

Immigration/Immigrants' RightsPlyler v. Doe - Right to Public Education for Undocumented Children

As you know, *Plyler v. Doe* was a Supreme Court decision in 1982 which guaranteed a free public education for undocumented immigrant children. The question was whether, consistent with the equal protection clause of the 14<sup>th</sup> Amendment, a state could deny to undocumented school-age children the free public education that it provides to U.S. citizen children or legal aliens. The Court held that it could not. Yet, in a Justice Department memo co-written by you, you criticized the decision and suggested the Administration could have obtained a contrary result if the Solicitor General had filed a brief supporting the State reciting "the values of judicial restraint".

1. What is your current view on *Plyler v. Doe*? Do you believe the Court should reconsider this precedent and why or why not? What is your personal view, not legal view on whether undocumented children should have access to public education?

RESPONSE: *Plyler v. Doe*, 457 U.S. 202 (1982), is a precedent of the Court and entitled to respect under principles of stare decisis. As for my personal view on the underlying questions, I stated at the hearing that I believed all children should be educated. That, however, is a different question from the issue in *Plyler* — whether the Texas law was unconstitutional. I would not assume that the dissenters in the *Plyler* case — including Justices White and O'Connor — were any less committed on a personal level to the importance of educating children than their colleagues in the majority.

As Justice Brennan wrote, "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries... whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."

2. If the Supreme Court exercised "judicial restraint" here, what do you believe would have been the impact on society of having a "subclass of illiterate children?"

RESPONSE: The four dissenters in *Plyler* "fully agree[...], that it would be folly — and wrong — to tolerate creation of a segment of society made up of illiterate persons," 457 U.S. at 242, and I agree with that assessment. As I read the various opinions in the case, there was no dispute on that point.

### Rights of Noncitizens Under the Constitution

All legal scholars would say that anyone present in the United States has core due process rights, no matter what their legal status is.

1. What are your views on the rights of illegal immigrants in the United States generally? Do they have the same constitutional rights as United States citizens? Which constitutional amendments do you believe apply equally to citizens and noncitizens?

RESPONSE: In considering whether aliens may invoke the protections of the Constitution, the Supreme Court has differentiated between aliens who have entered the United States and those at the point of entry. The Court has held, for example, that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law" of the Fifth Amendment, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953), including its equal protection component, see Mathews v. Diaz, 426 U.S. 67 (1976). See also Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). The Court has also held that the Equal Protection and Due Process guarantees of the Fourteenth Amendment apply to aliens, even if they have entered the country illegally. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982); Yick Wo v. Hopkins, 118 U.S. 356 (1886). "But an alien on the threshold of initial entry," the Court has held, "stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" Shaughnessy, 345 U.S. at 212. (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

The Court has also ruled on the applicability of other constitutional rights to aliens. For example, the Court has held that excludable aliens are not protected by the First Amendment, United States ex rel. Turner v. Williams, 194 U.S. 279 (1904), while resident aliens are, Bridges v. Wixon, 326 U.S. 135 (1945). The Court has also held that aliens are protected by the Just Compensation Clause, Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), and the Sixth Amendment, Wong Wing v. United States, 163 U.S. 228 (1896). The decisions in these cases are highly dependent upon the particular constitutional provision at issue and upon the facts before the Court. If I am confirmed, and if such an issue were raised before the Court, I would approach the issue with an open mind, and would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties, with due regard for the doctrine of stare decisis.

### Plenary Power Doctrine

As you know the plenary power doctrine over immigration matters began with the Supreme Court decision in the Chinese exclusion case, *Ping v. the United States*, in 1889. This doctrine basically gives the legislative and executive branches broad and often exclusive authority over immigration decisions. Many academic commentators criticize the doctrine, but it seems to be alive and well in the courts.

1. What are your views on the plenary power doctrine in immigration law?

RESPONSE: In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Supreme Court stated that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 588-89. But to say that the political branches are "largely immune" from judicial review in these areas is not to say that they are wholly immune. The *Harisiades* Court noted that "[i]t is . . . probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution." *Id.* at 590. And while the political branches have historically had vast authority over immigration policy, the Court noted in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that the political branches' authority is nonetheless "subject to important constitutional limitations." *Id.* at 695. The question whether judicial review over a decision of immigration policy made by the political branches is appropriate is highly dependent upon the facts of any particular case. If I am confirmed and such a case comes before the Court, I would approach it with an open mind, and would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties, with due regard for the doctrine of stare decisis.

2. A Supreme Court in decision 1991 (*Zadvydas v. INS*) stated that the plenary power "is subject to important constitutional limitations." Do you agree with the Court or do you believe there should be an automatic deference to the political and legislative branches of the government?

RESPONSE: Please see my response to Question 1.

### Meaningful Judicial Review: Habeas Corpus Relief

There are efforts to further limit judicial review for immigrants. Any limits on rights guaranteed by the Constitution deserve careful and deliberate consideration. Habeas corpus is a bedrock principle of U.S. law, reaching back to Magna Carta, six centuries before the Constitution. It has long been used as a safeguard for people facing unlawful detention and deportation by the government, and is a constitutionally-protected right. It is a fundamental principle of American justice and we owe it to future generations not to undermine the values inherent in the nation's great legal tradition. It's my understanding that the Supreme Court held in the *St. Cyr* case in 2001 that habeas corpus review guaranteed under the Constitution, must be preserved.

1. What is your view on the role of habeas corpus to challenge immigration detention decisions? Did you agree or disagree with the Court's analysis in the *St. Cyr* case?

RESPONSE: The Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), dealt, as you suggest, with habeas review of executive detentions of aliens, not with collateral review of state court criminal convictions. The Court held that as a matter of statutory interpretation, that the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), did not preclude federal habeas review of the question whether decisions concerning the deportation of resident aliens are within the Attorney General's discretion. In dictum, however, the Court stated that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 641, 663-64 (2001)). In dissent, Justice Scalia argued that the Suspension Clause did not "guarantee[] any particular habeas right that enjoys immunity from suspension," *id.* at 338, but rather precluded Congress from temporarily suspending whatever habeas review is available at any given time except in cases of rebellion or invasion. See *id.* at 336-41. Since there is a lively debate about the substance of the Suspension Clause, among the Justices, and since the issue may well come before me if I am confirmed, I believe it would be inappropriate to comment on the merits of any argument.

### Indefinite Detention

1. What are your views on noncitizens who are detained with no prospect of their being returned to their home country because we don't have repatriation agreements with those countries or there are no functioning governments? Should they be detained indefinitely, or should they be released under supervision?

RESPONSE: In Zadvydas v. Davis, 533 U.S. 678 (2001), the Supreme Court held that, as a matter of statutory construction, federal authorities may not indefinitely detain removable aliens that have previously entered the country. See id. at 699. This holding was in large part based on an invocation of the canon of constitutional avoidance — aliens that have entered the country enjoy the protections of the Due Process Clause, see, e.g. Wong Wing v. United States, 163 U.S. 228 (1896), and a reading of the statute that would allow for indefinite detentions would raise serious constitutional concerns. See Zadvydas, 533 U.S. at 689. In Clark v. Martinez, 125 S. Ct. 716 (2005), the Court extended its holding in Zadvydas to inadmissible aliens who are not afforded the protections of the Due Process Clause. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). Although reading the statute to allow indefinite detentions of inadmissible aliens may not raise serious constitutional concerns, the same statute can only mean one thing as applied to all situations within its ambit. See Clark, 125 S. Ct. at 722-23 (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”) Therefore, under current federal law as interpreted by the Supreme Court, the federal government does not have the authority to detain removable aliens indefinitely. As a judge on the D.C. Circuit, and if confirmed, as a Justice of the Court, I will treat these precedents as I will treat any other precedents of the Court, consistent with principles of stare decisis.