

REFUGEES, ADMINISTRATIVE TRIBUNALS, AND REAL INDEPENDENCE: DANGERS AHEAD FOR AUSTRALIA

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Few would deny that one core ingredient of any successful justice system is the independence of those who adjudicate cases. As will be evident, I believe that Australia's system of administrative justice is in grave danger as a result of dramatic recent threats to the independence of key adjudicators. While these events have taken place in the immigration and refugee context, the ominous implications are far broader.

I. THE ATTRIBUTES OF ADJUDICATION AND REVIEW

What attributes should the ideal adjudication system have? I cannot improve on a formulation offered in 1964 by Roger Cramton.¹ He was writing in the context of administrative law, but his thoughts apply with equal force to any dispute resolution system.

Professor Cramton suggested that we should insist on three ingredients. First, the system has to be accurate.² By "accurate", I think he meant that the findings of fact should reflect the most likely interpretation of the evidence, and the conclusions of law should reflect the most likely meaning of the applicable legal sources. I believe that accuracy also subsumes procedural

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1. See Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 111-12 (1963). For refinements of Cramton's formulation, see Ronald A. Cass, *Agency Review of Administrative Law Judges' Decisions*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 113, 154-57 (1983) (leading to A.C.U.S. Rec. 83-3, 1 C.F.R. § 305.83-3 (1985)); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975) (based on report leading to A.C.U.S. Rec. No. 75-3, 1 C.F.R. § 305.75-3 (1975)); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313-14 (1986) (based on report leading to A.C.U.S. Rec. No. 85-4, 1 C.F.R. section 305.85-4 (1985)). In Australia, the President of the Administrative Appeals Tribunal has articulated somewhat similar goals, but without the emphasis on acceptability. See Hon. Deirdre F. O'Connor, *Effective Administrative Review: An Analysis of Two-Tier Review*, 1 AUSTRALIAN J. ADMIN. L. 4, 4 (1993).

2. See Cramton, *supra* note 1, at 112.

fairness; without fair procedures, results inevitably will be unreliable. Second, the system has to be efficient.³ It shouldn't waste scarce resources, and it should decide cases within a reasonable time. Finally, a review system should be acceptable—that is, the agency, the participants and the general public should have confidence that the system is both accurate and efficient.⁴

I take those⁵ as the basic objectives of any system that adjudicates anything. But suppose, more specifically, the dispute concerns an administrative agency decision that adversely affects an individual. If the individual believes the government agency or official was wrong, what type of review mechanism, if any, should be in place?

To answer that question one must back up and ask why, exactly, we have review in the first place. Whether the review body is an administrative tribunal or a court, what are the benefits of review and what are the costs?⁶

I start with the costs, both generally and with particular attention to immigration. First, review does delay the ultimate resolution of the dispute. This is a real cost in any context, but it is a particular concern in the immigration context, because the longer the review process takes, the more incentive there is to seek review for the sole purpose of prolonging one's stay. What percentage of those who seek review actually do so for this improper purpose rather than because they genuinely believe the government's decision was wrong is a contentious issue in most immigration countries, including both Australia and the United States. Certainly, however, the concern about delay is a valid one.

Aside from delay, review costs money. Somebody has to pay the salaries of the people who decide the cases, the government officials who prosecute the cases and the various support personnel. In the case of migrants, the person might be detained pending the review. That too adds both fiscal costs for the government and the loss of the individual's liberty.

On the assumption that the adjudicators are independent of the government department whose decisions they are reviewing—and I return to that subject presently—there is another cost. The adjudicators are not

3. See *id.*; see also Cass, *supra* note 1, at 155.

4. See Cramton, *supra* note 1, at 112.

5. I have suggested elsewhere that consistency should be viewed as a fourth, independent goal of any adjudication procedure. Some of the benefits of consistency—for example certainty, predictability, and judicial efficiency—might fall neatly within the acceptability and efficiency objectives. But other benefits of consistency—most notably equal treatment of similarly situated parties—have independent value. See Legomsky, *supra* note 1, at 1313-14.

6. For a more detailed account of the general costs and benefits of judicial review of administrative action, and the relationship between review by administrative tribunals and review by courts, see STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA*, 272-324 (1987).

politically accountable, and yet they render decisions that sometimes rest unavoidably on values and preferences different from those of the administrators, who are politically accountable.

One last cost—applicable only to judicial review, not to most administrative tribunals—is that judges normally lack the specialized expertise of the officials whose decisions they are reviewing. The broader generalist perspective that they accumulate on the job is at least a partial offset, but it must be acknowledged that judges normally do not have specialized expertise.

All of these are real costs. Yet practically every democracy in the world today provides some kind of mechanism for obtaining review of those government decisions that adversely affect individuals in significant ways. Why do they do so if review is so costly?

I think the main reason⁷ they do so is that, whatever their views about immigration, social security or industry regulation, the leaders of most democratic nations truly believe in the rule of law. They are willing to pay for review because they know that without it there would be too many unjust results. But why? And how, exactly, does review help avoid unjust decisions?

My own belief is that one of the most important benefits of review happens to be one of the least obvious and the least recognized, for it applies even in the vast number of cases that never reach the review stage because no one requests it. I believe that the mere *prospect* of review can have a sobering effect on administrative officials. Most of us do not like to be embarrassed, especially in our work. When we know that someone might be scrutinizing our work and testing our reasons, we have an extra incentive to approach our decisions carefully, explain our reasons intelligibly and assure ourselves that those reasons are indeed persuasive. In this way, serious review enhances the quality of the primary decisions.

Nonetheless, the initial decisionmakers are human. They will still make

7. Many scholars have suggested that the benefits of review fall into two categories—a retroactive error-correcting function relevant to the particular case and a prospective guidance function that aids the disposition of future cases. See, e.g., David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 299-304 (1984); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 649-50 (1981). I do not take up the guidance function in this paper because some review tribunals, including Australia's Refugee Review Tribunal and Immigration Review Tribunal, have been granted no authority to hand down binding precedent. For a sensitive discussion of the difference between the functions of first-tier tribunals and the guidance function of second-tier tribunals, see O'Connor, *supra* note 1, at 9 (discussing the statutory provision for referring Immigration Review Tribunal and Refugee Review Tribunal cases to the Administrative Appeals Tribunal for general guidance).

mistakes. For that reason alone, when important interests are at stake, a second look is almost always beneficial. Still, if the second decisionmaker disagrees with the first one, is there really any reason to assume that the second decisionmaker is more likely right and the first one more likely wrong, rather than vice versa?

The answer to this last question is generally yes, for the second decisionmaker has a built-in advantage over the first. The first decisionmaker normally had to articulate reasons. The losing party therefore has an opportunity to point up any weaknesses or defects in those reasons, and the second decisionmaker is then able to focus attention on the disputed issue and add his or her own thinking to that of the first decisionmaker, in the light of the parties' reactions to those reasons. Thus, the second decision reflects not only increased attention to the main disputed issues, but also the combined insights of two decisionmakers.

More important, the review tribunal—whether it is an administrative tribunal or a general court—normally brings to the process a degree of independence that a politically accountable department of government simply cannot supply. When legislatures enact laws and executive officials issue regulations, the conventional wisdom is that the policies those decisions reflect demand political accountability. That is, after all, what democracy is all about. But once the legislative and executive branches have made those general policy decisions, disputes about the meaning of those laws and their applicability to specific fact situations are inevitable. When those disputes arise, justice demands that cases be decided on the merits, not on the basis of political considerations.

To be sure, the point should not be exaggerated. Today it is well recognized that a clean allocation of policymaking authority to the political branches and interpretation to adjudicative bodies is impossible; the division of power is merely one of degree. But the basic principle—political accountability for policymakers and insulation for adjudicators—is important enough to preserve. And insulation requires independence. That is why judges usually have life tenure or something close to it. Independence means that the people who decide the cases can base their decisions solely on the evidence presented and on their honest interpretations of the laws they are applying. If the rule of law means nothing else, surely it means that.

The acceptability principle is a second reason to treasure the independence of those who adjudicate cases. Justice must not only be done, but also be perceived as being done. Neither the parties to the case nor the general public will believe justice to have been done unless they are confident that the adjudicator was truly exercising his or her own, independent, honest judgment.

II. THREATS TO THE INDEPENDENCE OF AUSTRALIA'S ADMINISTRATIVE TRIBUNALS

That issue—independence—is a topic of great current interest in the United States. Recent events in Australia, especially in the migration context and especially in recent months, make it a critical issue there as well.

In the United States, increasing public hostility to immigration has led Congress to take radical measures that I believe quite dangerous in the long run. Among those measures are various restrictions on judicial review, including the virtual elimination of review of those deportation orders that are based on criminal convictions,⁸ and the elimination of judicial review of the denial of various statutory discretionary remedies.⁹

Regrettable as I believe these measures to be, in the United States the vast majority of deportation (now called “removal”) orders and the vast majority of asylum denials are still subject to judicial review.¹⁰ Moreover, and perhaps more importantly, most of these cases are additionally reviewable by an administrative tribunal called the Board of Immigration Appeals,¹¹ whose members enjoy a degree of independence that no one seriously questions.

In Australia, a pattern of strikingly similar assaults on the institutions of administrative and judicial review is taking shape. Despite the parallels, however, there are important differences in the nature of the assaults. The Australian initiatives raise fundamental issues about what it means to have a justice system and who may rely on that system.

On a personal note, I confess to some ambivalence about criticizing measures that have been taken or proposed in Australia, and not only because of the great fondness I have developed for that country. Americans seldom take kindly to foreign visitors criticizing United States policy; I want to be sensitive to analogous feelings in Australia. (Also, I hope to return for another visit some day; as an alien, I recognize that public criticism of the Minister of Immigration is not always the most effective strategy for gaining readmission.) But I do believe that the government's recent actions and proposals raise serious issues, not only for immigrants and refugees, but for the whole system of administrative justice. With respect, therefore, I offer the reaction of one outsider who has studied these issues in detail in various immigration countries.

8. See 8 U.S.C.A. § 1252(a)(2)(C) (West Supp. 1997).

9. See *id.* § 1252(a)(2)(B)(i),(ii) (West Supp. 1997).

10. See generally *id.* § 1252.

11. See 8 C.F.R. § 3.1 (1997).

The Australian Parliament in recent years has enacted significant restrictions on judicial review of asylum and on some related administrative decisions. It is not my purpose to analyze those provisions here; they are expertly critiqued elsewhere.¹² The Minister of Immigration and Multicultural Affairs, the Honorable Philip Ruddock, has proposed additional, further-reaching restrictions, primarily in the nature of privative clauses.¹³ I have already described what I see as the pros and cons of judicial review, and I have expressed my own belief that, when important individual interests are at stake, the benefits of judicial review overwhelm the costs.¹⁴ But that is a judgment that people can make for themselves.

More interesting about Minister Ruddock's approach is that these recently enacted and recently proposed additional restrictions on *judicial* review reinforce some potentially larger developments in *administrative* review. In December 1996, the Refugee Review Tribunal ("RRT"), which hears appeals from the Immigration Department's denials of asylum, decided two controversial cases.¹⁵ In each, a woman sought asylum on the basis of spousal abuse that her government was either unable or unwilling to prevent. Both women argued that they met the legal definition of "refugee"; the Department argued they did not. The RRT, following the lead of Canada and the United States, approved the claims, rejecting the position of the Immigration Department.¹⁶ My own view is that the issue is one on which reasonable minds could disagree and have disagreed.¹⁷ Much more important, though, is what happened next.

The Minister's reaction was to publicly chastise the two RRT members who had handed down the decisions. In an interview with the *Australian*, the Minister was quoted as saying, "[t]he view I take would be if there are tribunal members who have fixed term appointments who clearly make decisions outside the international law in relation to determining refugee claims, their appointments would be ones I would be highly unlikely to renew."¹⁸ The newspaper then added, "[b]ut he denied he was threatening

12. See Mary Crock, *Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?*, 18 SYDNEY L. REV. 267 (1996).

13. See Migration Legislation Amendment Bill (No. 5) (1997).

14. See, e.g., Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205 (1989).

15. The cases and their aftermath are described in Mike Steketee, *Ruddock Flags Tougher Line on Refugee Bids*, AUSTRALIAN, Dec. 26, 1996 at 1 and in the CANBERRA TIMES, Dec. 27, 1996, at 1.

16. See Steketee, *supra* note 15.

17. For a good discussion of the arguments, see Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565 (1993).

18. See Steketee, *supra* note 15.

particular members.” The *Canberra Times* then reported the next day¹⁹ that a spokesman had confirmed the Minister’s comments and had said Mr. Ruddock had “made it clear that members of the RRT would not be reappointed if they made decisions that went beyond the law.”

None of us, of course, is in favor of decisions that go beyond the law. But we also know that the losing party to a legal dispute is frequently inclined to think the decision was contrary to the correct application of law. That is not merely human nature; it is also because, as Mr. Ruddock and others who have been legally trained well know, the law is not always cut and dried. Legal language is often broad and general, for both the human imagination and the English language are limited. Consequently, there will often be no uniquely correct answer to a question of law; there will be room for reasonable difference of opinion.

That is especially true in refugee cases. The drafters of the international refugee definition²⁰ that Australia has incorporated into its domestic law knew that no one would ever be able to anticipate all the myriad horrors that any imaginative despot could cook up. For that reason, the drafters defined “refugee” with reference to broad terms like “persecution,” “well-founded” and “social group”. They were acutely aware that those who applied the definition would have to make some difficult judgment calls, but there was no real alternative.

Even though Refugee Review Tribunal procedures are not technically adversarial, the RRT member does ultimately have to choose between two conflicting positions. The applicant believes he or she qualifies as a refugee; the Immigration Department, from whose decision the applicant is seeking review, does not. One of these parties is going to win, and one is going to lose. In 80% to 85% of its cases the RRT has upheld the Minister’s decisions.²¹ But every lawyer except Perry Mason knows he or she cannot win *every* case. Sometimes the RRT finds the applicant’s position more convincing. When the Minister says the RRT is going outside the law, therefore, what he really means is that in some cases they find the applicant’s interpretation of the law more convincing than the Department’s.

19. See CANBERRA TIMES, *supra* note 15.

20. See U.N. Convention Relating to the Status of Refugees, July 28, 1951, art. 1.A, 189 U.N.T.S. 137 (done July 28, 1951), as amended by U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 606 U.N.T.S. 267 (done Jan. 31, 1967).

21. From July 1, 1995 to June 30, 1996, the Minister’s success rate before the RRT was 82.35%. From July 1, 1996 to January 1, 1997, he prevailed in 83.79% of the RRT decisions. See Mary Crock, *Reviewing the Merits of Refugee Decisions: An Evaluation of the Refugee Review Tribunal*, in RETREATING FROM THE REFUGEE CONVENTION (Conference Proceedings, Northern Territory University, Darwin, Australia (Feb. 7–10, 1997)).

Of course, that visceral reaction is to be expected in all sorts of proceedings; the losing party frequently thinks the tribunal or court was wrong. The difficulty is that, if that losing party happens to be the person who will later decide whether the adjudicator keeps his or her job, and if that losing party has made it crystal clear that those people who reach decisions that the losing party regards as wrong are "highly unlikely" to be retained, it is not hard to predict that that message will influence the way the adjudicators approach cases.

Only the Minister knows whether the comments were deliberately intended to have that effect. But whether or not they were so intended, no one could seriously deny that this fear would be at least in the backs of the adjudicators' minds, if not the fronts, any time they contemplate ruling against the Department. I spoke personally with a number of RRT members in the months following the Minister's public statements. Every one who ventured an opinion stated the obvious—that many of their colleagues now worried about losing their jobs every time they contemplated ruling against the Department.

The threats from the Minister were not idle. Thirty-five of the RRT members whose terms expired in June 1997 applied for reappointment. Sixteen of them were not renewed. They are being replaced with new applicants of the Department's choosing.²² One member of the Immigration Review Tribunal informed me that the two RRT members who had angered the Minister by rejecting his Department's position in the spousal abuse cases were among the casualties, though I have no way to verify that.

One non-renewed RRT member—Mr. John Gibson—had had a high set-aside rate of about 30%. Mr. Gibson had "no doubt" that the Minister's public statements about set-aside rates left adjudicators feeling "somewhat vulnerable."²³ In any event, during April 1997—the month in which the Immigration Department conducted interviews for applicants for reappointment—the set-aside rate plummeted to 2.7%.²⁴

Having come to know several RRT members, I cannot help but feel sad both for those RRT members who were nonrenewed—just as I would feel sad for any person who loses his or her job—and for those RRT and IRT

22. Honorable Philip Ruddock, Media Release, *Reappointments to Refugee Review Tribunal*, Parliament House, Canberra, Sydney, May 28, 1997 (available from Refugee Review Tribunal, Sydney).

23. Senate Legal and Constitutional Legislation Comm., The Parliament of the Commonwealth of Australia, *Consideration of Legislation Referred to the Committee, Migration Legislation Amendment Bill (No. 4) 1997, Migration Legislation Amendment Bill (No. 5) 1997* (Oct. 1997) (Minority Rpt. of Sens. Bolkus, McKiernan & Murray) [hereafter Senate Report].

24. *See id.*

members who will stay on in a climate increasingly afflicted with pressure to reach particular decisions, stress, and waning morale. But with all respect to the members of the RRT and the IRT, my principal concern is not for them. It is for the thousands of refugee claimants, present and future, who depend on the RRT and IRT for fair and independent evaluation of their cases.

Among us we might have different views about precisely which ingredients are essential to fair procedure. But I suspect we all agree that above everything else, one feature is indispensable—an unbiased adjudicator. If it is justice that one desires, and not politics, the adjudicator must base the factual findings solely on the evidence and the legal conclusions solely on his or her honest and well-considered interpretations of the applicable laws, not on the basis of the adjudicator's personal interest. In all candor, I do not see how that is even remotely possible when every adjudicator is made to feel "if I rule in favor of the applicant, I could lose my job." From my own conversations with several RRT members, there is no doubt whatever that, rightly or wrongly, they perceive precisely that kind of pressure.

To be sure, there are countries in which the situation is worse. In Colombia, the drug cartel makes it known that federal judges risk their lives by ruling unfavorably to the defendants. In Australia, the Minister of Immigration is not threatening the lives of RRT or IRT members; he is threatening only their livelihoods. But the difference is just one of degree. The principle is the same: *The adjudicator's own personal interests cannot be made to hinge on his or her decision.* If it is otherwise, can anyone seriously maintain that a fair hearing is possible? Would any readers of this article want their cases to be decided by people who had been told in no uncertain terms that they could lose their jobs by ruling in your favor?

In an attempt to justify this sequence of explicit warnings followed by mass nonrenewals, it is sometimes discreetly whispered that some of the RRT members had been appointed solely because of their political or personal connections in the first place. Thus, the argument seems to run, the Minister is merely replacing poorly qualified individuals with those who have better credentials.

I have no idea to what extent the premise is true. But even if one assumes a high correlation between those individuals whose initial qualifications were seen as unimpressive and those who were actually nonrenewed—a premise that no one has even asserted, much less demonstrated—it does not improve the quality of the decisionmaking to pressure RRT or IRT members to reach decisions favorable to the Department.

In response to the comments made in the speech on which the present article was based, the Minister seemed to suggest that he has been misunderstood. As the Minister sees it, RRT members were not threatened

with nonrenewal, and were not actually nonrenewed, simply because they ruled against his Department. They were nonrenewed because they were renegades, creating their own law, going off on what the Minister called "frolics" of their own (and for other reasons, such as low productivity).²⁵

With respect, that is not much of an answer either. As already noted, the law is couched in broad enough language that interpreting it and applying it to unanticipated fact situations require the exercise of judgment. Consequently, reasonable minds can disagree when faced with two possible outcomes. Finding the refugee claimant's legal arguments convincing cannot be equated with "going outside the law" and cannot be regarded as a fair basis for nonrenewal—not if an adjudication system is to maintain its integrity and command the confidence of the public.

Nor are such tactics even necessary. In the overwhelming majority of cases, the government position has always prevailed. In the small percentage of cases in which the applicant's position prevails, Parliament has given the Minister a legal means to challenge a decision he or she believes to be wrong—apply for judicial review in the Federal Court of Australia.²⁶

For all these reasons, it is both dangerous and unnecessary to signal adjudicators that ruling in favor of a particular party can be hazardous to their jobs. More radical still would be for the Department to be able to explicitly direct a tribunal to rule in its favor. Yet the Minister has now introduced legislation that would empower him to do precisely that.²⁷

On June 5, 1997, the Minister expressed anger over decisions by two RRT members granting asylum to East Timorese applicants. The two members had rejected the request of the Principal Member of the RRT to defer their decisions.²⁸ In light of a recent Federal Court of Australia decision leaving open the possibility that Portugal would not afford effective protection to East Timorese asylum claimants,²⁹ these cases too presented issues on which reasonable minds could differ.

Again, however, it was what happened next that should command our attention. The newspaper report stated that the decisions might "hasten the introduction of Government measures giving Mr. Ruddock the power to 'direct' tribunal members in their handling of cases."³⁰ Of course, express

25. Speech by Honorable Philip Ruddock, Minister of Immigration, Sydney, Australia (June 6, 1997).

26. See Migration Act 1958, § 479 (Cth).

27. See Migration Legislation Amendment Bill (No. 4) (1997); see also Michael Millett, *Asylum Granted Despite Order*, SYDNEY MORNING HERALD, June 5, 1997, at 3.

28. See Millett, *supra* note 27.

29. See *Jong Kim Koe v. Minister for Immigration and Multicultural Affairs* (1997) 306 F.C.A.

30. Millett, *supra* note 27.

directions would be even more extreme than subtle pressures. Nor is there any obvious reason even to have a tribunal to review Department decisions if the Department can direct the tribunal to reach a particular result.

The combination of the measures thus far taken or proposed is more dramatic than the sum of its parts. Stripping the *administrative* tribunals of their independence while simultaneously eliminating effective *judicial* review means that crucial life interests will be adjudicated by political officials without *any* meaningful review by an independent adjudicative body. That result might be precisely what the government wants, but such a system cannot in any realistic sense be called a justice system. It is a system of adjudication by opinion poll and executive fiat.

I have expressed some strongly held views, and I want to be clear that although I have referred to the Minister's statements and actions, my comments are not meant to be personal. I have had the pleasure of spending an evening with Mr. Ruddock and have found him to be a capable and knowledgeable man. I also recognize that the Minister of Immigration does not act in isolation. He is part of a larger team that takes major decisions collectively.

However, the independence of those who decide cases is indispensable, and not only because it is difficult to imagine fair and accurate determinations by an adjudicator whose job depends on the outcome of the case. Independence is also essential to the constitutional tradition of separation of powers. If the government of the day can legislate, execute and effectively direct the outcome of adjudication, the dangerous concentration of power that the principle of separation of powers was designed to avoid will be inevitable.

It is critical, therefore, that the government of *every* country look beyond the immediate frustration of occasional defeats in a tribunal or court. There is much more at stake for Australia than the procedure for adjudicating refugee claims. At stake is that nation's very commitment to a justice system worthy of the name.

I hope the government will ask itself what kind of justice system a country with Australia's proud history should guarantee to its society's most vulnerable members when profound life and liberty interests are at stake. I hope the government will consider how the international community will view the efforts of a Refugee Convention signatory to politicize the adjudication of refugee cases. And I hope the government will think about how historians ten or twenty or fifty years from now will look upon the decisions that the government makes today.

The Immigration Department should ask itself all those questions. If it does, it might well conclude that an independent tribunal whose members are

encouraged to reach the decisions that they believe the facts and the law require is not such a terrible thing—even if it means that, every once in a while, the Department is going to lose a case.