, and treason. ☺

Neysa M. Slater-Chandler is a native Rhode Islander who grew up several miles from the site of the Gaspée incident on land once owned by the Brown family. She now lives in the Mount Vernon section of Fairfax County, Va., on land once owned by George Washington. She dedicates this review to her father, who shared his June 9th birthday with the anniversary of the Gaspée incident. Slater-Chandler is a U.S. government attorney, and the views presented here are her own.



Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases

By Shoba Sivaprasad Wadhia

New York University Press, New York, NY, 2015.

240 pages, \$55.00.

Reviewed by R. Mark Frey

On June 23, 2016, the U.S. Supreme Court issued its eagerly anticipated opinion in *United States v. Texas* which, to much surprise, consisted of a mere nine words: "The judgment [of the lower court] is affirmed by an equally divided court." The result left

many wondering what's next in this contentious lawsuit involving President Obama's Nov. 20, 2014 executive actions: Deferred Action for Childhood Arrivals (expanded DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). As for the details of the litigation, suffice it to say that prosecutorial discretion looms large in the debate between the two sides.

Prosecutorial discretion has a vague, elusive, almost chimerical quality to it, a quality that induced Penn State law professor Shoba Sivaprasad Wadhia to seek an understanding of its use in the immigration realm. Her inquiry encompassed such questions as, what is prosecutorial discretion and how did it develop and evolve in the immigration context? What are its features and how do they relate to one another? What framework do they create as a whole, and how could it be improved upon?

Beyond Deportation is comprehensive, first expounding on the historical development of prosecutorial discretion as seen in attorney Leon Wildes' work during the 1970s to prevent John Lennon's and Yoko Ono's deportations, as he sought to bring to light the Immigration and Naturalization Service's less than transparent use of prosecutorial discretion.

The book then moves on to an exposition of prosecutorial discretion itself, its basis in law, and its implementation in the immigration realm. Prosecutorial discretion, explains Wadhia, "refers to a decision by a government employee or attorney or the immigration agency (as opposed to the judge) to abstain from enforcing the immigration laws against a person or group of persons." A favorable exercise of prosecutorial discretion serves as a temporary form of relief from removal (deportation) for those meriting it while enabling an agency to focus its limited resources on removal of the "truly dangerous."

The authority for prosecutorial discretion in the immigration sphere derives from section 103(a) of the Immigration and Nationality Act, as amended by the Homeland Security Act: "The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens..." The agencies empowered to enforce those laws include Customs and Border Protection (CBP), Immigration and Customs Enforce-

ment (ICE), and United States Citizenship and Immigration Services (USCIS). The thousands of employees working at these agencies make decisions daily in their dealings with individuals affected by our nation's immigration laws.

These decisions, according to Wadhia, encompass up to 25 forms of prosecutorial discretion. To name a few, they involve whether to allow a person lacking proper travel documents to enter the United States through the "parole" mechanism; whether to arrest an individual; whether to issue and file a Notice to Appear with the immigration court (Executive Office for Immigration Review), which formally initiates removal proceedings; whether to join a motion to terminate removal proceedings; and whether to issue a stay of removal after the individual has been ordered removed.

Wadhia draws parallels to the exercise of prosecutorial discretion in the criminal law realm, in which prosecutors balance resources and the public interest in deciding whether to file charges and what charges to file.

Prosecutorial discretion involves decisions made on an individual basis, each case involving an evaluation of both positive and negative features. In the immigration context, those features typically involve two key components: an economic one that weighs the agency's priorities for removal against its limited resources, and a humanitarian one that considers factors such as whether the individual is married, has children who are U.S. citizens, and has good moral character, as well as whether the individual or family members face medical problems, and whether the individual is a victim of a natural disaster, domestic violence, or other serious problem.

Other forms of humanitarian prosecutorial discretion, applied to groups rather than individuals, while still requiring a case-by-case assessment, include Extended Voluntary Departure (now more typically known as Deferred Enforced Departure), immigration parole, and Deferred Action, such as Deferred Action for Childhood Arrivals..

Prosecutorial discretion plays a key role in the immigration realm and will continue to do so in the coming years. Its elucidation and development since the days that John Lennon and Yoko Ono fought their deportation is significant. Wadhia suggests, however, that the system could be improved even more with greater oversight through judicial

review, and greater transparency by formalizing the system more. I cannot disagree with her assessment.

Beyond Deportation is a significant contribution to the literature on immigration law and policy. It connects the different aspects of prosecutorial discretion that have arisen over the years in various nooks and crannies of the immigration bureaucracy, providing readers (be they legal scholars, attorneys, students, or the general public) with a comprehensive conceptual framework for understanding the place of this mechanism in our immigration system. Both sides of the debate growing out of the *United States v. Texas* lawsuit would do well to read this book. ☺

R. Mark Frey is an attorney based in St. Paul, Minn., who writes extensively on immigration law and policy. He is an active member of the Federal Bar Association's Immigration Law Section and the American Immigration Lawyers Association (AILA), currently serving on AILA's Board of Publications. Frey has practiced immigration law for almost 30 years, with an emphasis on asylum and other forms of humanitarian relief, family and marriage-based immigration, removal defense, appeals, H-1B and religious worker visas, and naturalization.