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Ira J. Kurzban: Lawyer as Hero

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Ira Kurzban represents the best of his generation. He has spent the past fifteen years spearheading the intense legal effort to revolutionize and reshape immigration law, particularly as applied to refugees, so that it conforms to our constitutional norms. He has led the fight to alter fundamentally the Immigration and Naturalization Service's (INS) invidiously discriminatory treatment of Haitian refugees. Ira has been the leader in the battle to make a runaway government agency adhere to the rule of law. His public life as an unceasing advocate for the fair treatment of Haitian refugees makes him a true American hero.

Ira's life as a lawyer has represented a passionate defense of the ideal that one's business on earth is to discover and do what is right, and that it is the law's function to help make real this commitment. Certainly this commitment to justice stems from his family background—the fact that his father was himself a refugee who sought freedom from oppression in the United States. But his vision of law has a great deal to do with the body of constitutional law created by the Supreme Court in the 1960s and early 1970s.

On many levels—intellectual, political, and social—a previous generation, to which Ira belongs, came of age in its conception of the role that law and the judiciary should play in our society during the Warren Court era. This era was, of course, the "golden age" of American law. Indeed, I refer to it as the "golden age" because the Warren Court represented a unique experiment in judicial decisionmaking. It stood for a set of commitments and a vision of law that grew into a program of revolutionary constitutional reform. *Brown v. Board of Education*,[1] for example, undertook the almost impossible job of making good on America's complex historical promise of racial equality in all aspects of political and social life. The Court also brought a modicum of procedural fairness and equality to the administration of criminal justice in all the states.

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1. 347 U.S. 483 (1954).

Furthermore, the Court expanded constitutional protections against state infringements on the most intimate of human relationships. In pursuit of this vision of law, the Warren Court employed the Bill of Rights and the Civil War Amendments as the standard for providing rights and challenging the status quo. This revolution in judicial conception and role changed the entire set of relationships between the federal and state governments, as well as the relationships between the individual and state and federal governments.

Even with these reforms, however, immigration law remained isolated from the most fundamental norms of due process and equal protection, administrative procedure, and judicial role that define the remainder of our legal system. In the midst of a revolution in these most basic conceptions of our legal system, immigration law continued to maintain its stubborn adherence to government authority. A number of factors contributed to this dilemma. Courts viewed immigration law as being an integral part of the very idea of nationhood. Judges thought, therefore, that any judicial interference with the executive and congressional branches' determination of who may enter and remain in the United States, and under what conditions, violated the concept of sovereignty. Moreover, courts viewed foreign policy considerations as being directly implicated in immigration law. Thus, courts tended to be more deferential to executive and congressional mandates. Perhaps more significantly, many Americans view immigrants with suspicion, if not outright hostility. During periods of economic crisis, therefore, aliens become targets for racial and religious bigotry. This, in turn, has a serious impact on the interpretation and application of immigration laws.

From the late 1970s through the early 1990s, however, civil rights lawyers filed a series of lawsuits in attempts to transform this field of law so that the executive branch would conform its behavior to meet constitutional norms. The influx of approximately 125,000 Cubans in the 1981 Mariel boatlift, and the thousands of Haitians fleeing the Duvalier regime and now the military coup that ousted President Jean-Bertrand Aristide, are the driving forces behind this legal assault. These cases forced the INS to change its illegal treatment of refugees. Ira Kurzban led the way. He was the lead counsel in almost every significant decision

affecting refugees from the late 1970s through today.[2]

Perhaps the most significant case arising out of these developments is *Jean v. Nelson*.[3] *Jean* involved the influx of Haitians into south Florida during the early 1980s, most of whom sought political asylum. The government adopted a general practice of incarcerating these Haitians in "camps" pending a determination of their asylum claims, and did not grant their requests to be released temporarily on "parole." In so doing, the government violated several statutes by not meeting fundamental procedural norms, such as the basic notice and comment rulemaking requirements of the Administrative Procedure Act (APA).[4]

Although Congress permitted the Attorney General to incarcerate aliens on a non-discriminatory basis pending the determination of an alien's claim, the statute does not require incarceration.[5] Indeed, INS officials did not read the immigration statutes to require incarceration from 1954 until 1981. Moreover, Congress specifically provided that excludable aliens could be paroled pending a determination of their admissibility.[6] Prior to 1981, the government routinely paroled excludable aliens seeking asylum, regardless of race or nationality. In 1981, however, the INS continuously refused to apply Congress's intent to permit temporary release pending a determination of admissibility to black Haitian refugees. Nevertheless, INS continued to permit such parole for all other refugees, including asylum seekers entering Florida from Cuba and Nicaragua. The Haitian refugees filed suit, alleging, *inter alia*, that this detention policy denied them equal protection and other constitutional and statutory guarantees because it discriminated against them solely on the basis of their national origin and race. In 1982, the Haitians obtained an injunction releasing them from incarceration. The injunction further required the INS to establish and follow rules and regulations which met APA notice and comment requirements. The case nevertheless continued to wind its way through the courts on a variety of issues for approximately ten

2. Indeed, since 1985, Ira has been the lead counsel for a team of lawyers who have represented Haitian refugees in front of the United States Supreme Court on four separate occasions. *See* Haitian Refugee Ctr., Inc. v. Baker, 112 S. Ct. 1245 (1992); McNary v. Haitian Refugee Ctr., Inc., 111 S. Ct. 888 (1991); Commissioner, INS v. Jean, 496 U.S. 154 (1990); Jean v. Nelson, 472 U.S. 846 (1985).

3. 472 U.S. 846 (1985).

4. *See* 5 U.S.C. § 553.

5. *See* 8 U.S.C. § 1225(b).

6. 8 U.S.C. § 1182(d)(5)(A).

years.

The Supreme Court eventually ruled that any discrimination against the Haitians based on race or national origin would be unlawful under the applicable immigration statutes and government regulations. But the Court did not reach the constitutional issues. In response to this litigation and the loud public outcry that it produced, Congress eventually enacted new legislation to address these tragic circumstances. These laws allowed all Haitian refugees who had reached our shores prior to 1982 to apply for resident status and eventually citizenship. These changes in the law can be attributed directly to the litigation in *Jean*. Ira Kurzban provided the leadership for this vital change in the law.

In October 1981, in addition to its new detention policy which applied only to Haitian refugees, the Reagan Administration adopted a program of Coast Guard interdiction of boats in waters between Haiti and the United States. Through this interdiction policy, the government clearly meant to cut down on the number of asylum seekers. In November 1991, Haitian refugees filed another lawsuit, claiming illegalities in the implementation of this policy.[7] After a harrowing litigation that produced numerous appeals, the Supreme Court denied petitioner's application for a stay and its petition for certiorari.[8] Thousands of Haitians have thus been repatriated and face persecution in Haiti.[9]

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7. *See* Haitian Refugee Ctr., Inc. v. Baker, 112 S. Ct. 1245 (1992).

8. *Id.*

In a suit raising similar issues, the Second Circuit recently found that the government's practice, pursuant to a May 1992 Executive Order, of intercepting and automatically repatriating Haitian refugees without a hearing or screening violates §243(h) of the Immigration and Nationality Act. Haitian Ctrs. Council, Inc. v. McNary 969 F.2d 1350 (2d Cir. 1992), *cert. granted*, 61 U.S.L.W. 3256 (U.S. Oct. 6, 1992) (No. 92-344). Although the Second Circuit ordered an injunction to prevent the government from automatically repatriating Haitian refugees, *id.* at 1367, the Supreme Court has stayed the injunction, 61 U.S.L.W. 3082 (U.S. August 1, 1992) (No. A-82), and granted certiorari. 61 U.S.L.W. 3256 (U.S. Oct. 6, 1992) (No. 92-344).

9. This is another tragic instance in which the Supreme Court has failed to live up to its constitutional mandate. In my opinion, it is akin to the Court's shameful decision in Korematsu v. United States, 323 U.S. 214 (1944), where, despite the clear violation of personal liberty, the Supreme Court upheld the War Department's program, enacted following Pearl Harbor, of exclusion, detention, and physical relocation of persons of Japanese ancestry residing in an extended area in the western United States. The program did not restrict itself to enemy aliens, but instead included American citizens of Japanese ancestry who resided in the particular area determined by the military to be off limits. The government justified the program as a means essential to protect against espionage and sabotage during this period of World War II. This is the only instance in which the Supreme Court has ever upheld an explicit racial discrimination after applying strict scrutiny. The case has been

But surely this is not the end of the struggle. Haitian refugees continue to leave Haiti in record numbers. The INS continues to violate the laws. Legal and political efforts will not cease until the government adheres to the rule of law. Ira Kurzban will certainly continue to lead the assault against illegal government practices. A hero is incapable of asking less of himself.

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widely described as an immoral blot on our constitutional conscience. It is an example of the impact that racism may have on our institutional health and national integrity. It is the accepted wisdom that *Korematsu* has been overruled by the courts of history. But the recent treatment of Haitian refugees clearly contradicts that conclusion.