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THE CHECKING VALUE OF THE INDEPENDENT AMERICAN LAWYER: AN ESSAY IN HONOR OF IRA J. KURZBAN*

BRUCE J. WINICK**

In a recent conference held at the University of Miami School of Law, Professor Irwin Stotzky brought together an impressive group of international scholars, jurists, government officials, and attorneys to ruminate on the subject of "Transition to Democracy in Latin America: The Role of the Judiciary." In a series of separately focused sessions, these distinguished panelists discussed such subjects as "The Independence of the Judiciary," "The Judicial Process: The Trial," "The Role of the Prosecutor," and "Judicial Review and Remedies." The courts, of course, play a crucial role in a democratic society. As Tocqueville showed more than a century ago, the courts play an especially significant role in American democracy.¹

Because the American model of democracy is so highly regarded throughout the world, the role of American courts in expanding and protecting democratic principles is of special interest to any student of the transition to democracy. Yet, though the conference analyzed in detail the roles of the judiciary and of the prosecutor, it omitted one crucial area of the judicial process that makes American democracy so unique. That unexamined area is the crucial role played by the independent American lawyer acting as a significant check against governmental abuses.

The "checking value"² of the independent lawyer in America is deeply imbedded in our history and traditions, going back to colonial times. By challenging governmental action in courts, both in the representation of civil plaintiffs and in the defense of those accused of crimes, the independent American lawyer has made the

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1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1862).

2. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (discussing the role of free speech as a restraint on the abuse of governmental power).

courtroom in America an important public forum for the discussion and dramatization of ideas and, consequently, an important forum for political expression and action.³ Indeed, the political trial has always been part of our history.⁴

Certainly the most celebrated political trial of the colonial era, and one that laid the foundation for the role of the independent attorney in challenging governmental abuses, was the 1735 trial of John Peters Zenger, the New York printer charged with seditious libel for publishing newspaper articles criticizing the colonial governor.⁵ Two leading New York lawyers, James Alexander and William Smith, came to Zenger's defense. When the lawyers challenged the fairness of the presiding judge, who had been appointed by the governor who was the subject of Zenger's sharp criticism, the judge responded by disbaring them. When Zenger, who was

3. See OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 47 (1961) ("Throughout the modern era, whatever the dominant legal system, both governments and private groups have tried to enlist the support of the courts for Change upholding or shifting the balance of political power."); Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. A.B. CTRY N.Y. 320, 320 (1974) ("In recent decades courts have caused or helped to generate much of the important social change in America."); David J. Rothman, *The Courts and Social Reform: A Post-progressive Outlook*, 6 LAW & HUM. BEHAV. 113 (1982) ("the judiciary has become a forum in which attorneys have pressed for social change").

4. See *Illinois v. Allen*, 397 U.S. 337, 352 (1970) (Douglas, J., concurring) ("[P]olitical trials . . . frequently recur in our history. . . ."); KIRCHHEIMER, *supra* note 3, at 47 ("Political trials are inescapable."); JOHN M. SINK, *POLITICAL CRIMINAL TRIALS: HOW TO DEFEND THEM* vii (1974) ("[P]olitical trials are an [sic] historical constant of Anglo-American law."); Michal R. Belknap, *Introduction: Political Trials in the American Past*, in AMERICAN POLITICAL TRIALS 3 (Michal R. Belknap ed., 1981) ("Throughout United States history, from pre-Revolutionary time to the post-Vietnam era, war, economic conflict, racial and ethnic tensions, fundamental disagreements about the organization of government, and occasionally even simple partisan competition for office have spawned political trials.") (footnotes omitted). See generally AMERICAN POLITICAL TRIALS (Michal R. Belknap ed., 1981) (collection of essays on the role of political trials in American history); NORMAN DORSEN & LEON FRIEDMAN, *DISORDER IN THE COURT* 72-89 (1974) (analyzing disruptive and disorderly political trials); KIRCHHEIMER, *supra* note 3 (analyzing the difference between a typical criminal trial and a political trial); POLITICAL TRIALS (Theodore Lewis Becker ed., 1971) (survey of notable political trials); Leon Friedman, *Political Power and Legal Legitimacy: A Short History of Political Trials*, 30 ANTIOCH REV. 157 (1970) (discussing the trials of uncommon criminals); Nathan Hakman, *Political Trials in the Legal Order: A Political Scientist's Perspective*, 21 J. PUB. L. 73 (1972) (explaining trials in terms of the political, social and economic interests involved).

5. See, e.g., JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL* (Stanley Nider Katz 2d ed., 1972); Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, in AMERICAN POLITICAL TRIALS 21 (Michal R. Belknap ed., 1981); Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 790-98 (1989).

without funds, petitioned the court for appointment of counsel, the judge obliged him by appointing a young lawyer who was a member of the governor's faction.

At the trial, Andrew Hamilton, a distinguished attorney from the neighboring colony of Pennsylvania and reputedly the best trial lawyer in North America, came forward to take over the representation of Zenger. Hamilton made an impassioned plea to the jury in support of the liberty to expose and oppose tyranny by speaking and writing the truth. English common law did not then recognize truth as a defense to seditious libel, and the judge so instructed the jury. Hamilton's closing argument, however, invited jury nullification. The New York jury, striking a blow for colonial self-government and freedom from despotic rulers, rebuffed the court and acquitted the young printer. While advocating for John Peter Zenger in a colonial New York courtroom, Andrew Hamilton advanced ideas that reverberated throughout the colonies and planted the seeds of revolution and of the new order.⁶

Hamilton's efforts began a tradition for the independent bar — acting as a significant check against the abuse of governmental power and as an institutional safeguard against injustice. When Judge Henry R. Selden argued that the then recently adopted Fourteenth Amendment protected the right of women to vote in his defense of Susan B. Anthony during her 1873 prosecution for voting in a federal election, he carried out this tradition. Selden's advocacy on behalf of Anthony, in a test case that challenged sexual discrimination and dramatized the women's suffrage movement, "arrested the attention of legal minds as no popular discussion had done."⁷

Few attorneys more exemplify the private lawyer fighting against injustice than Clarence Darrow. Darrow used the pulpit of

6. See Finkelman, *supra* note 5, at 80-82; Winick, *supra* note 5, at 796-98.

7. 2 HISTORY OF WOMAN SUFFRAGE 691 (Susan B. Anthony et al. eds., 1882 & photo reprint 1985). The trial of Susan B. Anthony "was in many ways advantageous to the cause of freedom. Her trial served to awaken thought, promote discussion, and complete investigation of the principles of government." *Id.* The book narrates the trial with commentary by Ms. Anthony, Elizabeth Cady Stanton, and Matilda Joslyn Gage. *Id.* at 647-91. Anthony, with the aid of several Rochester, New York election officials, had registered and voted in open defiance of the law in order to set up a test case and "to use her trial as a political forum." Belknap, *supra* note 4, at 7, 101. The constitutional challenge to the denial of women's right to vote was rejected by the Supreme Court of the United States in another case. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). Women were denied the right to vote until 1920, when the nineteenth amendment was adopted. U.S. CONST. amend. XIX.

the courtroom to dramatize the plight of labor in its battle to unionize the railroads in his representation of Eugene V. Debs, who had been charged with criminal conspiracy in 1895.⁸ Darrow championed academic freedom over religious dogma in his attack on the Tennessee law forbidding the teaching of evolution on behalf of Biology teacher John Thomas Scopes in the 1925 Dayton, Tennessee "monkey trial."⁹ Darrow also plead for an end to capital punishment in his stirring closing argument in the trial of Leopold and Loeb for the 1924 "thrill killing" of little Bobby Franks.¹⁰ Darrow's advocacy in these cases sparked a public dialogue about controversial issues and demonstrated the First Amendment value of the independent American lawyer.

When Thurgood Marshall and Constance Baker Motley led the NAACP Legal Defense and Educational Fund's historic march from *Plessy* to *Brown*,¹¹ they acted in this tradition. Their efforts succeeded in placing an important check on the ability of local

8. *United States v. Debs*, 63 F. 436 (C.C.N.D. Ill. 1894); see Daniel Novak, *The Pullman Strike Cases: Debs, Darrow and the Labor Injunction*, in *AMERICAN POLITICAL TRIALS* 129 (Michal R. Belknap ed., 1981). The criminal trial was aborted when a juror fell ill; Debs was not re-prosecuted. *Id.* at 131. Darrow's strategy of putting George Pullman and the railroad association on trial worked, but the victory was short-lived. Convinced their efforts would not succeed before a jury, the railroads shifted to a new tool, the labor injunction — equitable relief to be granted by the court, thereby avoiding jury trial. See *id.* at 147-48.

9. See *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927) (reversing conviction on state law grounds); ARTHUR G. HAYS, *LET FREEDOM RING* 26 (1925 & repr. ed. 1972); Belknap, *supra* note 4, at 9. For a novelistic account of the case, later made into a popular film, see JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND* (1955). Such limits on what can be taught in the public schools were later held unconstitutional under the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578 (1978); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Daniel v. Waters*, 515 F.2d 485 (5th Cir. 1975).

10. See JOHN KAPLAN, *CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS* 12-15 (1973); IRVING STONE, *CLARENCE DARROW FOR THE DEFENSE* 414-17 (1941); CLARENCE DARROW, *ATTORNEY FOR THE DAMNED* (Arthur Wienberg ed., 1957). The two defendants received life imprisonment, rather than the death penalty. KAPLAN, *supra*, at 12 n.†. Although Loeb died in prison several years later, Leopold was paroled after thirty-one years. *Id.* He became a social worker and is cited frequently as both an example of the possibility of redemption for capital defendants and proof of the merits of Darrow's argument. *Id.* For a novelistic account of the trial, later made into a popular film, see MEYER LEVIN, *COMPULSION* (1956).

11. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) invalidated segregation in public schools, overruling, *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had legitimated racial segregation through the separate but equal doctrine. *Plessy* was a test case on the part of a civil rights organization in New Orleans to attack the constitutionality of the Jim Crow laws then spreading throughout the South. See Greenberg, *supra* note 3, at 323-26. Richard Kluger tells the story of the long effort to overrule *Plessy* with great insight and feeling in *RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN v. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976). Thurgood Marshall's role as a lawyer functioning as a check on government abuse continued during his tenure as an Associate Justice of the Supreme Court.

school boards to reinforce and perpetuate racial discrimination and in ending the system of legal segregation that had replaced slavery.

When segregation in privately-operated public accommodations and housing continued to perpetuate our bitter legacy of race prejudice, often under the protection of local law, private lawyers came forward to meet the challenge. In the 1960s civil rights activists found the ordinary political process closed to them and resorted to such protest techniques as the "sit-in" demonstration to attack discrimination and press their constitutional claims. Civil rights lawyers from the North and other parts of the country provided representation when members of the local bars in the Southern states would not do so. These lawyers stood at their side, and their efforts helped to overcome this vestige of slavery, prodding passage of the Civil Rights Act of 1964.¹² The success of the civil rights movement in effecting legal change sparked similar legal efforts to extend constitutional rights to other disadvantaged groups, such as criminal defendants, juveniles, children, illegitimates, aliens, women, the mentally disabled, and the poor.¹³

The role of the independent lawyer in challenging the government when it is wrong, often in the face of intense popular support for its actions, requires a degree of skill, courage, and stamina that provides the greatest possible test of any lawyer's character and intelligence. Such lawyers are rare. While many pursue wealth or

12. See Leon Friedman, *Introduction to SOUTHERN JUSTICE* 5-6 (Leon Friedman ed., Meridian Books 1967); JACK GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE* 121 (1977) ("The legal effort of the 1960s to extend the Fourteenth Amendment protections to public accommodations was inextricably interwoven with the . . . 'sit-in' demonstrations . . ."); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 47 (1983). During the early 1960s a common tactic for challenging the widespread practice of refusing service to blacks in restaurants, lunch counters, hotels, and similar service establishments was the "sit-in" demonstration. *E.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965) (demonstration outside of a courthouse); *Griffin v. Maryland*, 378 U.S. 130 (1964) ("sit-in" demonstration in an amusement park that refused to admit blacks); *Bell v. Maryland*, 378 U.S. 226 (1964) ("sit-in" demonstration in a restaurant); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) ("sit-in" demonstration at a drug store lunch counter that refused to serve blacks); *Peterson v. Greenville*, 373 U.S. 244 (1963) ("sit-in" demonstration at a lunch-counter). The "sit-in" demonstrations and the trials they produce were "the focus and cutting edge of the black civil rights movement" in the early 1960s and succeeded in "arous[ing] support for passage of the Civil Rights Act of 1964." GREENBERG, *supra*, at 121.

13. See, *e.g.*, ANN FAGAN GINGER, *THE RELEVANT LAWYERS* (1972); Alvin Bronstein, *Offender Rights Litigation: Historical and Future Developments*, in 2 *PRISONER'S RIGHTS SOURCEBOOK* 5 (Ira P. Robbins ed., 1980); Alexander D. Brooks & Bruce J. Winick, *Forward: Mental Disability Law Comes Of Age*, 39 *RUTGERS L. REV.* 235, 236-37 (1987); Rothman, *supra* note 3; Patricia M. Wald & Paul R. Friedman, *The Politics of Mental Health Advocacy in the United States*, 1 *INT'L J.L. & PSYCHIATRY* 137 (1978).

power, these lawyers are driven by a strong sense of justice that is particularly offended when government officials visit tyranny upon the powerless. These are the true heroes of the law. One such hero was Leonard Boudin. During the outrages of the McCarthy era,¹⁴ Boudin repeatedly stood up to the government when few lawyers would, challenging its actions and defending its victims.¹⁵ During the Vietnam War era, Boudin represented such war protesters as Daniel Ellsberg¹⁶ and Dr. Benjamin Spock.¹⁷ Boudin staunchly defended our freedom to criticize the government, particularly in times — during cold war and hot — of heightened government and public sensitivity to criticism. When the government attempted to hold hostage the freedom to travel by revoking passports or denying visas to those whose political views it found offensive, Boudin rose to the challenge. He vindicated the right to travel and championed the vision that national borders cannot keep out ideas.¹⁸

These lawyers challenged governmental action and in the process put the government on trial. They played a central role in maintaining and preserving the rule of law. A Hitler could never seize power in America and transform the legal system into an instrument of oppression because the independent bar in America would never tolerate it. Whether functioning as a private attorney general or as a champion of the accused, the independent lawyer in America is a bulwark against tyranny and a guardian of our liberty.

14. See, e.g., CEDRIC BELFRAGE, *THE AMERICAN INQUISITION: 1945-1960* (1973); LILLIAN HELLMAN, *SCOUNDREL TIME* (1976); PETER L. STEINBERG, *THE GREAT "RED MENACE": UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947-1952* (1984); Walter Millis, *The Rise and Fall of the Radical Right*, 44 VA. L. REV. 1291 (1958); Arthur E. Sutherlands, Jr., *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951); Winick, *supra* note 5, at 853-58.

15. See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Braden v. United States*, 365 U.S. 431 (1961); *Uphouse v. Wyman*, 360 U.S. 72 (1959); *Kent v. Dulles*, 357 U.S. 116 (1958); see Norman Dorsen et al., *In Memory of Leonard B. Boudin*, 64 N.Y.U. L. REV. 1225 (1989).

16. *United States v. Russo*, No. 9373-WMB-CD (C.D. Cal. 1973); Belknap, *supra* note 4, at 11; James W. Ely, Jr., *The Chicago Conspiracy Case*, in *AMERICAN POLITICAL TRIALS* 263 (Michal R. Belknap ed., 1981). See generally PETER SCHRAG, *TEST OF LOYALTY* (1974).

17. See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969); JESSICA MITFORD, *THE TRIAL OF DR. SPOCK* (1969); Ely, *supra* note 16, at 266.

18. See, e.g., *Regan v. Wald*, 468 U.S. 222 (1984); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *United States v. Laub*, 385 U.S. 475 (1967); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Kent v. Dulles*, 357 U.S. 116 (1958); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956); Leonard B. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956). For an analysis of the significant administrative law and statutory construction contributions of *Kent v. Dulles*, see Winick, *supra* note 5, at 853-65.

Ira J. Kurzban is a lawyer in this honored tradition. Over the past fifteen years he has stood up to one of the most lawless of governmental agencies — the Immigration and Naturalization Service — in order to protect one of the most powerless and oppressed groups in the history of our nation — the Haitian refugees. His efforts stand as a potent example of the independent lawyer effectively combatting governmental abuses that are all too common in the administrative state.

Courts do not like agency action that is “blatantly lawless,”¹⁹ and when it is brought to their attention, they do not hesitate to say so and to provide a measure of judicial remediation. The INS, unfortunately, is not unique. Other agencies in our nation’s history have displayed arbitrariness verging on — if not surpassing — “blatant lawlessness.” Although the list is undoubtedly a lengthy one, during my time at the bar the most glaring examples have included the Selective Service System, the prison, the public mental hospital, and the public school, in addition to the INS.

Opening up these areas of bureaucratic domain to public and judicial scrutiny has had a salutary effect in decreasing the potential for abuse. The Selective Service System is a noteworthy example. Prior to the Vietnam War and during its early years, Selective Service local boards, those “little groups of neighbors” assigned to make conscription decisions and apply Congress’s stated policies concerning who should be exempted or deferred from military service,²⁰ often freely applied their own conceptions of the law, following arbitrary procedures and issuing induction orders to many young men who demonstrated entitlement to exemption or deferment.

With the rise of political opposition to the Vietnam War, more and more young men refused induction and faced criminal prosecution. At an early point in the war, prosecutors easily obtained convictions in refusal of induction cases: They simply introduced into evidence the registrant’s Selective Service file and asserted

19. See, e.g., *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233 (1968) (reading a statutory limitation on judicial review of Selective Service Board “classification or processing” until after induction into the military to permit pre-induction judicial review of local board reclassification decisions that were “blatantly lawless”); see Bruce J. Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 MICH. L. REV. 55 (1970) (analyzing the breadth of *Oestereich*’s exception to the statutory ban on pre-induction judicial review).

20. See JAMES W. DAVIS & KENNETH DOLBERAE, *LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM* (1968).

that the file provided a "basis in fact" for the draft board's classification decision, one of the most narrow standards of review known to the law. In the late 1960s, however, an increasing number of young law school graduates learned the intricacies of Selective Service law and began to challenge draft board action, ultimately serving the checking value described in this essay. These young lawyers began to educate the courts concerning the arbitrariness of draft board action, and the courts paid attention. Whereas at the start of the war, virtually all young men charged with refusal of induction were convicted, near the end, an increasingly higher percentage were acquitted. Federal district courts became more aware of the many procedural and substantive irregularities in which the boards engaged and less willing to tolerate these practices.

In an effort to combat the increasingly effective efforts of this growing corps of draft lawyers, the military and its supporters in Congress were able to obtain an amendment to the Selective Service statute in 1967 that severely limited judicial review of Selective Service board action.²¹ Notwithstanding the clear language of this congressional limitation on judicial review, the courts quickly fashioned what became a broad exception to this limitation for "blatantly lawless" agency action.²² Even though they had not stopped the war with their legal efforts, these young draft lawyers had succeeded in bringing the rule of law to the Selective Service System. By exposing the egregious practices of the Selective Service boards, by creating new paths to judicial review of these practices, and by educating the courts, these lawyers accomplished needed reforms and reduced procedural irregularities.

Parallel developments also occurred in other areas of administrative law involving agencies with a similar penchant for irregular and arbitrary action. When the Supreme Court in *Tinker v. Des Moines Independent School Board*²³ held that a ban on the wearing of arm bands violated the First Amendment rights of public school students who were protesting the Vietnam War, lawyers pressed the constitutional rights of students in the courts, effecting many needed reforms in other areas such as school suspension and

21. Military Selective Service Act of 1967, § 1(8)(c) (amending Universal Military Training and Service Act § 10(b)(3), 50 U.S.C. § 460(b)(3) (Supp. IV, 1965-68)).

22. See, e.g., *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233 (1968); *Foley v. Hershey*, 409 F.2d 827 (7th Cir. 1969); see Winick, *supra* note 19.

23. 393 U.S. 503 (1969).

expulsion.²⁴ Judicial recognition that the Constitution could not be kept out of institutions in which the courts had previously applied a "hands off" policy — such as prisons,²⁵ jails,²⁶ and public facilities for the mentally disabled²⁷ — subjected those who ran such institutions to the rule of law and curtailed arbitrary and irregular practices.

Few governmental agencies have surpassed the record of INS for irregular and arbitrary action. Just as in these other areas where administrative abuses have flourished, lawyers such as Ira Kurzban have played an important role by bringing abuses to popular and judicial attention, obtaining judicial relief to correct them, and providing a deterrent to their continuation. This is the checking value of the independent attorney in America.

Miami has traditionally been a civil liberties frontier. The most visible and pressing civil liberties concern in recent years has been the continued course of arbitrary and discriminatory action by the INS in its treatment of the Haitian refugees. In the past two decades, growing numbers have fled the oppressive political conditions in Haiti in small wooden boats for the promised land of Miami. Seeking refuge in this land of liberty, they were met, not with the hospitality promised by our country's treaty commitments under the United Nations Convention and Protocol Relating to the Status of Refugees,²⁸ but with a series of blatantly lawless actions.

24. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring a procedural due process hearing for school expulsion and suspension in excess of ten days).

25. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974) (due process requires a hearing for prison discipline resulting in deprivation of good time credit); *Vitek v. Jones*, 445 U.S. 480 (1980) (due process requires a hearing before prisoner can be transferred to mental hospital); *Bounds v. Crawford*, 397 U.S. 936 (1970) (right of access to courts); *Johnson v. Avery* 393 U.S. 483 (1969) (right of access to courts and to prison law libraries); *Procunier v. Martinez*, 416 U.S. 396 (1974) (First Amendment right of prisoners).

26. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979).

27. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982) (right of resident of mental retardation facilities to freedom from unnecessary restraints and to reasonably safe conditions); *Addington v. Texas*, 441 U.S. 418 (1979) (due process requires standard of proof by clear and convincing evidence for civil commitment); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (substantive due process limits on state's civil commitment power); *Jackson v. Indiana*, 406 U.S. 715 (1972) (substantive due process and equal protection limits on commitment of defendants found incompetent to stand trial).

28. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, art. 33. The essential terms of the Convention were expressly incorporated in the Protocol Relating to the Status of Refugees, *opened for signature* Jan. 1, 1967, U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. The United States ratified the Protocol on October 4, 1968. 114 Cong. Reg. 29607 (1968).

Under article 33 of the Convention and Protocol, signatory nations are obligated to

INS officials repeatedly violated the right of the Haitians to fair hearings and to be treated on a non-discriminatory basis.

This story was just unfolding when Ira Kurzban came to Miami as a young lawyer. In a long series of cases that has spanned the past fifteen years, Ira Kurzban challenged these practices. As the most recent of these cases, *Haitian Refugee Center, Inc. v. Baker*,²⁹ sadly demonstrates, Ira's efforts have not always succeeded. The Haitians continue to be the victims of governmental oppression. But Ira did succeed in an impressive number of cases, and his victories not only put an end to a great many egregious practices, but brought the plight of the Haitian refugees to the attention of the world.

The INS is one of those low-visibility administrative agencies whose actions usually evade public attention and judicial scrutiny. Left unchecked, arbitrariness becomes a way of life. Through a series of dramatic law suits, Ira Kurzban has succeeded largely in bringing the rule of law to the INS. Ira successfully attacked the fairness of INS's perfunctory procedures to adjudicate asylum claims of Haitian refugees in deportation proceedings,³⁰ to determine excludability and entitlement to asylum in exclusion proceedings,³¹ and to the award of the Special Agricultural Workers amnesty granted by Congress in IRCA.³²

Ira more recently challenged the fairness of the procedures used by INS aboard Coast Guard cutters and at Guantanamo Naval Base in conducting asylum screenings under the Haitian Interdiction Program. His efforts provoked a series of temporary restraining orders and preliminary injunctions issued by federal

refrain from returning to their country of origin refugees having a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. A parallel statutory obligation is reflected in section 243(h) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1253(h) (1990).

29. 949 F.2d 109 (11th Cir. 1991) and 953 F.2d 1498 (11th Cir. 1992), *reh'g en banc denied*, 954 F.2d 731 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

30. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1978), *aff'd in part and rev'd in part sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).

31. *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981) (enjoining the holding of exclusion hearings for a class of Haitian refugees transferred from Miami to remote areas of the United States in violation of their statutory right to counsel at exclusion); *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated as moot*, 631 F.2d 1247 (5th Cir. 1980) (recognizing an alien's right to a hearing before an immigration judge in exclusion proceedings on claims of political asylum).

32. *McNary v. Haitian Refugee Ctr.*, 111 S. Ct. 888 (1991), *aff'g*, 872 F.2d 1555 (11th Cir. 1989).

district judge C. Clyde Atkins, but the district court ultimately was reversed by a divided panel of the Eleventh Circuit Court of Appeals.³³ Although the Supreme Court's recent denial of certiorari in this case³⁴ prevented review of the blatant procedural irregularities found by the district court, Ira's efforts were not in vain. Embarrassed by the shabby practices which Ira had documented at the district court hearings, the government changed its procedures, increasing their fairness. Consequently, some 5,000 of the refugees were ultimately screened into the country for further determination of their asylum claims.

Ira also taught the INS about the procedural requirements of the Administrative Procedure Act (APA), which mandates notice and comment rule making procedures before an agency repeals an existing rule or adopts a new one.³⁵ To discourage the secret fashioning of policy, notice and comment rule making attempts to open up the policy making process to public scrutiny and participation, thereby reducing arbitrariness and increasing the quality of policies ultimately adopted.³⁶ Ira successfully asserted the APA when INS changed the procedures for processing asylum claims in exclusion proceedings;³⁷ when INS revoked the work authorizations of all Haitian refugees whose asylum claims were then pending;³⁸ and when INS discontinued its long-standing practice of releasing excludable aliens until determination of their admission claims, adopting instead a new policy mandating detention.³⁹

The Haitian refugees were repeatedly subjected to special treatment by INS — treatment accorded no other group of aliens, and Ira's law suits challenged this discriminatory conduct. One case, *Jean v. Nelson*, provoked world-wide concern. INS had set

33. *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1552 and 1579 (S.D. Fla. 1991), *rev'd*, 949 F.2d 109 (11th Cir. 1991) and 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

34. 112 S. Ct. 1245 (1992).

35. 5 U.S.C. § 553(c).

36. *Jean v. Nelson*, 544 F. Supp. 973, 1002-03 (S.D. Fla. 1982), *aff'd in part and rev'd in part*, 711 F.2d 1455 (11th Cir. 1983), *dismissed in part, rev'd in part and remanded*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd in part, vacated in part and remanded*, 472 U.S. 846 (1985).

37. *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated as moot*, 631 F.2d 1247 (5th Cir. 1980).

38. *National Council of Churches v. Egan*, No. 79-2959-CIV-WMH (S.D. Fla. 1979).

39. *Jean v. Nelson*, 532 F. Supp. 881, 544 F. Supp. 973 & 1004 (S.D. Fla. 1982), *aff'd in part and rev'd in part*, 711 F.2d 1455 (11th Cir. 1983), *dismissed in part, rev'd in part and remanded*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd in part, vacated in part and remanded*, 472 U.S. 846 (1985).

up a series of barbed wire detention camps and used them primarily for Haitian boat people, while releasing refugees of other nationalities into the community. Although Judge Eugene P. Spellman invalidated the new detention policy for violation of the APA notice-and-comment rule making requirements, he rejected the discrimination claim on the basis that although the evidence had shown a discriminatory pattern, the plaintiffs had failed to demonstrate the necessary discriminatory intent.⁴⁰ In a detailed and thorough opinion authored by Judge Arleen Kravitch, a unanimous panel of the Eleventh Circuit Court of Appeals reversed, finding Judge Spellman's determination of non-discrimination to be clearly erroneous. After reviewing the extensive record compiled in the seven-week trial, the circuit court found that the United States government had engaged in invidious discrimination against the Haitians based on their race and national origin in violation of the Constitution.⁴¹ It was a historic opinion. Although judicial findings of discrimination by states and localities are not rare, seldom has the federal government itself been found guilty of invidious discrimination.

Subsequently, however, the Eleventh Circuit granted *en banc* review of the panel's decision and vacated its finding of discrimination, not on the basis that it was factually incorrect, but rather on the ground that excludable aliens could not assert constitutional rights.⁴² The stage was set for a landmark decision when the Supreme Court granted Ira's petition for certiorari to consider the significant and unresolved issue of the applicability of the Constitution to excludable aliens. The Court, however, ultimately dodged the question, finding it unnecessary to reach the constitutional issue in light of the Court's holding in the case that INS could not discriminate based on nationality when the relevant statute and regulations did not authorize differential treatment.⁴³ Although Ira was not successful in establishing that the Constitution forbids the kind of discrimination that the Haitians had received, he did establish the important principle that such discrimination may not be engaged in by the agency when the statute and regulations are neutral on their face.

Not only do Ira's many victories on behalf of the Haitian refu-

40. *Jean*, 544 F. Supp. at 1002.

41. *Jean*, 711 F.2d 1455 (11th Cir. 1983).

42. *Jean*, 727 F.2d 957 (11th Cir. 1984) (*en banc*).

43. *Jean*, 472 U.S. 846 (1985).

gees serve as vivid examples of the checking value of the independent lawyer in preventing governmental abuses, but his litigation efforts have fostered structural legal changes that facilitate access for aliens to lawyers and to judicial review in order to challenge INS action. In so doing, Ira created a lasting legacy for future generations of lawyers continuing in this historic tradition.

The immigration statutes contain a variety of provisions limiting judicial review of INS action. For example, the statute limits judicial review in deportation cases to the court of appeals and in exclusion cases to habeas proceedings in the district court. Similarly, the statute restricts the review of denials of Special Agricultural Workers status to a limited review proceeding in the court of appeals. In a series of cases, Ira forged an exception to these restrictive review provisions that allows district courts to consider class actions that challenge the fairness of procedures used in the determination of these various statuses.⁴⁴ His significant Supreme Court victory in *McNary v. Haitian Refugee Center*⁴⁵ vindicated the principle of judicial review of agency action in general, and strongly endorsed the presumption in favor of such review. Ira has thus paved the way to the courts, not only for aliens, but for all persons aggrieved by agency action. The judicial review thereby made available not only corrects abuses of power by governmental agencies, but also acts as a significant deterrent to such abuses.

In addition to broadening access to judicial review, Ira championed the right of aliens to have access to counsel. When the government acts unlawfully, and then compounds its illegality by isolating its victims and preventing them from having access to counsel, the checking value of the independent lawyer is frus-

44. *McNary v. Haitian Refugee Ctr.*, 111 S. Ct. 888 (1991) (permitting judicial review of the fairness of procedures used in determining SAW status); *Jean v. Nelson*, 544 F. Supp. 973 & 1004, 532 F. Supp. 881 (S.D. Fla. 1982), *aff'd in part and rev'd in part*, 711 F.2d 1455 (11th Cir. 1983), *aff'd in part, vacated in part and remanded*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *dismissed in part, rev'd in part and remanded*, 472 U.S. 846 (1985) (permitting judicial review of the detention of excludable aliens); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982) (permitting judicial review of fairness of procedures used in deportation); *Louis v. Nelson*, 530 F. Supp. 924 (S.D. Fla. (1981) (authorizing a class action challenge to procedural irregularities in exclusion proceedings and granting a preliminary injunction); *Velasquez v. Nelson*, No. 86-1262-CIV-RYSKAMP (S.D. Fla. 1986) (class action resulting in a preliminary injunction which cancelled a change of venue of exclusion hearings from the Krome Detention Center in Miami to the Oakdale Detention Center in Louisiana based on lack of proper notice); *National Council of Churches v. Egan*, No. 79-2959-CIV-WMH (S.D. Fla. 1979) (permitting judicial review of an across-the-board revocation of work authorizations of excludable Haitians).

45. 111 S. Ct. 888 (1991).

trated. In 1981, INS attempted to conduct exclusion proceedings behind closed doors in an immigration courthouse in Miami by denying an attorney access to the Haitians. The attorney, who sought to offer representation to the Haitians, was from the Haitian Refugee Center, a political action organization established to provide legal representation to the refugee community. INS subsequently attempted to keep the Haitian Refugee Center's lawyers from having access to the aliens held in detention at the Krome Detention facility in Miami. Ira challenged these actions and obtained an important First Amendment victory establishing the right of attorneys for the Haitian Refugee Center to have access to their clients and potential clients.⁴⁶ Ira's recent effort to extend this principle to allow attorneys access to interdicted Haitian aliens held on the high seas in Coast Guard cutters and at a tent city erected at the Guantanamo Naval Base in Cuba was rebuffed by a divided panel of the Eleventh Circuit Court of Appeals.⁴⁷ However, future courts more faithful to the tradition of the First Amendment and to the importance of the checking value of the independent American lawyer undoubtedly will protect the reasonable access of attorneys for such political action organizations to interview and represent those in government custody.

Ira's pioneering use of the Equal Access to Justice Act (EAJA) not only increased access of all individuals and organizations to attorneys, but also increased the incentives for private lawyers to provide such access. In 1981 Congress passed the EAJA to promote access to counsel by individuals and organizations aggrieved by agency action.⁴⁸ By allowing court-awarded attorneys' fees in cases in which parties prevailing against the federal government could demonstrate that an agency's position was not "substantially justified,"⁴⁹ Congress attempted to deter the agencies from acting lawlessly and taking unreasonable positions in litigation. By creating the incentive of attorneys' fees, Congress also attempted to encourage more private lawyers to act as "private attorneys general"

46. *Jean v. Nelson*, 727 F.2d at 983. *See also* *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981); *Velasquez v. Nelson*, No. 86-1262-CIV-RYSKAMP (S.D. Fla. 1986).

47. *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992). Judge Hatchett's strong dissent on the access issue displays a greater sensitivity to the First Amendment values at stake. *See* 953 F.2d at 1515-24 (Hatchett, J., dissenting).

48. Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321, 2325-30 (codified as amended at 5 U.S.C. § 504 (1982), 28 U.S.C. 2412 (1982)).

49. *Id.* § 504.

in such cases, thereby providing equal access to the courts for people and organizations without wealth. Ira's efforts on behalf of the Haitian refugees not only have been the subject of several EAJA awards, but his successful defense of fee awards on appeal has resulted in important judicial elaborations of EAJA that have increased the availability of fees and costs.⁵⁰ Ira's unanimous Supreme Court victory in *Commissioner v. Jean*,⁵¹ broadening the availability of "fees on fees" (the award of attorneys' fees for work performed in litigating their availability), has special significance for the checking value of the independent lawyer. By paving the way for attorneys' fees, and for "fees on fees," Ira's efforts have institutionalized the role of the private attorney in fighting against government abuse and have provided a new incentive for many present and future lawyers to join him in playing this historic role.

It is thus entirely fitting that the *Inter-American Law Review* bestows its "Lawyer of the Americas" honor upon Ira J. Kurzban. Like Andrew Hamilton, Clarence Darrow, Leonard Boudin, and many brave and energetic lawyers past and present, Ira Kurzban exemplifies the importance of the checking value of the American lawyer, a role that plays an important part in preserving our liberties and in achieving our democratic aspirations. Not only do Ira's efforts stand as a model of lawyering in the public interest, but by broadening access to counsel and to courts, they facilitate the continuation of this honored tradition.

50. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982); *Jean v. Nelson*, 646 F. Supp. 1300 (S.D. Fla. 1986), *aff'd in part, vacated and remanded*, 863 F.2d 759 (11th Cir. 1988), *aff'd sub nom., Commissioner v. Jean*, 496 U.S. 154 (1990).

51. 496 U.S. 154 (1990).