

## Constitution Corner – The Rights of Illegal Aliens

Let's say a Mexican national decides to illegally enter America and is successful in doing so, but he then unfortunately steps into a quicksand pit and is slowly being sucked down despite his efforts to extricate himself.

A passerby, an American citizen, observes the man's predicament. Does the citizen first ascertain whether or not the man is a U.S. citizen, or even in the country legally, before deciding whether or not to throw him a lifeline? Of course not; as Jefferson said, or implied: We are all created equal in the sight of God and are equally entitled to the enjoyment of certain unalienable rights endowed to us by our Creator; among which are the right to pursue happiness, enjoy liberty, and escape from quicksand, or something like that.

I think all Americans would agree that every human being should enjoy these unalienable, natural rights. Obviously, many Americans do not. Many Americans believe that until a person has first filled their lungs with air, and for some, even after that time, they can be killed, murdered, terminated, have their little spinal cord snipped or cranium crushed, whatever, all for the convenience of the person who carries them, or moments ago carried them, in their womb.

So as we approach the subject of rights for illegal aliens, we must realize that we as a nation have a long way to go before claiming Jefferson's ideal of equality at creation, and that some in our country are far more willing to extend certain rights to lawbreakers than they are to the unborn.

Whether I think, or you think, or any American thinks illegal aliens should enjoy any of the rights secured by our Constitution, is, in the end, not that important. What matters, at least in the near-term, is what does the Supreme Court think? We'll get to that in a moment.

I know, even as I say those words concerning the court, that I've committed an heresy, and even contradicted statements I've made in the past: the Supreme Court doesn't have the final say on anything Constitutional, the people do. But until the people act on the authority they have, the Court does. That, unfortunately, is what our system of government has become.

Ever since *Marbury v. Madison*, when Chief Justice John Marshall carved out this special privilege the Court now enjoys, Americans have generally yielded to the Court's opinion on any matter, even when the Court has been clearly wrong.

When the Court ruled, in 1896,<sup>1</sup> that separate bathrooms and drinking fountains for blacks were entirely proper and constitutional, it took nearly 60 years<sup>2</sup> for the people to say they disagreed, and “encourage” the Court to agree with them.

So here’s a question: in 1865, when Congress began working on what became the 14<sup>th</sup> Amendment, did they intend to have the privileges it extends and the protections it provides cover aliens in this country illegally? The answer has to be clearly and unequivocally: no - for two reasons. First, the focus at that time was clearly on slavery and how to rid the United States of it and its effects.<sup>3</sup> Second, in 1865, the concept of an illegal alien was unknown.

Prior to the 14<sup>th</sup> Amendment Congress passed the [Civil Rights Act of 1866](#),<sup>4</sup> guaranteeing citizenship to all Americans without regard to race, color, or previous condition of slavery or involuntary servitude. The Act was a direct attack on the infamous “Black Codes” that were passed by most of the southern states after the War for Southern Independence. Black Codes restricted the movement of blacks, controlled the type of labor contracts they could enter into, prohibited them from owning firearms, and prevented them from suing or testifying in court.

When the Civil Rights Act reached his desk, President Andrew Johnson vetoed it. Johnson objected to the fact that, at the time, 11 of 36 states were not yet represented in the Congress; he also thought the Act discriminated against whites and in favor of African-Americans. Even after overriding Johnson’s veto, there were concerns in Congress whether the Act was constitutional. In response, they drafted the 14<sup>th</sup> Amendment, and forced the southern states to ratify it or face continued martial law.

The 14<sup>th</sup> Amendment’s Section 1 states:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**”

The critical clause for our discussion is the last one. What did Congress mean by “any person?” Did they mean to extend these protections to all “persons,” i.e., all human beings, regardless of their legal status in our country? They distinguished between “citizens” and “persons” but did not consider a “person’s” lawful status.

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<sup>1</sup> Plessy v. Ferguson, 163 US 537 (1896).

<sup>2</sup> Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

<sup>3</sup> Slaves were freed by the 13th Amendment.

<sup>4</sup> [https://en.wikipedia.org/wiki/Civil\\_Rights\\_Act\\_of\\_1866](https://en.wikipedia.org/wiki/Civil_Rights_Act_of_1866)

Until 1875, there was no such thing as an “illegal alien.” Anyone in the country who had not become a citizen was simply an “alien.” Aliens entered and left America at will. If they stayed long enough to meet the rules for naturalization, they could voluntarily apply for citizenship, or not; if they choose not to become citizens, they could stay indefinitely as nothing more than an “alien.”

The [Page Act of 1875](#)<sup>5</sup> was the first attempt by Congress to control who would be allowed to legally immigrate to America. That year it became illegal to enter the country if you were Asian, and you were coming to America to be a forced laborer, were intent on engaging in prostitution, or were considered to be a convict. The “illegal alien” was born.

In 1921, Congress established the [first immigration quotas](#)<sup>6</sup> based on country of origin. Quotas based on national origin continued until 1965 when the Immigration and Nationality Act of 1965<sup>7</sup> initiated a system of preferences based on immigrants' skills and family relationships with U.S. citizens or U.S. residents (while retaining by-country limits).

In “[Yes, illegal aliens have constitutional rights](#),”<sup>8</sup> immigration activist and political consultant Raoul Contreras cites none other than James Madison in claiming that aliens should have the full protection of the Constitution.

In the [Report of 1800](#), Madison wrote:<sup>9</sup>

“...Aliens are not more parties to the laws, than they are parties to the constitution; yet it will not be disputed, that as they owe on one hand, a temporary obedience, they are entitled in return, to their protection and advantage.”

According to Madison, “aliens” are entitled to “protection and advantage.” But which aliens, those who are in the country legally, or illegally? And which “protections and advantages.”

Would James Madison have extended his undefined “protection and advantage” to aliens in the country *legally*? I think so. Would Madison have extended these protections to aliens in the country *illegally*? I think not, but I’m willing to be convinced otherwise. And just what specific protections would Madison extend to aliens in either category? We can’t know for sure.

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<sup>5</sup> [https://en.wikipedia.org/wiki/Page\\_Act\\_of\\_1875](https://en.wikipedia.org/wiki/Page_Act_of_1875)

<sup>6</sup> [https://en.wikipedia.org/wiki/Emergency\\_Quota\\_Act](https://en.wikipedia.org/wiki/Emergency_Quota_Act)

<sup>7</sup> [https://en.wikipedia.org/wiki/Immigration\\_and\\_Nationality\\_Act\\_of\\_1965](https://en.wikipedia.org/wiki/Immigration_and_Nationality_Act_of_1965)

<sup>8</sup> <http://thehill.com/blogs/pundits-blog/immigration/255281-yes-illegal-aliens-have-constitutional-rights>

<sup>9</sup> <https://founders.archives.gov/documents/Madison/01-17-02-0202>

After citing Madison, Contreras discusses several Supreme Court decisions which he says support his contention that illegal aliens enjoy “the full panoply of constitutional protections American citizens have with three exceptions: voting, some government jobs and gun ownership (and that is now in doubt).” So what has the court said?

In the 2001 case of *Zadvydas v. Davis*,<sup>10</sup> the Court decided that the Due Process Clause of the 14th Amendment applies to all aliens in the United States whether their presence here is “lawful, unlawful, temporary, or permanent.”

In 1982, in *Plyler v. Doe*,<sup>11</sup> the court said: “The illegal aliens who are ... challenging the state may claim the benefit of the Equal Protection clause which provides that no state shall ‘deny to any person within its jurisdiction the equal protection of the laws.’ Whatever his status under immigration laws, an alien is a ‘person’ in any ordinary sense of the term.”

So thus far the Court has granted due process and equal protection provisions of the 14<sup>th</sup> Amendment to illegal aliens, based on the unrefined definition of “person.” But then we encounter a problem with Mr. Contreras’ interpretation of Supreme Court opinions.

*Almeida-Sanchez v. United States* (1973)<sup>12</sup> centered on the warrant-less search of an automobile, 20 miles from the U.S. border, belonging to a Mexican national with a valid work permit to be in the U.S. The search, conducted by the Border Patrol to determine whether illegal aliens were being carried in the car, instead found a large quantity of marijuana. Almeida-Sanchez was convicted of the marijuana trafficking and the 9<sup>th</sup> Circuit Court of Appeals affirmed the conviction. But the Supreme Court found the warrant-less search to be unreasonable and reversed the lower court.

According to Contreras, the Court decided that “all criminal charge-related elements of the Constitution's amendments contained in the First, Fourth, Fifth, Sixth and the 14<sup>th</sup>, such as search and seizure, self-incrimination, and trial by jury, protected all non-citizens, whether in the country legally or illegally.” Unfortunately for Mr. Contreras, the court reached no such conclusion (don’t take my word for it, [read the opinion](#)).<sup>13</sup> Instead, the (6-3) majority ends by stating: “those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.” So while the Court affirmed the protection of the 4<sup>th</sup> Amendment for those aliens lawfully in the country it extended no such protection to those in the country

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<sup>10</sup> [https://en.wikipedia.org/wiki/Zadvydas\\_v.\\_Davis](https://en.wikipedia.org/wiki/Zadvydas_v._Davis)

<sup>11</sup> [https://en.wikipedia.org/wiki/Plyler\\_v.\\_Doe](https://en.wikipedia.org/wiki/Plyler_v._Doe)

<sup>12</sup> [https://en.wikipedia.org/wiki/Almeida-Sanchez\\_v.\\_United\\_States](https://en.wikipedia.org/wiki/Almeida-Sanchez_v._United_States)

<sup>13</sup> <https://www.law.cornell.edu/supremecourt/text/413/266>

unlawfully, nor do I find evidence that it found that any other protections of the Bill of Rights should be applied.

Based on this evidence, it seems clear that, in the eyes of the Court, at least the "due process" and "equal protection" provisions of the 14th Amendment apply to illegal aliens. Aliens *legally* in the country enjoy additional protections as well, at least those of the 4<sup>th</sup> Amendment, perhaps extending to much of the Bill of Rights.

So I return to my earlier question: in 1865, when the 14th Amendment was drafted, did Congress see its protections extending to "persons" who had broken the law to arrive here? I think not. But as I have stated in the past, it is not so much what the drafters of a Constitution, Amendment or Statute *intended*, it is what they *achieved* that counts. The drafters of the 14<sup>th</sup> Amendment used the word "person" in a general sense without discriminating between "lawful" and "unlawful" persons. In 1865, no such distinction of aliens even existed; that came ten years later. Had such a distinction existed, would the drafters have been more elaborative? One would hope.

In the eyes of the Court, perhaps this question is settled; but is it settled with the owners of the Constitution? In that regard, I think the jury is still out. What do you say, America? What rights should illegal aliens enjoy? Are you content with those that have already been extended to them or would you like to see more, or fewer? If you think the Court erred in its use of the 14th Amendment's "person," you need to let someone know (and who would that be?). Or you could just sit back and let the Supreme Court continue to dictate the policy of the United States. I'm just saying...

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