1992

On Remembering Judge Eugene P. Spellman: a Different Vision

Ira J. Kurzban
Kurzban & Weinger P.A.

Irwin P. Stotzky
University of Miami School of Law, istotzky@law.miami.edu

ON REMEMBERING JUDGE EUGENE P. SPELLMAN: A DIFFERENT VISION

IRA J. KURZBAN†
IRWIN P. STOTZKY‡

Celebrations of important community leaders, particularly those who have stood for moral accountability by government authorities, are curious events. They are a strange mixture of sadness and joy, and that is especially true for both of us as we honor the memory of Judge Eugene P. Spellman. Indeed, we make these claims on an emotional as well as intellectual level, based on our unique experiences with him in the seemingly never-ending litigation encapsulated in the case of *Jean v. Nelson*.[1]

The uniqueness of our relationship with Judge Spellman evolves from the fact that *Jean* confronted a field of law — immigration law — that has long evaded the most basic requirements of civilized decency. No other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional law, administrative procedure, and judicial role that define the remainder of our legal system. In the midst of legal revolutions in due process and equal protection doctrine and conceptions of judicial role, immigration law continues to maintain its stubborn adherence to absolute government authority.

The distinctiveness of immigration law reflects a variety of factors. From the beginning of the ideal of nationhood, a country's power to decide who may enter and remain in its domain, under what conditions and with what legal conequences, has been viewed as an essential precondition of sovereignty. Moreover, immigration law often implicates the nation's basic foreign policy objectives, thereby pressuring courts to be less scrupulous in safeguarding constitutional values and more deferential to

† Partner, Kurzban, Kurzban & Weinger P.A., Miami, Florida; Past President, American Immigration Lawyers Association.

‡ Professor of Law, University of Miami School of Law. Professor Stotzky is spending part of 1991-92 as a Fulbright Scholar in Argentina.

Mr. Kurzban and Professor Stotzky have been an integral part of a team of lawyers that have represented Haitian refugees for the past fifteen years in a series of path breaking lawsuits. Since 1985 they have represented Haitian refugees in front of the United States Supreme Court on four separate occasions. *See* Jean v. Nelson, 472 U.S. 846 (1985); Commissioner, INS v. Jean, 496 U.S. 154 (1990); McNary v. Haitian Refugee Center, 111 S. Ct. 888 (1991); Haitian Refugee Center v. Baker, 60 U.S.L.W. 3577 (U.S. Feb. 25, 1992).

A major purpose of the lawsuits is to make the government adhere to the rule of law by forcing the INS to restructure its illegal practices so that they conform to constitutional requirements.

1. 472 U.S. 846 (1985).

Executive and Congressional mandates. Further, the domestic politics of immigration, and thus the law governing aliens, are unusual. Even lawfully admitted aliens do not have the right to vote, and millions of undocumented workers live outside the protection of the law. For complicated psychological reasons, many Americans view immigrants with suspicion and even hostility.[2] Refugees are a constant reminder of the uncertainty and randomness of life. Indeed, during periods of economic, political, and social crisis, aliens become the targets for racial and religious bigotry, releasing forces that have a profound impact on the character of immigration policies and laws.

The 1980's, however, witnessed a resurgence of interest in attacking this skewed vision of immigration law. Civil rights lawyers filed a variety of lawsuits in an attempt to employ the remedies of injunctive relief and class actions to obtain structural reform of government institutional practices so that they reflect our constitutional norms. Much of the power of this attack is attributable to events which tested the limits of immigration law in unprecedented ways. The influx of approximately 125,000 Cubans in the 1981 Mariel boatlift, the thousands of Haitians fleeing the Duvalier regime and, most recently, the military coup that ousted Jean-Bertrand Aristide, the first democratically elected President of Haiti in 200 years, are the sources for this legal attack.

More importantly, however, these cases forced federal judges to take a moral stand against a wide array of blatantly illegal government actions, thus helping to create a moral consciousness in the citizenry. Judge Spellman led the way. The most prominent case arising out of these developments is *Jean*, a 1985 decision of the United States Supreme Court that captures much of what is significant about the immigration law cases of the past decade. *Jean* involved the influx of Haitians into South Florida during the early 1980's, 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).

Under our law, any alien, regardless of race or nationality, has a statutory, regulatory and treaty right to seek asylum if he has a well-founded fear of persecution, or if his life or freedom would be threatened if returned to his country of origin. Excludable aliens, those who seek

2. Indeed, even the use of the term "alien" implies a stranger of whom one should be wary.

admission but have not been granted entry into the United States, such as these Haitian refugees, are accorded these rights whether they arrive at our shores by boat or by other means. The process for determining asylum claims is complex and often takes many months.

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. Indeed, Immigration and Naturalization Service (INS) officials did not read the statutes to require incarceration from 1954 until 1981. Moreover, Congress specifically provided that excludable aliens could be paroled pending a determination of their admissibility. 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' intent to permit temporary release pending a determination of admissibility to black Haitian refugees. Nevertheless, it 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. Indeed, no other group had ever been incarcerated in this way.[3] In 1982, in the face of hostile public reaction and intense government pressure, the Haitians obtained an injunction from Judge Spellman releasing them from incarceration. The injunction further required INS to establish and follow rules and regulations which met APA notice and comment requirements, but the case nevertheless continued to wind its way through the courts on a variety of issues for approximately ten 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

3. The closest case in American history is the shameless 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. Thus, on the grounds of military necessity, the Supreme Court upheld a discriminatory racial classification. 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 widely described as an immoral blot on our constitutional conscience. It is an example of the impact that racism and war may have on our institutional health and national integrity. It can safely be stated that *Korematsu* has been overruled by the courts of history.

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 deal with 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. Virtually all of these Haitians are now living productive lives in the United States, and many are applying for citizenship.[4] These changes in public attitude and in the law can be attributed directly to Judge Spellman's opinions in *Jean*. They provided the impetus for change.

Because of *Jean*, we lived with Judge Spellman and his decisions (and he with us) for approximately ten years, as the case continuously wound its way back to him after a dizzying, complicated series of circuitous appeals that twice reached the United States Supreme Court, and the Eleventh Circuit Court of Appeals almost too many times to recall.[5] During the frenzied days of pre-trial, trial and post-trial emergencies, when the pressure was most intense, we appreciated and greatly enjoyed Judge Spellman's humor and empathy for all of the parties, including the lawyers for both the government and the Haitians. He always had the perfect comment, the correct stare, or the precisely worded written order that seemed to relieve the almost solid-like tension between the opposing attorneys.

This is not to say, of course, that we necessarily agreed with all of his rulings. Quite the contrary. We often vehemently disagreed with his conclusions and the reasoning he used in reaching them. During the course of battle, we even became angry at Judge Spellman because of some of his rulings. One could not, however, remain angry with him for long. His personal and professional integrity and the intellectual rigor with which he confronted his tasks were beyond reproach. They became more apparent as the years passed. These attributes seem especially significant today, when much of the population, and particularly the bar,

4. In October 1981, in addition to its new detention policy applied only to Haitian refugees, the Reagan Administration also 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. *See* Haitian Refugee Center v. Baker, 60 U.S.L.W. 3577 (U.S. Feb. 25, 1992). After a harrowing litigation that produced numerous appeals, the Supreme Court denied petitioner's application for a stay and its petition for certiorari. Thousands of Haitians have thus been repatriated and face persecution in Haiti. This is another tragic instance in which the Supreme Court has failed to live up to its constitutional mandate. In our opinion, it is akin to the Court's decision in *Korematsu*, 323 U.S. at 214.

5. Indeed, several government attorneys claim that the government appealed the district court decisions in *Jean* more times than any case ever reported in the federal reporters. We have never had the opportunity to verify this information. Nevertheless, we can attest to the fact that there were an incredible number of such appeals.

feels so alienated from the historic function played by the federal courts in perpetuating a highly moral body of learning known as constitutional law.

Lawyers who came of age in previous generations, including both of us, saw the Supreme Court of the United States, as well as the circuit and district courts, as institutions worthy of our highest respect, admiration, and support. Presently, however, federal courts are often seen as hostile and uncommitted to our most prized national ideals of equality and justice under the law. They are increasingly seen as institutions dedicated to protecting the "established order" and increasing the power of those who serve it, such as officials of the Executive Branch.

It is, therefore, not an exaggeration to say that Judge Spellman was a judge who possessed qualities that have long since gone out of style, but which, we believe, are integrally related to the fragile art of judging and to the pursuit of substantive justice. We will never forget him for these qualities, and we hope to emulate him in our practice, teaching, and writing. We rejoice, therefore, in Judge Spellman's memory and feel the pleasure of his work, but, at the same time, we feel sadness, not just for his family, friends, fellow judges and other colleagues, but even more for the law. His death jeopardizes the positive achievements of the federal courts in profound ways, for he represents the best ideals of an institution that created the impetus for the most significant changes in the history of the republic, including, not least of all, the quest for racial equality.

It is perhaps easier to understand our views about him if we set the context for our conclusions. On many significant levels — intellectual, political, and social — we came of age in our conceptions of the role the judiciary should play in our society in the 1960's and early to mid-1970's. This was, of course, during the hey-day of the Warren Court, a remarkable era of Supreme Court history that can be said to have started with *Brown v. Board of Education*[6] in the mid-1950's, and reached its most dazzling heights during the early to mid-1960's when the progressive wing of the Court achieved a strong majority. This was the "golden age" of American law, the era of Justices Warren, Black, Brennan, Douglas, Fortas, Goldberg and Marshall, among others. Although Chief Justice Earl Warren retired in 1969, this extraordinary phase of legal history that bears his name continued into the early 1970's.

The foundations of the Warren Court jurisprudence had its antecedents in earlier Supreme Court periods. Most particularly, these foundations are reflected in the decisions of the Supreme Court in the 1930's. During this period, the Court took the dissents written by Justices

6. 347 U.S. 483 (1954).

Holmes and Brandeis and turned them into majority positions, thus elevating the principle of freedom of speech into a significant set of values of American society.[7] Simultaneously, the Court began to intervene in criminal proceedings to assure a minimum level of procedural fairness.

Even with these roots as background, however, the Warren Court represented an almost completely new experiment in judicial decision-making. There was clearly something unique, distinctive, and special about that Court. *Brown*, for example, undertook the most daunting of all constitutional jobs: making America's historic promise of racial equality in all aspects of political and social life a reality. But *Brown* stood for even more than this incredible challenge. It stood for a set of commitments and a vision of law that grew into a program of wide-ranging constitutional reform. In pursuit of this vision, the Warren Court used the Civil War Amendments and the Bill of Rights as the standard for judging the accepted, established order. By so doing, it changed the entire range of relationships between the federal and state governments, as well as the relationships between the citizen and the state and federal governments. The Warren Court nationalized a set of rights reflected in these amendments. No longer could a man charged with a crime in State A be given virtually no procedural protections or be treated with less procedural protections than one charged with the same crime in State B. Both now had to be treated with an equivalent minimum of procedural protections.

This was, of course, a profound change from the 1950's. During that era, America was not a nation that stood for the highest ideals in its treatment of the people by the government. In point of fact, America was a dreadful place. State governments systematically disenfranchised blacks and even excluded them from serving on juries. State legislatures were starkly malapportioned and gerrymandered. McCarthyism was at its height. The government stifled any attempt at so-called "radical" speech — any speech which challenged the status quo. State governments censored what they considered to be libelous or obscene speech without any constitutional limits to their repression.

The legal system treated other aspects of public and private life even more harshly. Law impinged upon the most intimate of human relationships; it barred the public dissemination of any information concerning contraceptives. Moreover, the states had a free and unbridled reign on the administration of justice in criminal matters. Courts often upheld convictions based solely on illegally seized evidence or on statements

7. It was not until this period that the Supreme Court began to create and take seriously the tradition of protecting seditious libel as the central meaning of the First Amendment.

physically or psychologically coerced from the accused. Trials often took place without counsel or even juries. No legal barriers existed for limiting the imposition of the death penalty. This was not all. Government administered the welfare system in an arbitrary, capricious, and sometimes oppressive manner. Economic restrictions, such as poll taxes, directly harmed the ability of the poor to engage in public, civic activities enjoyed by the more affluent. All of these practices, of course, disproportionally affected the poor and otherwise disadvantaged.

These were only some of the extremely difficult challenges faced by the Warren Court. The Court not only spoke to these issues, but attacked them systematically and, by and large, successfully. In dealing with these matters, the Court acted with the strong support of many important sectors of society, such as the civil rights and welfare rights movements. It did not, and could not, act without such political and social support. Law reflects and is reflected in social movements. Indeed, the federal courts often looked to the executive and legislative branches for support during the most critical times of change.

The rigidly segregated dual school system, for example, could not have been dismantled without the use of federal troops, the Civil Rights Act of 1964, the lawsuits of the NAACP, intervention of the Department of Justice and other government agencies, or the incredibly brave black citizens, fully cognizant that their lives were on the line, who became plaintiffs or marched and demonstrated to break the Jim Crow system and to obtain their rights. Without the committed, enthusiastic involvement of all of these participants, the positive changes in public and private life for all of the American people could never have taken place in the 1960's. But, in our opinion, it was the Warren Court and the lower federal courts of that era which acted as a catalyst for these bold reforms. The federal courts inspired and protected the people who sought to implement those changes. To put it another way, constitutional and statutory law became both an object as well as a subject. Employing that law, the federal judiciary created a centrifugal force for change, and was itself inspired and empowered by those political and social changes.

A constitutional program of such a revolutionary nature is, of course, the work of many hearts and minds. The Warren Court and the lower federal courts not only had fine theoreticians, but also had first rate technicians; lawyers who possessed not only the vision for change, but also those who had a mastery of the legal craft. Moreover, academics provided important theoretical and interpretive positions which aided the Supreme Court in its task.

Perhaps of even more significance, lower federal court judges brought to bear their visions, skills, and talents in addressing constitu-

tional claims in the first instance. These judges also faced the almost impossible task of implementing the changes as the Supreme Court began to articulate them at an almost non-stop, dizzying speed. So the lower courts had to be creative in first suggesting theories and applying them to constitutional guarantees and statutes, and then had to implement the new changes suggested by the Supreme Court. Because of these revolutionary changes, federal circuit and district court judges faced another significant, almost overbearing burden. They faced the outright hostility, social ostracism, and distinct possibility of violence against them and their families by some members of the communities within which they lived. In general, they took the high road and the heat of the community. They followed and lead simultaneously. All in all, it was a stunning performance.

A constitutional program that was so revolutionary, however, is certain to face powerful opposition. Indeed, in our opinion, the counter-assault began in the early 1960's. By the late 1960's, the battle was on. In 1968, Richard Nixon ran against the entire federal judiciary, particularly the Warren Court and its noble view of law. Prior to this time, Earl Warren tendered his resignation to President Johnson in an effort to have Johnson's choice, Abe Fortas, replace him as leader of the Court. But Fortas' nomination was withdrawn when the Senate refused to confirm him, and later, due to financial improprieties, he was forced to resign altogether. Following the 1968 election, Nixon appointed Warren Burger to replace Earl Warren as chief justice. In short order, John Harlan and Hugo Black resigned. President Nixon found himself with the opportunity to make three appointments during his first term in office. Over time, only one of those appointments, Harry A. Blackmun, grew into a justice whose constitutional vision could be said to be compatible with that of the Warren Court. The other two appointments, Lewis Powell and William Rehnquist, were clearly at odds with the Warren Court's jurisprudence of the sixties.

The final dissolution of the Warren Court came in 1975, with the resignation of William O. Douglas and his replacement by John Paul Stevens. Moreover, two significant accidents of history occurred which secured this shift in power: President Carter did not have an opportunity to make any appointments to the Court (a distinction he shared with no other president in our history who completed a full term), while President Reagan had the opportunity to fill three vacancies during his term in office. He appointed Antonin Scalia to replace Justice Burger, Sandra Day O'Connor to replace Justice Stewart, and Anthony Kennedy to replace Justice Powell. In 1986, President Reagan elevated Rehnquist to the position of chief justice. Rehnquist, who actually lead the Court in-

tellectually and politically during the seventies and eighties in its counter-assault to the Warren Court's jurisprudence, finally assumed the outward mantel of leadership.[8]

These changes led to an entirely new era of Supreme Court history. The gutting of the Warren Court's jurisprudence started with an attack on *Brown* and its progeny. Although the Court did not expressly overrule *Brown*, it ruled that it is constitutional for a school system to contain a large number of all-black and all-white schools. To put it another way, the Rehnquist Court has shifted the emphasis of *Brown* and, in so doing, severely limited the nature of the remedy. As a result, *Brown* lost much of its strength, energy, and moral power.

Moreover, the egalitarianism of the Warren Court outside of the school desegregation context has been barred by new and revised interpretations of the Equal Protection Clause. For example, the Court has drawn a sharp distinction between state and society, confining the ban on racial discrimination to a very narrowly understood concept of state action. Furthermore, the Court has held that to establish an equal protection claim it is not enough to show that state action has a disparate impact on and thus especially disadvantages minorities; rather, a proponent of the claim must also show that the state intends to have such an effect.

The Rehnquist Court has gone even further. In the mid-1970's, the Court removed the poor from the protection of the Equal Protection Clause, and declared that education was not a fundamental right. Actions such as this, of course, brought to an abrupt stop the Court's process of enumerating rights that would warrant special consideration under the Equal Protection Clause. In addition, the Court diluted the requirement of strict numerical equality in the apportionment area. Thus, departures from the "one person one vote" standard have become constitutionally acceptable.

In other areas, such as freedom of speech and criminal law issues, the Rehnquist Court created new power for the state and certain private interests. The Court's strong commitment to what Justice Brennan called "uninhibited, robust, and wide-open" debate, for example, has been severely cut back and even gutted. The Rehnquist Court has upheld laws denying politically active groups and individuals the opportunity to reach audiences at the only places where they may be reached, such as at shopping centers and in front of particular government buildings. The Court has even sanctioned laws banning demonstrations at

8. President Bush completed the changes with the appointments of David Souter to replace Justice Brennan and Clarence Thomas to replace Justice Marshall.

public parks and the like. But, on the other hand, the Court has struck down as violative of the First Amendment a number of laws attempting to limit political expenditures as a means of preventing the wealthy from drowning out the voices of the poor.

In the criminal context, the Warren Court precedents have fared no better. The Rehnquist Court has shifted the balance of advantage in the criminal process strongly to the state. For example, restrictions on the investigatory powers of the police have been almost totally removed. Fourth Amendment protections against unreasonable searches and seizures and Fifth Amendment bars to self-incrimination have been narrowly construed. The Sixth Amendment right to counsel has also been severely compromised. The ban on the death penalty, which had its roots in the 1960's and its formal effect in the 1970's, has essentially been removed. Moreover, Rehnquist, both as Chief Justice and as head of the Judicial Conference of the United States, has attempted to institute a series of procedural reforms which expedite that process. To a large extent, he has succeeded. Since 1976, approximately 169 convicted persons have been executed.

These changes, of course, are only a sample of the success that the Rehnquist Court has had in destroying the vision and jurisprudence of the Warren Court. For many members of the profession, both in practice and in the academy, disaffection from the federal judiciary runs deep. Under such conditions, therefore, it is very difficult to pay respect to and admire the present body of constitutional law. It is difficult to see how the federal courts can continue to speak authoritatively to the burning issues that divide us, and to attempt to ameliorate the great tensions in our society, when many feel so alienated from them. Yet, for the most optimistic of us, it is always possible to believe that the federal courts will once again become a source of moral authority and hope. Can we create a new vision of what might be by looking at what was and what is?

In thinking about this predicament, we often think of Judge Spellman. While he means many things to us, one of the most important aspects of his public life, which touches us deeply and pushes the cynicism away, is his loyalty to the federal courts as an institution. As a judge, he resisted these cynical views of constitutional law tenaciously; he always remained faithful to the prospect of achieving justice even within the confines of this dilemma. His achievements speak for the correctness of his views. His faith is the torch which helps sustain us during these dark times.

There are, of course, other qualities of heart and mind which Judge Spellman had, and which inspire us to continue to use law as both an end in itself and as an instrument for achieving justice. Judge Spellman's

contribution to the federal courts and the search for substantive justice had many levels. He was devoted to the values we identify with freedom, liberty, and autonomy — equality, procedural fairness, freedom of speech and the like — and he was prepared to protect and perpetuate these values by acting on them. Moreover, Judge Spellman was thoroughly devoted to the federal courts as an institution — as a co-equal branch of government. His opinions reflected a set of skills which invariably declared principles and attested to the details that constitute the law in a manner that was meant to strengthen the courts in the eyes of the public and the profession alike. To Judge Spellman, this was significant both constitutively and instrumentally. To put it another way, Judge Spellman believed that opinions should be written in a technically correct manner by employing the craft of the law as an end in itself, and so that opinions would enhance a court's capacity to do its socially important work.

Perhaps even more significantly, Judge Spellman was, in the best sense of the phrase, a judicial statesman. He was a person who was capable of grasping a multiplicity of conflicting principles, including some of which are concerned with the health of the courts as an institution. At the same time, he related the vision that a judge's duty is not merely to speak to the law, but also to act on it, to see to it that it becomes reality and a living truth to those it affects. Thus, unlike the way most of us lead our lives, by tempering principle with prudence, Judge Spellman reversed this theme: he tempered prudence with principle. In his opinions, Judge Spellman always selected his words in a way that would minimize the confrontation with other branches of government. He clearly understood that major reforms required a coordination of government powers. He also respected the traditions of law and, thus, followed the principle of stare decisis; but not in a wooden way. Justice always remained the overriding goal.

Judge Spellman was equally as much a lawyer as a judicial statesman. The mastery of the craft of law requires a mixture of the theoretical and the technical. Judge Spellman was a master of both sets of skills. He knew the cases, the statutes, and the theories behind them and how they interacted. He also understood, in a common sense, no frills, unpretentious way, how the legal system worked and how a judge might make it work better. He put all of these remarkable skills together in dealing with the very complex issues presented in *Jean v. Nelson*. He was the right man at the right time for a most difficult job. We will never forget him for this rare achievement.