Meshea

ANNUAL IMMIGRATION JUDGES CONFERENCE BANQUET

SAN DIEGO, CALIFORNIA
TUESDAY, NOVEMBER 19, 1985, 7:00 P.M.
BEL AIRE BALLROOM SOUTH
SHERATON HARBOR ISLAND WEST HOTEL

GOOD EVENING LADIES AND GENTLEMEN. IT IS A REAL HONOR TO BE HERE TONIGHT. CHIEF JUDGE ROBIE WAS KIND ENOUGH TO ALLOW ME TO PICK MY OWN TOPIC AND I THOUGHT I WOULD TALK TO YOU A LITTLE BIT ABOUT MY PERSPECTIVES ON BEING A JUDGE. A QUESTION I GET ASKED FREQUENTLY THESE DAYS IS, WHY DO I WANT TO BE A JUDGE. THIS IS A MATTER THAT I HAVE GIVEN CONSIDERABLE THOUGHT SINCE, AFTER ALL, IT LOOKS LIKE I'LL BE SPENDING THE NEXT 40 OR 50 YEARS ON THE BENCH.

IT WAS NOT EASY TO COME TO GRIPS WITH MY MOTIVATION, BUT AFTER CONSIDERABLE SOUL-SEARCHING AND SELF-ANALYSIS, I THINK I'VE FIGURED IT OUT: I'M IN IT FOR THE MONEY!

NOW I KNOW WHAT YOU'RE THINKING. WE'VE ALL HEARD ABOUT THE EROSION OF JUDICIAL SALARIES AND HOW JUDGES ARE LEAVING THE BENCH TO PUT THEIR KIDS THROUGH COLLEGE. BUT I THINK THAT LOOKING AT SALARY ALONE GIVES A DISTORTED PICTURE. THERE ARE A LOT OF FRINGE BENEFITS IN BEING A JUDGE, MANY OF THEM WORTH REAL MONEY. WHEN YOU ADD IT ALL UP, IT'S NOT BAD AT ALL.

FOR EXAMPLE, HAVE YOU EVER CONSIDERED WHAT IT'S WORTH TO HAVE PEOPLE STAND UP WHEN YOU WALK INTO THE ROOM? I HAVE AND I'VE DECIDED IT'S WORTH EXACTLY $12.50. WELL, I'M IN COURT A LOT. TWELVE-FIFTY WHEN I WALK IN AND TWELVE-FIFTY WHEN I WALK OUT. TWO SESSIONS A DAY, THAT'S $50, NOT EVEN COUNTING RECESSES. I TEND TO SIT ABOUT 200 DAYS A YEAR, THAT'S $10,000 RIGHT THERE.

THEN THERE ARE OTHER BENEFITS. YOU GET TO WEAR A ROBE. OTHER PEOPLE ONLY GET TO WEAR COSTUMES NEW YEAR'S EVE OR HALLOWEEN. ROBES TURN OUT TO HAVE REAL PRACTICAL VALUE -- YOU GET A LOT MORE MILEAGE OUT OF A CLEAN SHIRT AND TIE, NOT TO MENTION THE SAVINGS IN WEAR-AND-TEAR ON YOUR SUIT JACKETS. OVERALL, I BET THE ROBE SAVES ME $1,500 A YEAR IN DRY CLEANING ALONE.

THEN THERE IS THE FACT THAT NO ONE EVER TELLS YOU THAT YOU DID OR SAID SOMETHING REALLY STUPID. AT TIMES THE COURT MAY BE MISGUIDED; OR HIS HONOR MAY HAVE A VERY INTRIGUING POINT THAT NEEDS FURTHER BRIEFING; OR, ONCE IN A WHILE, THE JUDGE MAY HAVE--UNDERSTANDABLY ENOUGH--OVERLOOKED AN ARGUMENT. BUT NO ONE EVER TELLS YOU YOU'RE WAY OUT IN LEFT FIELD; OR THAT YOU'VE MISSED THE BOAT; OR THAT YOU OUGHT TO HAVE YOUR HEAD EXAMINED. NOW I TEND TO PULL QUITE A FEW BONERS--I COUNTED 78 LAST YEAR ALONE. WHEN I WAS IN PRIVATE PRACTICE I WOULD GLADLY HAVE PAID UP TO $150 TO AVOID BEING CALLED ON THE CARPET FOR MY

GOOFUPS. SEVENTY-EIGHT TIMES $150 AMOUNTS TO ALMOST $12 THOUSAND I MADE ON THIS ITEM LAST YEAR.

THERE ARE ALSO SOCIAL BENEFITS. MOST JUDGES I KNOW GET LOTS OF DINNER INVITATIONS. AS CALVIN COOLIDGE USED TO SAY ABOUT SOCIETY DINNERS, "YOU HAVE TO EAT SOMEWHERE." MY STANDARDS FOR ACCEPTING DINNER INVITATIONS ARE VERY STRINGENT: I GO TO NO MORE THAN ONE DINNER A NIGHT. THE SAVINGS IN GROCERIES ALONE MUST COME TO $2,000 A YEAR.

THERE ARE OTHER THINGS. YOU GET A PARKING SPACE NEAR THE DOOR. WORTH SAY $45 A MONTH IN DOWNTOWN WASHINGTON. MORE, IF YOU TAKE INTO ACCOUNT THAT IN WASHINGTON HAVING YOUR CAR HANDY GIVES YOU A LEG UP ON MUGGERS. THAT SAVES ANOTHER $500 A YEAR IN CASH AND PERHAPS $200 ON YOUR MEDICAL DEDUCTIBLE.

AND WHEN'S THE LAST TIME YOU HEARD OF A FEDERAL JUDGE BEING AUDITED BY THE IRS? NOT THAT ANY TAX DOLLARS ARE SAVED THAT WAY, OF COURSE, BECAUSE JUDGES TEND TO BE PRETTY CONSERVATIVE ABOUT THE DEDUCTIONS THEY TAKE. BUT AVOIDING THE HASSLE AND ACCOUNTANT FEES IS SURELY WORTH SOMETHING, SAY $300.

NOW HERE'S ANOTHER GOODIE: NO HARD DEADLINES. WHICH ONE OF US DOES NOT REMEMBER WAKING UP IN THE MIDDLE OF THE NIGHT IN A COLD SWEAT WONDERING WHETHER WE MISSED A FILING

DEADLINE THAT WOULD COST THE CLIENT FIFTEEN MILLION DOLLARS? JUDGES HAVE NO SUCH NIGHTMARES. IN FACT, I KNOW JUDGES WHO TERRORIZE LAWYERS FOR GETTING A BRIEF IN ONE DAY LATE BUT ARE THEMSELVES FOUR YEARS BEHIND IN THEIR OPINIONS.

NOW THIS NEXT ITEM IS WHERE I REALLY CLEAN UP: EVERYBODY ALWAYS LAUGHS AT THE JUDGE'S JOKES, FUNNY OR NOT. I, FOR ONE, HAVE THEM ROLLING IN THE AISLES WITH SUCH WITICISMS AS THE FOLLOWING: "OK FOLKS, WE'RE HAVING A STATUS CONFERENCE NEXT WEEK. BE THERE OR BE SQUARE." LAUGHTER, THEY SAY IS GOOD FOR YOU. I HAVE HAD OCCASION TO STUDY JUST HOW GOOD: BY MY COUNT A GUFFAW IS WORTH ABOUT $17; A BELLY LAUGH ABOUT $13, AND A CHUCKLE ABOUT $5. ON A GOOD DAY, I CAN RAKE IN ABOUT $200 IN LAUGHS ALONE.

THERE ARE ALSO SOME BIG BENEFITS THAT HAVE TO BE FIGURED IN. THE VALUE OF A LIFETIME EMPLOYMENT CONTRACT IS NOT REFLECTED BY A WEEKLY PAYCHECK. A PERSON MY AGE WOULD HAVE TO PAY $1,700 A MONTH, MORE THAN $20,000 A YEAR, FOR A DISABILITY POLICY PAYING THE SALARY OF A CIRCUIT JUDGE.

AND THERE ARE SMALL BENEFITS AS WELL. FOR INSTANCE, YOU GET TO CALL OTHER JUDGES BY THEIR FIRST NAMES. THAT'S WORTH MAYBE SIXTY OR SEVENTY-FIVE CENTS PER NAME. I KNOW A LOT OF JUDGES. IT ADDS UP.

BEST OF ALL, THESE BENEFITS ARE TAX-FREE. THAT MEANS THAT WHEN YOU COUNT THEM UP, YOU HAVE TO DOUBLE THEIR CASH VALUE. WHEN YOU DO THAT, YOU FIND THAT, FAR FROM BEING UNDERPAID, FEDERAL JUDGES ARE IN FACT RICHLY REWARDED, GETTING THE EQUIVALENT OF SOME $250,000 A YEAR. WELL FOLKS, THAT'S AN OFFER I JUST COULDN'T TURN DOWN.

HOWEVER, NOT ALL THE REWARDS OF BEING A JUDGE ARE TANGIBLE. ARISTOTLE SAID THAT THE LAW IS REASON FREE FROM PASSION, AND ONE OF THE GREAT INTANGIBLE BENEFITS OF BEING A JUDGE IS THE OPPORTUNITY TO THINK ABOUT THE LAW OBJECTIVELY. ABSTRACT STUDY OF THE LAW IS SOMETHING THAT HAS FASCINATED ME FOR MANY YEARS. INDEED, IT IS PART OF MY JEWISH HERITAGE.

I HAVE RECENTLY HAD OCCASION TO STUDY MORE CLOSELY THE PRINCIPLES OF JEWISH LAW AND FOUND AN AMAZINGLY COHERENT LEGAL SYSTEM DEVELOPED OVER THE CENTURIES IN VARIOUS COMMUNITIES WHERE JEWS HAVE LIVED. I LEARNED, SOMEWHAT TO MY SURPRISE, THAT MANY JEWISH COMMUNITIES WERE ABLE TO OBTAIN AUTONOMY FROM LOCAL RULERS, GIVING RABBINICAL COURTS CIVIL AND EVEN CRIMINAL JURISDICTION. IF YOU THINK COURTS TODAY ARE JEALOUS OF THEIR JURISDICTION, LET ME TELL YOU ABOUT RABBI JOSEPH COLON, ONE OF THE GREATEST ITALIAN RABBIS, WHO LIVED DURING THE FIFTEENTH CENTURY. RABBI COLON ORDERED THE EXCOMMUNICATION OF A JEW WHO HAD SUED ANOTHER

JEW IN THE GENTILE COURTS, UNLESS HE DISMISSED THE SUIT AT ONCE.

IN EXERCISING THEIR JURISDICTION, THE RABBINICAL COURTS ADDRESSED A LARGE VARIETY OF ISSUES, FROM TORTS AND CONTRACTS, TO DEFAMATION AND INHERITANCE. COMPLEX RULES WERE DEVELOPED AS TO THE RIGHTS OF CREDITORS, INCLUDING INSOLVENCY PROCEEDINGS, AS WELL AS RIGHTS TO REAL AND PERSONAL PROPERTY. IN DEVELOPING THESE RULES, THE TALMUDIC SCHOLARS WERE GUIDED BY A BASIC DOCUMENT, THE BIBLE, WHOSE WORDS WERE INTERPRETED AND REINTERPRETED OVER THE CENTURIES TO DEAL WITH THE CHANGING REALITIES OF LIFE IN THE DIASPORA.

THE MANNER IN WHICH THE RABBINICAL SCHOLARS USED THIS PROCESS OF INTERPRETATION IS BOTH INTERESTING AND INSTRUCTIVE. FOR EXAMPLE, A PASSAGE IN DEUTERONOMY CALLS FOR THE EXECUTION BY STONING OF A SON WHO IS REBELLIOUS, NOT WHAT WE WOULD TODAY CONSIDER A CAPITAL OFFENSE. THE TALMUDIC SCHOLARS WERE TROUBLED BY THIS PASSAGE, BUT FELT CONSTRAINED TO GIVE IT EFFECT FOR IT WAS, AFTER ALL, GOD'S COMMAND. BUT THEY PROCEEDED TO ROB THE PASSAGE OF ALL MEANING BY INTERPRETING IT IN THE NARROWEST POSSIBLE FASHION.

THUS THE PASSAGE WAS CONSTRUED TO APPLY EXCLUSIVELY TO SONS AND NOT TO DAUGHTERS. MOREOVER, BOTH MOTHER AND

FATHER HAD TO JOIN IN THE COMPLAINT AGAINST THE SON; IF EITHER REFUSED, OR WAS DEAD OR ABSENT, THE CASE COULD NOT BE BROUGHT. MOREOVER, SINCE THIS WAS A CRIMINAL OFFENSE, IT COULD NOT BE APPLIED AGAINST MINORS AT ALL, THAT IS, AGAINST BOYS LESS THAN 13 YEARS OLD. AT THE SAME TIME, THE DEFENDANT HAD TO BE A "SON," A TERM THAT WAS CONSTRUED TO EXCLUDE ANYONE WHO HAD GROWN A BEARD, WHICH WAS LATER CONSTRUED FURTHER AS EXCLUDING THOSE HAVING ANY BODY HAIR EVIDENCING SEXUAL MATURITY.

WHILE DEFINING THE CATEGORY OF THE OFFENDER NARROWLY, THE RABBINICAL SCHOLARS DEFINED THE REQUIREMENTS OF THE OFFENSE ITSELF BROADLY. THUS, THE BIBLICAL INJUNCTION WAS READ AS PROHIBITING NOT ONLY SERIOUS REVILING OF MOTHER AND FATHER, BUT DOING SO WHILE ALSO BEING A "GLUTTON AND DRUNKARD." TO QUALIFY FOR GLUTTONY AND DRUNKENESS, THE OFFENDER HAD TO CONSUME LARGE AND PRECISELY DEFINED QUANTITIES OF FOOD AND ALCOHOL IN A SINGLE SITTING, AND THE MONEY FOR THESE EXCESSES HAD TO BE STOLEN FROM MOTHER AND FATHER. WHEN ALL OF THE REQUIREMENTS WERE READ TOGETHER, THE OFFENSE CALLED FOR AN ASTONISHING DEGREE OF MISCHIEF IN A FAIRLY SHORT PERIOD OF TIME, SOMETHING BEYOND THE CAPACITY OF MOST 13 YEAR OLDS EVEN TODAY. AS A CONSEQUENCE, I HAVE FOUND NO RECORD THAT ANYONE EVER SUFFERED THE PUNISHMENT CALLED FOR IN THE REBELLIOUS SON PASSAGE OF DEUTERONOMY. NOW, LADIES AND GENTLEMEN, THAT'S WHAT I CALL JUDICIAL ACTIVISM.

THE RABBIS DEALT WITH EQUAL IMAGINATION WITH OTHER PASSAGES IN THE BIBLE THAT PROVED INCONVENIENT IN LIGHT OF EVOLVING MORES AND CIRCUMSTANCES. THUS, THE BIBLE CLEARLY APPEARS TO SANCTION POLYGAMY, AT LEAST FOR MEN. THIS PRACTICE BECAME A PROBLEM, PARTICULARLY FOR JEWS LIVING IN CHRISTIAN COMMUNITIES WHERE POLYGAMY WAS PROHIBITED. AT FIRST, THE RABBIS SOUGHT TO LIMIT THE PRACTICE BY RULING THAT MONOGAMY WAS AN IMPLICIT TERM OF THE MARRIAGE CONTRACT. THIS RATIONALE PROVED INADEQUATE, IN PART BECAUSE A HUSBAND COULD OBTAIN THE FIRST WIFE'S CONSENT TO ACQUIRE A SECOND WIFE. AROUND THE 13TH CENTURY RABBI GERSHOM BEN JUDAH RULED THAT A MAN COULD ACQUIRE A SECOND WIFE ONLY AFTER OBTAINING PERMISSION FROM NO FEWER THAN 100 RABBIS IN THREE COUNTRIES. ONCE AGAIN, THE BIBLICAL SANCTION OF POLYGAMY WAS NOT FORMALLY REVERSED BUT IT WAS RENDERED A NULLITY IN PRACTICE.

ASIDE FROM SATISFYING AN ACADEMIC INTEREST, THE STUDY OF JEWISH LAW LEADS ME TO SOME INTERESTING OBSERVATIONS. THE FIRST IS THAT SHAPING OF THE LAW THROUGH JUDICIAL DECISION IS A NATURAL AND TIME-HONORED PROCESS. ABSENT A LEGISLATURE THAT COULD CONFORM THE LAW TO CHANGING CIRCUMSTANCES, THE RABBINICAL SCHOLARS ACTED AS JUDGES, COMMENTATORS AND DEVELOPERS OF THE LAW, AND DID AN EXCEEDINGLY FINE JOB OF IT. WE HAVE SEEN THIS PROCESS AT WORK IN OTHER PLACES AS WELL. THE ENGLISH COMMON LAW SYSTEM IS A SOMEWHAT ANALOGOUS EXAMPLE. OUR MODERN SYSTEM OF VESTING LAW-

MAKING AUTHORITY IN ONE PART OF THE GOVERNMENT, AND ENTRUSTING THE COURTS ONLY WITH ITS INTERPRETATION, IS A RELATIVELY RECENT DEVELOPMENT.

THIS LEADS TO ANOTHER OBSERVATION: THE PROCESS OF INTERPRETATION IS AN EXCEEDINGLY FLEXIBLE ONE AND NOT ALWAYS READILY DISTINGUISHABLE FROM THE PROCESS OF LEGISLATION. AS THE RABBICAL SCHOLARS PROVED, WITH ENOUGH TIME AND IMAGINATION, THERE IS ALMOST NO LIMIT TO THE RESULTS ONE CAN REACH BY INTERPRETING APPARENTLY CLEAR LANGUAGE. NOW THE JEWISH SCHOLARS HAD A PRETTY GOOD REASON FOR THIS. WHEN ONE IS INTERPRETING THE WORD OF GOD, THERE IS NO REASONABLE HOPE THAT UNEXPECTED PROBLEMS WILL BE CORRECTED DURING THE NEXT SESSION OF THE LEGISLATURE. WHEN INTERPRETING STATUTES, OR EVEN A CONSTITUTION THAT IS SUBJECT TO AMENDMENT, THERE IS FAR LESS EXCUSE FOR USING THE PROCESS OF INTERPRETATION IN THIS FASHION. IF A FAIR CONSTRUCTION OF THE LAW LEADS TO AN ABSURD OR UNDESIRABLE RESULT, ONE WILL NOT HAVE TO AWAIT THE COMING OF THE MESSIAH TO OBTAIN RELIEF. FOR BETTER OR WORSE, CONGRESS AND MOST STATE LEGISLATURES ARE IN SESSION YEAR IN AND YEAR OUT, DUTIFULLY SEEKING TO SOLVE ALL OUR PROBLEMS BY PASSING MORE LAWS.

UNFORTUNATELY, THE ROLE OF THE JUDGE AS A LAWMAKER RATHER THAN MERE INTERPRETER, IS A DIFFICULT ONE TO FORGET. CONSCIOUSLY OR UNCONSCIOUSLY, THE OTHER BRANCHES OF

GOVERNMENT HAVE COME TO RELY ON JUDGES TO AVOID ABSURD OR UNDESIRABLE RESULTS THROUGH CREATIVE INTERPRETATION. THUS, IT IS MORE AND MORE USUAL TO FIND STATUTES WRITTEN IN MURKY LANGUAGE, AS IF DESIGNED TO HIDE THE INTENT OF THE LEGISLATURE. OR, ONE FINDS LANGUAGE THAT APPEARS TO BE CLEAR ON ITS FACE BUT THAT IS CONTRADICTED BY EQUALLY CLEAR LANGUAGE ELSEWHERE IN THE SAME STATUTE OR IN THE LEGISLATIVE HISTORY. OR, ONE FINDS LANGUAGE OF SUCH GENERALITY THAT THE COURTS, IN INTERPRETING IT, MUST PROVIDE THE POLICY CONTENT THAT IS OTHERWISE MISSING.

THE REASONS FOR THIS PHENOMENON ARE NO SECRET. SOMETIMES THE LEGISLATURE AGREES UPON A PARTICULAR MEANING BUT FAILS TO EXPRESS IT CORRECTLY OR PRECISELY BECAUSE OF POOR DRAFTSMANSHIP. MORE OFTEN, HOWEVER, THE USE OF IMPRECISE OR MISLEADING LANGUAGE BECOMES A TOOL OF LEGISLATIVE COMPROMISE. IT AVOIDS THE DIFFICULT POLITICAL CHOICES THAT HAVE TO BE MADE WHERE A STATUTE IS DRAFTED CLEARLY. WHEN STATUTORY LANGUAGE IS SUBJECT TO VARYING INTERPRETATIONS, ALL SIDES CAN CLAIM VICTORY, IN THE HOPE THAT THE COURTS WILL EVENTUALLY ADOPT THEIR POSITION. SO THEY AGREE TO DISAGREE AND THEN TRY TO SHADE THE PROCESS OF INTERPRETATION BY SPRINKLING THE RECORD WITH CONTRADICTORY SNIPPETS OF LEGISLATIVE HISTORY.

THIS IS NOT, IN MY VIEW, A HEALTHY PROCESS. WHETHER IT HAPPENS AS A RESULT OF POOR DRAFTSMANSHIP OR BY INTENT, WHEN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF GOVERNMENT PASS STATUTES THAT ARE DEVOID OF OBJECTIVE CONTENT, THEY ABDICATE THEIR RESPONSIBILITY TO MAKE THE LAW. UNDER OUR SYSTEM OF GOVERNMENT THERE IS, OF COURSE, GOOD REASON WHY LAW IS TO BE MADE BY ELECTED OFFICIALS AND NOT THE JUDICIARY: IF THE LAW IS TO CONFORM BY AND LARGE TO POPULAR WILL, IT SHOULD BE SHAPED BY THOSE WHO HAVE TO STAND FOR RE-ELECTION AND NOT BY THOSE WHO ARE SHIELDED FROM THE POLITICAL PROCESS BY LIFE TENURE. LEGISLATORS ARE ABLE TO ESCAPE POPULAR WRATH FOR UNPOPULAR LEGISLATIVE CHOICES BY AGREEING TO LANGUAGE THAT IS NEBULOUS AND THEN BASHING THE COURTS AS ACTIVIST WHEN THEY ADOPT A MEANING THAT TURNS OUT TO BE POLITICALLY INCONVENIENT.

THIS PROCESS ALSO HAS UNHEALTHY EFFECTS ON THE JUDICIARY. AS I NOTED BEFORE, THE PROCESS OF MAKING LAW THROUGH JUDICIAL DECISION IS A SEDUCTIVE ONE. IT IS VERY TEMPTING TO USE CREATIVE INTERPRETATION TO CURE A VARIETY OF ILLS, FROM POOR LEGISLATIVE DRAFTSMANSHIP TO MORE SUBSTANTIVE PROBLEMS IN OUR SOCIETY. BY CONSTANTLY DEALING WITH STATUTES THAT MEAN LITTLE OR NOTHING ON THEIR FACE, OR WHOSE PLAIN MEANING IS UNDERCUT BY LEGISLATIVE HISTORY, JUDGES AND LAWYERS TEND TO FORGET THAT STATUTORY LANGUAGE IS THE PRINCIPAL OR EVEN DISPOSITIVE INDEX OF THE LEGISLATIVE WILL. IT IS DISCONCERTING TO NOTE HOW FREQUENTLY I

SEE BRIEFS THAT START AN ARGUMENT WITH REFERENCE TO THE LEGISLATIVE HISTORY AND CONTINUE ON TO DISCUSS POLICY, OVERLOOKING THE STATUTORY LANGUAGE ALTOGETHER.

BY AND LARGE COURTS HAVE DONE THEIR BEST TO DEAL WITH THIS ABDICATION OF RESPONSIBILITY BY THE OTHER BRANCHES OF GOVERNMENT, INTERPRETING MURKY LANGUAGE, SUPPLYING POLICY CONTENT AND RECONCILING CONFLICTS BETWEEN STATUTE AND LEGISLATIVE HISTORY. BUT IN SO DOING, THEY HAVE BEEN ABETTING A PROCESS THAT UNDERMINES OUR TRIPARTITE SYSTEM OF GOVERNMENT AND THAT BRINGS THE JUDICIARY INTO DISREPUTE. I AM PERSONALLY CONVINCED, FOR EXAMPLE, THAT THE CURRENT CONTROVERSY OVER WHETHER JUDGES ARE TOO ACTIVIST IS DUE IN LARGE PART TO THIS PHENOMENON, AND NOT TO AN INHERENT TENDENCY OF JUDGES TO GRAB POWER.

THE SOLUTIONS TO THIS PROBLEM, IF ONE AGREES IT IS A PROBLEM, ARE NOT EASY, AND FULL RESOLUTION MAY NOT BE POSSIBLE. IN MY VIEW, HOWEVER, COURTS HAVE A RESPONSIBILITY TO RESIST THE LEGISLATIVE SLEIGHT OF HAND THAT SHIFTS THE POLICY DEBATE FROM THE FLOOR OF CONGRESS TO THE WELL OF THE COURTROOM. ONE POSSIBLE TECHNIQUE IS TO INTERPRET STATUTORY LANGUAGE AS WRITTEN, REGARDLESS OF WHAT MIGHT BE DIRE CONSEQUENCES. THE SUPREME COURT DID SO IN TVA V. HILL, WHERE CONSTRUCTION OF THE TELLICO DAM WAS HALTED TO AVOID DESTRUCTION OF THE SNAIL DARTER, A TINY FISH. WHILE

THE CASE CAUSED MUCH HAND-WRINGING AT THE TIME, IT SQUARELY PLACED RESPONSIBILITY FOR THE RESULT -- DESIRABLE OR NOT -- ON CONGRESS WHERE IT BELONGED. ONE CAN ONLY WONDER WHAT WOULD HAVE HAPPENED IF THE COURTS HAD INTERPRETED SECTION 1 OF THE SHERMAN ANTITRUST ACT IN THE SAME STRAIGHTFORWARD FASHION. THAT SECTION, AS YOU MAY RECALL, PROHIBITS ALL CONSPIRACIES IN RESTRAINT OF TRADE, USING LANGUAGE THAT LITERALLY COVERS ALL CONTRACTS. THE COURTS LOOKED AT THAT LANGUAGE AND DECIDED THAT IT COULD NOT MEAN WHAT IT SAID AND THEREFORE READ THE WORD "UNREASONABLE" INTO THE SECTION. BY SO DOING, THE COURTS AGREED TO PROVIDE POLICY CONTENT TO A STATUTE THAT HAD NONE. WHETHER ONE IS HAPPY WITH THE DEVELOPMENT OF ANTITRUST LAW OVER THE PAST 95 YEARS OR NOT, THE FACT REMAINS THAT IT IS LARGELY JUDGE-MADE LAW, AN ABDICATION OF LEGISLATIVE WILL.

ANOTHER POSSIBLE WAY OF DEALING WITH THIS PROBLEM IS TO REFUSE TO GIVE EFFECT TO LEGISLATION WHERE THERE IS SIGNIFICANT DOUBT AS TO WHETHER THE PARTICIPANTS IN THE ENACTMENT PROCESS IN FACT HAD A MEETING OF THE MINDS. THIS IS A BLUNT TOOL AND OUGHT TO BE USED WITH SOME CARE. BUT IT IS NOT THAT RARE TO RUN INTO A STATUTE THAT IS SERIOUSLY INTERNALLY INCONSISTENT, OR WHERE CLEAR STATUTORY LANGUAGE IS CONTRADICTED BY EQUALLY CLEAR LANGUAGE IN THE LEGISLATIVE HISTORY.

SUCH INSTANCES ARE DISTURBING BECAUSE THEY RAISE SERIOUS DOUBTS WHETHER ALL OF THOSE WHO, UNDER OUR CONSTITUTION, ARE SUPPOSED TO ASSENT TO LEGISLATION BEFORE IT IS ENACTED, IN FACT WERE AGREEING TO THE SAME THING. WHAT IF THERE IS SIGNIFICANT PROOF THAT THEY DID NOT? DOES THE PRODUCT OF THEIR EFFORTS STILL BECOME LAW? WE ALL REMEMBER FROM LAW SCHOOL THE CASE INVOLVING THE TWO SHIPS PEERLESS, WHERE THE COURT HELD THAT NO CONTRACT EXISTED BECAUSE OF A MUTUAL MISTAKE OF FACT BETWEEN THE CONTRACTING PARTIES. OUGHT LEGISLATION, WHICH HAS EFFECTS FAR GRAVER THAN A PRIVATE CONTRACT, BECOME OPERATIVE UNDER SIMILAR CIRCUMSTANCES?

FORTUNATELY, THIS IS AN AFTER-DINNER SPEECH AND NOT AN OPINION. NONE OF US ARE CALLED UPON TONIGHT TO SOLVE THESE PROBLEMS. BUT, AS COLLEAGUES ON THE BENCH, YOU NO DOUBT HAVE HAD SOME OF THE SAME FRUSTRATIONS WITH LEGISLATION, AND I THEREFORE THOUGHT I WOULD SHARE WITH YOU SOME OF MY EMBRIONIC THOUGHTS ON THE SUBJECT.

I DO WANT TO CLOSE ON A PERSONAL NOTE. AS YOU ARE AWARE, I AM A PRODUCT OF OUR IMMIGRATION SYSTEM, HAVING COME TO THIS COUNTRY WITH MY PARENTS AS REFUGEES FROM COMMUNISM IN 1962. WE GOT OUR GREEN CARDS -- AND THEY WERE REALLY GREEN AT THE TIME -- TWO YEARS LATER, AND IN 1968 WE BECAME NATURALIZED U.S. CITIZENS. OUR PAPERS WERE

PROCESSED THROUGH INS IN LOS ANGELES, AND WE TOOK THE OATH OF CITIZENSHIP IN THE DISTRICT COURT IN L.A.

THESE WERE SIGNIFICANT EVENTS IN MY LIFE AND I REMEMBER THEM WELL. I HAVE GREAT RESPECT FOR THOSE WHO RUN OUR IMMIGRATION SYSTEM, AS WELL AS A LOT OF GRATITUDE FOR HAVING MADE IT POSSIBLE FOR ME TO BE IN THIS COUNTRY AND BECOME ONE OF ITS CITIZENS. WHATEVER MEASURE OF SUCCESS I ENJOY IS DUE IN A VERY REAL SENSE TO THOSE FOLKS WHO ENABLED ME TO BE HERE IN THE FIRST PLACE.

I WANT YOU TO KNOW THAT I THINK THE WORK YOU ARE DOING IS EXCEEDINGLY IMPORTANT; THE SYSTEM YOU HELP TO IMPLEMENT IS PART OF THE LIFEBLOOD OF OUR COUNTRY. I ALSO WANT YOU TO KNOW THAT YOU HAVE A FRIEND IN ME. IF THERE IS ANYTHING I CAN EVER DO TO HELP YOU DO YOUR JOB BETTER, PLEASE DO NOT HESISTATE TO CALL.

LN:MLS:WDE