JUDICIAL INDEPENDENCE AND ASYLUM LAW

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I am delighted to be attending this exciting conference and honoured that you have given me an opportunity to speak to you. Before I discuss the subject of judicial independence in asylum cases from the American standpoint, it may be helpful if I spend a few moments discussing more generally the workings of our judicial system. Also, although it may be obvious, I am obligated to state that I speak for myself alone and not for my court or my government.

The system with which most of you are undoubtedly familiar is our federal court system. Federal judges are appointed for life by the President, subject to confirmation by the United States Senate. The appointment process is highly political, particularly for appellate court judges and Supreme Court justices. Ideology plays a considerable role in both the selection and confirmation aspects of that process. Confirmation battles may be extremely bitter and protracted. One member of my court waited approximately four years for a vote by the Senate on his nomination.

For the past twenty to thirty years, during our presidential campaigns conservatives have made a political issue over liberal judges – a very small group indeed these days. Conservative Presidents have made certain that those they appoint will be representative of the narrow judicial philosophy conservatives espouse. While the public has shown little interest in the issue, conservatives have for other reasons won a series of critical presidential elections and as a result the face and the philosophy of the federal judiciary has been drastically changed from what it was during the preceding 40 or 50 years. Regardless, once a judge is appointed to the federal courts he is essentially free from political pressure. If he wishes to change his judicial philosophy or to decide a controversial case in an unpopular way, he can and will do so without fear of retribution. No federal judge has ever been

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removed from office because of his ideology, his philosophy, or his decisions or opinions. In fact, only a handful of federal judges have ever been impeached, and then only on the ground of financial corruption. As a result, federal judges are generally free to decide matters as they see them and to make the decisions they believe the law requires them to make. A few, of course, may be influenced on occasion by a desire to do what they believe may best improve their chances to be promoted to the Supreme Court – a post for which most American judges consider themselves eminently qualified – and some may be influenced occasionally by public sentiment or outrage. Still, the tradition of judicial independence is extremely strong in the federal system. Protection against retribution by Congress is ironclad. Not only are our positions guaranteed for life, so is our salary; we receive it until we die and the amount cannot be decreased even after we have retired.

The worst that can ordinarily happen to a federal judge when he issues an opinion that politicians do not like happened to me recently. I was one of two appellate judges who decided that the insertion of the phrase "under God" in the pledge of allegiance to the flag, which most American public school children recite every morning, violates our First Amendment, in that it constitutes an intrusion of religion into matters conducted by the state. The next day both Houses of Congress, by near-unanimous votes, condemned our decision. President Bush expressed his outrage. Right-wing TV commentators urged my impeachment and inspired a nation-wide letter-writing campaign. Some Christian ministers organized a demonstration at my home. They advertised the time and place over a religious radio station. On the appointed date, a crowd assembled outside my condominium, prayed over microphones, sang hymns, and did whatever religious pickets do, including flying a plane with a large banner attacking the decision over the nearby beach. Although no politicians were willing to come forward and defend us or our court, neither I nor my colleague who actually authored the opinion gave any serious thought to the personal consequences of our decision, either before or after we made it. To those who tell us it was courageous, I say, not so. It does not take a lot of courage to do what is right when one's independence is guaranteed by the Constitution.

In our country, it is the federal courts that play a role in refugee and immigration matters, and not the state courts. That role is, however, in many respects quite limited. Before I describe the structure of our asylum and refugee cases, I want to add two significant facts to what I have said about the federal judicial system. First, unlike in some countries, our judges are not professionals in the sense that they have trained their entire lives for a judicial career or have worked their way up through the judicial ranks. We have no special schools or special academic training for judges.

We all become lawyers and begin practising law in one field or another, either public or private. Some of us give little if any thought to becoming jurists until we are approached in mid-career and asked if we would be willing to do so. Others have aspirations starting in their childhood, but there is not much planning they can do to bring about the realisation of their ambitions. Judges are appointed to the federal courts from various career paths: law professors, elected public officials, state court judges, prosecutors, and private practitioners. Supreme Court and appellate judges need not have had prior judicial experience. One of our greatest Chief Justices, for example, Earl Warren, was the Governor of California prior to his appointment; the current Chief Justice, whose judicial philosophy is precisely the opposite, was a lawyer in the Justice Department when he was appointed to the Court. Neither had spent a day as a judge before ascending to the United States Supreme Court.

Second, federal judges are generalists. We all handle the whole variety of cases that fall within the jurisdiction of the federal courts. We do not specialize in particular areas of the law. We may handle an asylum appeal one day and a bankruptcy, tax, or criminal appeal the next.

I should also mention the obvious fact that federal judges, despite their lifetime appointments, are ordinary human beings with ordinary views, passions, and prejudices. They do their jobs within the context of the times. Their decisions in wartime or times of national emergency may be different from those they would have made a few years or a few months earlier. The events of September 11th have necessarily affected the judgments that many federal judges make. We can only hope that to the extent possible all of us will try, at all times — in times of crisis as well as in ordinary times — to bear in mind the fundamental principles of our Constitution and the necessity of maintaining the integrity of our Bill of Rights.

That being said, however, I must emphasize that while the composition of the American federal judiciary is not only influenced but determined by the philosophy of the appointing President, once an individual becomes a federal judge his actions are as independent of outside pressure as is reasonably possible. That does not mean that a judge is not influenced by his own personal philosophy of life and the law, but it does mean that generally federal judges cannot be pressured by the Executive Branch or by the Congress to do their bidding.

Having described so glowing a picture of the independence of federal jurists, I must now report that for a number of reasons our independence often provides little comfort to those concerned about the implementation of asylum law. The fact is that our authority over asylum cases is quite limited. The limitations result from actions

on the part of all three branches of our government. First, the Executive Branch is charged with the administration of the asylum process. It also performs, however, the principal functions which would ordinarily be considered judicial in nature, and it does so in a manner that is contrary to the concept of judicial independence. Second, the Congress has passed a number of laws that limit the ability of the federal courts fully and fairly to review asylum decisions. Third, our Supreme Court has adopted doctrines that require federal judges to give almost unbounded deference to the actions of the Executive Branch in asylum cases. Essentially, asylum cases are handled administratively rather than judicially, consistent with the general trend towards an administrative society that began with the election of President Franklin Roosevelt and the birth of the New Deal in 1932 and that continues to the present day. Still, in asylum cases and others there remains a significant role for the federal courts; so it is probably now time for me to explain how our system operates practically.

Individual asylum cases are adjudicated by individuals we call immigration judges. Their decisions are reviewable by a Board of Immigration Appeals. The Board's decision may in turn be reviewed on a limited basis by federal judges sitting on federal courts of appeals. In only the rarest of instances will the United States Supreme Court grant further review to the case, and then, invariably, only when it is the government that is dissatisfied with the decision.

Although the immigration judges are probably the most important decision-makers in our asylum process, they are in fact and in law not independent. The immigration judges are employees of the Department of Justice, the executive agency that both administers the asylum laws and prosecutes deportation cases. The immigration judge takes the evidence, makes the record, frequently questions the asylum seeker and then makes the critical initial decision. He will determine, for example, whether the government of a particular country has the ability and willingness to control persecution by a rebel group, or whether when the government actors in a particular case beat the asylum-seeker they were motivated by the applicant's political views, or the all-important question of the applicant's credibility – the question, in short, whether or not the claim of persecution is truthful. The immigration judge's decisions on these critical questions, especially credibility, are difficult to overturn. Frequently, the immigration judge makes his decisions in cases in which the asylum seeker is not represented by counsel. In fact, in approximately two-thirds of our deportation cases, the deportee is unrepresented.

The immigration judge is responsible for applying the law fairly and determining the merits of the case. Some are indeed not only good lawyers, but fair-minded

individuals who take their title of judge literally – more literally in fact than the Executive Branch would like. None, however, is protected by the constitutional guarantees necessary to ensure independent decision-making. Immigration judges are in fact administrative decision-makers employed by an administrative agency to implement the law according to the agency's policies. I say this not in criticism of immigration judges, but simply to explain that the critical decision-maker in asylum cases is not a member of an independent judiciary. That is simply not the statutory scheme under which they are appointed. Needless to say, immigration judges, unlike federal judges, do not have life tenure, nor do they have fixed terms of office. Instead, they are employees of the nation's chief law enforcement officer, the Attorney-General. Moreover, immigration judges know that their decisions will be directly reviewed not by independent appellate jurists, but by the Board of Immigration Appeals, a group I will discuss shortly, and that even if that higher echelon of their administrative agency upholds their decisions, the Board in turn can be overruled by the Attorney-General.

On the other hand, the minimal good news is that immigration judges' decisions are not controversial in the United States, unlike in Great Britain or Australia — the case of a young Cuban boy, Elian Gonzalez, being almost the only instance that ever drew the attention of the American public. Our immigration judges are faceless, anonymous government officials as far as the public and press are concerned, and therefore rarely, if ever, do they have reason to worry about pressure from the public. The pressure from the Attorney-General inherent in the nature of their position is more than enough.

I should add, in fairness, that recently the organization that represents immigration judges sought to make its members independent of the Department of Justice. It requested that immigration judges be placed in a separate department, as are all other Administrative Law Judges. The request was met with a total lack of enthusiasm by the present administration, and the prospects for immigration judges obtaining this desired status in the foreseeable future appear to be nil.

Apart from the effect of the institutional arrangements I have described on substantive decision-making, the independence of American immigration judges is compromised in very practical ways. Policy decisions concerning how to run immigration hearings, at the most basic procedural level, are ultimately subject to the control of the Attorney-General. To give you a sense of the importance of these kinds of procedural decisions by the nation's chief law enforcement officer, I want to mention briefly a recent example that illustrates this point. As many of you already know, over the course of several months after the attacks of September 11, the FBI

and Immigration and Naturalization Service, apparently under orders from the Attorney-General's office, arrested and detained approximately 1,000 non-citizen men of Middle Eastern, South Asian, and North African origin, mostly on immigration charges. The Justice Department adopted a policy under which none of these men could be released from detention until the FBI had determined that they were not involved in any way with the terrorism investigation. However, this policy presented significant legal problems; because most of the men were charged only with routine immigration violations, they were generally entitled to be released on bond absent some evidence that they presented a danger to the community or a risk of flight. Nonetheless, the government instituted a strict policy of incarcerating all of the detainees until they were affirmatively "cleared" of any involvement. Although in many cases the immigration judges had no evidence to justify holding the individuals, and therefore could only deny release by refusing to apply the ordinary standards governing bail, they complied with the Justice Department's directive. In some cases the judges stated explicitly that they were denying release because they had been instructed by their superiors to hold the men in question until the FBI had "cleared" them.

Although these events were unusual and resulted from the unprecedented nature of the September 11 attacks, they nonetheless illustrate the key problem in terms of judicial independence. In immigration cases, the enforcement wing of the government can dictate the policies that bind the immigration judges. It goes without saying that an independent judiciary does not function in this manner.

The next set of judges I would like to discuss consists of the individuals who sit on the Board of Immigration Appeals (BIA). The Board is also composed of administrative judges. They are appointed and may be removed by the Attorney-General. The Board plays a fundamentally different institutional role because it is an appellate body and has a higher public profile. Its basic purpose is, officially, to correct errors made by the immigration judges and to resolve complex legal questions concerning the administration of the immigration and refugee laws.

Like the immigration judges, the judges on the Board of Immigration Appeals have far more influence on the outcome of refugee cases than do the lifetime federal judges who ultimately review some of their decisions. A large number of refugees do not have the resources or the will to appeal beyond the decision of the immigration judge; and, in the case of many others, for similar reasons the Board is the last stop before deportation.

Apart from the fact that the Board is effectively the body of last resort in many cases, its decisions are of particular importance because its resolution of a number of

critical questions, not only factual but legal, is for practical purposes immune from further review. Under a doctrine known as *Chevron* – the federal courts must give special deference to the legal conclusions of an administrative agency interpreting the statute it is charged with implementing. Basically, this means that if the federal court finds that the agency's interpretation is one that any reasonable person could arrive at, then it must uphold that interpretation, even if the court itself would have decided the question differently.

Because the Board is treated as the administrative agency charged with interpreting the refugee statutes, the federal courts will generally give great deference to its decisions on key questions of refugee law. For example, most federal courts are unlikely to overturn the Board's resolution of questions such as whether or not domestic violence constitutes persecution under the Convention, or even such questions as whether or not the burning of buses in protest against government policies can constitute a political offence.

Unfortunately, despite its importance, the Board, like the immigration judges, is sorely lacking in independence from the political branches. Because Board members serve at the pleasure of the Attorney-General, they do not have life tenure or even a fixed term of office. As the Attorney-General has stated:

> [T]he Board acts on the Attorney-General's behalf rather than as an independent body. The relationship between the Board and the Attorney-General thus is analogous to an employee and his superior rather than to the relationship between an administrative agency and a reviewing court.

The glaring absence of independence on the part of Board members has become particularly clear in the last several months. Recently, the Attorney-General announced (and has now begun to implement) a plan that drastically changes the way the Board handles the vast majority of its cases. Remarkably, in order to speed up proceedings and reduce the backlog, the Attorney-General adopted the rather odd solution of eliminating twelve of the twenty-three judicial positions on the Board. Although I will not describe the plan in detail, among its most controversial features are a change requiring that the vast majority of cases be decided by a single judge rather than a panel of three, a provision codifying and expanding upon the practice of issuing decisions without any written opinion, and the institution of a clear error doctrine designed to limit reversals of immigration judges' decisions. Although it remains to be seen how the Attorney-General will select which of the current judges are to be discharged, many observers fear that judges who have been most sympathetic to the plight of refugees and immigrants will be targeted for dismissal.

Recent months have also seen other evidence of the Board's lack of independence. Because the BIA is the creature of the Attorney-General, the Attorney-General may review its rulings in any given case, in a process known as certification. While Attorneys-General have exercised this power on occasion in the past, the present Attorney-General has been unusually active in this regard. I am limited by the rules governing my office from commenting on the substance of these recent cases, but I think it is appropriate to mention that in one of them the Attorney-General adopted an extremely narrow interpretation of the Convention Against Torture, thereby undermining the claims of many asylum seekers from Haiti and elsewhere.

After asylum cases are decided by the BIA, the asylum seeker may appeal to the United States Court of Appeals. There are twelve regular courts of appeals nationally, each of which covers a particular geographic area. I sit on the largest, which covers the western United States. Asylum cases come to us rather than to the federal trial court because, in our legal system, courts of appeals review the decisions of administrative agencies directly. Only a few cases go to the trial courts first, essentially those in which a person about to be deported seeks a writ of habeas corpus. Leaving that small group of cases aside for the moment, courts of appeals generally perform the limited type of review of asylum cases to which I alluded earlier.

Essentially, we can reverse only those administrative decisions that we can hold to be objectively unreasonable. It may be worth my quoting the language of the rule that governs our standard of review. We may reverse the decision of the Board only if "the evidence [that the asylum seeker] presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." Note that this mode of constraint operates with respect to both factual and legal findings, and the we owe deference to the legal conclusions of the Board under the *Chevron* doctrine, which I described earlier. As a result, federal judges are frequently required to affirm decisions denying refugee status even though we believe that the individual in question is entitled to protection under the Refugee Convention and Protocol.

The power of federal judges to ensure that the law is enforced fairly is also subject to limitations on the courts imposed by Congress. Congress's substantial power over our ability to shape the law in the refugee field is a product of two basic features of American law, one having to do with the relationship between international law and our domestic law, and the other with Congress' constitutional authority over the jurisdiction of federal courts.

As you all know, American domestic refugee law derives from the Refugee Convention. Under the United States Constitution, however, treaties do not obtain independent legal force under American law until they are ratified by the Senate, even if they have been signed by the President. Thus, the Convention could not be enforced in the United States' courts prior to its ratification. In addition, under a somewhat more peculiar body of doctrine, Congress typically passes legislation implementing a treaty at or after the time the treaty is ratified. In some cases, the implementing legislation may be narrower than the treaty itself. Under our domestic law, however, that legislation constitutes the authoritative interpretation of the treaty, and the courts cannot set it aside on the ground that it is overly restrictive. Thus, if the Congress adopts legislation that fails to protect refugees in a manner consistent with the Convention, courts must accept and enforce that legislation. To round out the picture, subsequent legislation enacted by the Congress, by a majority vote, overrides any relevant treaty provision, even though the treaty has previously been approved by a two-thirds vote of the United States Senate.

Here, I want to provide an example which puts into context an issue that has been discussed at some length at this conference. As you know, the Refugee Convention proscribes the detention of asylum seekers except under certain fairly limited circumstances. Although the standard may be somewhat difficult to discern, it is clear that detention should be the exception rather than the norm. However, under the Immigration and Nationality Act, which contains the legislation implementing the Refugee Convention in the United States, Congress has authorized the detention of asylum seekers under far broader circumstances, and in fact has given immense discretionary power to immigration officials to detain such individuals. Under our legal system, an asylum seeker may not argue that the legislation governing his detention should be struck down because it is inconsistent with the Convention. Courts may resolve ambiguities in legislation in light of the purposes of a treaty, but if the language of the statute is clear, we must apply it, even if it is contrary to the treaty.

The second feature of our legal system that serves to limit the ability of the federal courts to ensure that asylum cases are appropriately resolved stems from the powers of Congress with respect to our jurisdiction. With some narrow exceptions, the legislative branch has the authority to determine the scope of federal court jurisdiction. As a result, Congress can for the most part control both the types of cases we may hear and the standards we must apply in evaluating those cases. In 1996, at a time when President Clinton was in office, Congress with the President's approval and encouragement adopted a number of new rules limiting the ability of

federal courts to deal with asylum, deportation, and other immigration issues. The limitations ranged from the institution of an effectively unreviewable new procedure for turning away persons at the border, to strengthening the rules against judicial review of discretionary actions, to prohibiting review of all asylum cases in which the individual has committed "a particularly serious crime" – the rub being that "particularly serious crime" is, in some aspects of the 1996 legislation, defined so as to include almost any criminal offence.

There are, as I indicated earlier, certain limited exceptions to Congress's power over the jurisdiction of the federal courts. Most American legal scholars believe that a critical exception concerns the authority of the federal courts to grant writs of habeas corpus. This view gained substantial support in the refugee context in the early summer of 2001, shortly before September 11, when the Supreme Court held that habeas corpus is available as a remedy for at least some classes of detained non-citizens seeking to challenge their removal orders, although the Court was careful to say that it was not commenting on what the rule might be in times of national emergency. In any event, it may well be that Congress cannot take away the power of the courts to review asylum petitions altogether, at least in cases in which the asylum seeker is detained in some manner. To be clear, I am not saying that the law on this point is settled, but rather that it presents an interesting and to some a difficult question whether the Constitution ensures the jurisdiction of the federal courts over certain aspects of asylum law.

Whatever the limits on Congress's power to strip the courts of authority to hear particular types of actions, it is probably that Congressional power that poses the greatest threat to judicial independence – and perhaps partly for that reason, judges tend to become even more deferential to the views of the Executive and Legislative branches in times of national crisis.

George Washington, our first President, said that ours is a land whose "bosom is open to receive the persecuted and oppressed of all nations". To a greater extent than I believe to be desirable, American law today leaves critical decisions as to the granting of refugee status within the unreviewable discretion of the Executive branch. The limitations on judicial authority conflict in my opinion with a fundamental principle of our system of governance: that a regime of laws must be subject to judicial review and control. Carried to its extreme, such limitations serve neither the interests of refugees, whom we are bound to protect by international law and common decency, nor, ultimately, the interests of the society of laws we have striven to create.

It may seem to you from what I have said thus far that it does not matter much whether we federal judges are independent because we have so little opportunity to review asylum decisions effectively or at all. To some degree, this is unfortunately true. For example, federal judges can offer little solace to aliens who attempt to gain refugee status from abroad, or who are intercepted before they reach American shores. As you know by now, our Supreme Court has held that asylum seekers who are intercepted before they enter our territorial waters have no rights at all under our Constitution, and may be turned away by United States personnel notwithstanding any provisions of the Refugee Convention and Protocol. Those who arrive *at* our borders by plane, car, boat or otherwise, but who have not entered the United States, have a little more protection; they may assert an asylum claim, but the determination by the immigration officer or sometimes an immigration judge, is in almost all instances unreviewable by our courts.

But to leave the picture this bleak would be to give you a false impression. Aliens who succeed in coming within our borders, whether they enter illegally or overstay their visas, are afforded a substantial measure, though not all, of the legal rights granted Americans by our Constitution. Our courts retain the fundamental obligation to ensure that these constitutional protections and procedures are met and that due process rights are complied with. While our authority to review individual cases and reverse administrative decisions where an injustice has occurred is indeed limited, some of the courts of appeals, including mine, have taken a fairly broad view of our authority and continue to find legal grounds for overturning Board decisions that conflict with what we believe to be the governing principles of law. In addition, we sometimes succeed in finding ways to construe the law so as to avoid gross injustices, although our Supreme Court, being a rather conservative institution these days, does not look with favour on demonstrations of what it believes to be judicial creativity, and indeed sometimes reverses us summarily.

It is, nevertheless, with respect to the overall application of basic constitutional principles that the independence of the judiciary is most important. Federal judges continue to resolve controversial and highly disputed issues involving the constitutional rights of non-citizens, including asylum seekers, often to the displeasure of the Executive branch. For example, federal judges have imposed strict limitations on the time potential deportees may be detained, even after a final decision to deport them has been made. We have regulated procedures governing the manner in which asylum and deportation hearings must be conducted, and have decided when additional hearings must be held for persons previously ordered

removed. We have also limited the evidentiary burdens that may be imposed on asylum seekers so as to ensure that they will receive due process of law.

Now, however, we have moved to a new era – an era of overwhelming concern in the United States regarding terrorist attacks. Post-September 11, our federal courts have had a mixed record. Some have reined in what they believe to be the excesses of the Executive branch; others have found the exceptional steps taken by the Attorney-General to be warranted by exceptional circumstances. Judges both trial and appellate in various parts of the country have issued orders both prohibiting and permitting secret detentions, secret trials, and secret deportations, and have disagreed on the extent of the right to counsel to be afforded individuals the government has sought to hold incommunicado. These decisions have made clear generally that the Constitution applies in times of crisis as well as in all others, but have come to different conclusions regarding the strength of our constitutional guarantees in such times. The ultimate question is to what extent our courts will hold that liberty should yield to national security during periods of national emergency.

Our Supreme Court has not yet considered any case involving asylum or deportation, let alone terrorism, since the September 11 attack. However, in times of national crisis the Court has tended to view the rights of all people more narrowly and to afford the government greater flexibility to act; and the current Court has made it plain that even in ordinary times the Executive branch enjoys extremely wide discretion to adopt policies affecting asylum seekers and other aliens. In sum, were one to predict how the Supreme Court will respond in future refugee cases, particularly in those in which terrorism may be a stated or unstated factor, one could not be optimistic that liberty interests will trump security concerns.

Still, in the long run, Americans must continue to look to the federal judiciary to protect the fundamental rights of all within our borders. We must do so because only the federal judiciary is truly independent; and because even when the federal courts have gone astray in periods of crisis, we have always ultimately returned to our true values – although often with a fair degree of embarrassment and shame: to wit, the Japanese-American detention cases.

We would clearly fare better if our federal courts were afforded a greater degree of authority over asylum and immigration matters. We would also certainly fare better if the various branches of government developed a greater sensitivity and understanding of the problems of refugees. And, surely, justice would be better served if some of our judges at all levels of our judicial system exhibited greater compassion and a better understanding of human rights in general. Nevertheless, I take comfort in the fact that our judiciary is truly independent, and I believe that, in

the long run, that independence is our nation's best guarantee of fair treatment and due process of law, not only for asylum seekers, but for all within our borders.

Now, a word about the state of asylum and refugee law generally. The problems of refugees as defined in the Convention, and the problems of others who flee intolerable economic or political conditions, or simply want to obtain a better life for themselves and their children, are not neatly separated into different compartments in the minds of the public, or of governmental officials. Moreover, heretical as it may sound, there may be valid reasons for the public's inability or unwillingness to pigeon-hole the two sets of problems.

In the United States, for example, the principal problem these days is not persons who might qualify as refugees. Because of our long border with Mexico, there is a constant flood of immigrants – from that country and the other Central American nations – who seek a better life for themselves and their families. When they succeed in gaining entry, often by incredible feats of physical endurance — and hundreds a year lose their lives in the effort — they frequently become productive workers who transmit a portion of their earnings to those family members they left behind. Often, after what may be a considerable period of time, they send for their wives and children, who themselves enter illegally by one means or another and then also become productive members of society. Because the problems of such immigrants are not generally within the scope of this conference, I will say only that we have recently adopted harsh, punitive laws that result in the expulsion of non-citizens who have obtained legal status as long-term permanent residents, for comparatively minor offences committed long in the past — offences as minor as marijuana possession or even petty theft. Some of the cases are heartbreaking, and many result either in the tearing apart of families or the involuntary transfer of children born and raised in the United States to countries they have never previously seen. Federal courts have little ability to ameliorate the cruelty of such laws, although some of us who hold judicial office try to do the best we can within the limits of the law.

Despite the Convention, the lines between asylum cases and those involving other would-be immigrants are not clearly drawn in practice, and the policies justifying opening a nation's borders to the various groups of individuals who flee their native lands not only overlap, but are sometimes quite similar. Indeed, the broader the definition the courts give to the five categories of persecution covered by the Convention, the fairer the treatment that will be afforded large numbers of oppressed people. On the other hand, the negative consequence of an expansive judicial reading of the Convention is that the growing anti-immigrant sentiment in

many countries, including mine, may ultimately have a substantial adverse effect upon traditional asylum seekers as well as on others seeking entry. Expansive court decisions can lead to restrictive, mean-spirited retaliatory actions by the political branches of government – retaliatory actions that can make it more difficult for persons to enter our country in the future and easier for the government to deport those who are already here.

Thus, while we federal judges need not be concerned about threats to our independence, or about the ability of the government to dictate our decisions, we might legitimately pause to consider the law of unintended consequences. Will our decisions that are favorable to those seeking refuge on our shores evoke responses that will be harmful to those to follow, and to the principles that underlie immigration and refugee laws generally? And should that affect how we decide cases?

One closing thought. Our system of handling asylum cases has some serious and obvious flaws. However, in my opinion, far more important than the particular procedures a nation adopts for its treatment of Convention claims is the national spirit and will that underlies those procedures. A generous, open-hearted country with an informed and enlightened citizenry is the best hope for those who would see the Convention fully and fairly enforced. A frightened, threatened nation whose people are worried about their personal security and economic well-being is unlikely to provide a welcoming home for refugees, regardless of the procedures it enacts.

There is little that we here today can do to affect the underlying problems that concern our fellow countrymen. We can hope, however, that by the time we assemble again, the world will be a better place, not just for asylum seekers and other would-be immigrants but for all people. These are indeed troubling times. None of us can predict the events of the coming months with any certainty. We can only act as citizens to try to influence our governments to conduct themselves with common sense and wisdom, as well as with respect for the rights of others. The history of the world shows that such efforts are not always successful, but the cost of not trying is simply too great. Again, thank you for inviting me, and congratulations on a most successful conference. Peace.