



U.S. Department of Justice
Office of Legal Counsel

Williams:census2.wp
COOPER
CARVIN
MCGINNIS
KMIEC
WILLIAMS
MURPHY
DISHARON
READING
FILES
RET.

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

MAY 16 1988

MEMORANDUM FOR JOHN R. BOLTON
Assistant Attorney General
Civil Division

Re: The Application of the Apportionment Clause
of the Fourteenth Amendment to Illegal Aliens

You have requested the opinion of this Office on the issue of whether aliens who are in the United States in violation of the immigration laws may be excluded from the decennial census for purposes of apportioning representation among the several States. At issue is whether the first sentence of Section 2 of the Fourteenth Amendment which mandates that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed" requires the counting of illegal aliens. It has been the long standing position of this Office and the Department that illegal aliens must be considered as "persons" within the meaning of section 2 of the Fourteenth Amendment and must, therefore, be included. This view has been challenged in a memorandum to you from Stephen J. Markman, Assistant Attorney General, Office of Legal Policy (OLP Memorandum).¹

After undertaking a thorough review of the relevant constitutional provisions, Article I, sec. 2 and the Fourteenth Amendment, we reaffirm the previous conclusion of this Office that illegal aliens cannot be excluded. Our conclusion is supported by the text of the apportionment clauses in both the original Constitution and the Fourteenth Amendment, by the legislative history of the Fourteenth Amendment, by the consistent administrative practice in which aliens, both legal and illegal, have been counted in the census, and by Supreme Court precedent. First, both the Framers of the Constitution and the Fourteenth Amendment consciously chose the word "persons" over narrower terms such as "citizens" or even "inhabitants" to describe those who were to be counted for the purposes of apportionment -- a choice that reflected a decision to include all persons residing in each state, regardless of whether they belonged to the body politic. Second, the legislative history of the Fourteenth Amendment demonstrates that the Framers specifically intended to include aliens within the class of those to be counted for apportionment.

¹ We have also received and reviewed a second memorandum from the Office of Legal Policy. Memorandum for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Stephen J. Markman, Assistant Attorney General, Office of Legal Counsel, May 10, 1988 (OLP Supplemental Memorandum).

tionment and there is nothing to suggest that those who proposed or ratified the Fourteenth Amendment distinguished between legal and illegal aliens. Third, from the first census onward aliens were counted for apportionment purposes and this practice did not change after the Civil War although by that time some portion of the aliens residing in the United States was here illegally. Finally, in Plyler v. Doe, 457 U.S. 202, 210, 215 (1982), a unanimous Court construed the term "person" in section 1 of the Fourteenth Amendment to include illegal aliens. There is no reason to believe that the Court would come to a different conclusion in construing "persons" in section 2 of the Fourteenth Amendment.

First, we address each of these bases for our conclusion in turn. We then turn to address certain novel arguments raised by OLP in support of its conclusion that illegal aliens need not be counted.

I. Article I, Section 2

One of the key issues facing the Framers of the Constitution was how to structure the federal government so that it reflected the relative strength -- in terms of wealth and population -- of the States. This was obviously important both for appropriate representation in the national legislature and for the assessment of taxes. What is sometimes referred to as the Great Compromise is reflected in this Article in the equal representation of the States in the Senate and the population-based representation in the House of Representatives. U.S. Const., Art. I, secs. 2, 3. The apportionment provision reflects an equally important compromise -- the Three-Fifths Compromise.

As originally enacted, Article I, sec. 2, cl. 3 provided:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Given the importance of the issue, it is not surprising that the question of who should be counted under this provision consumed the attention of the Constitutional Convention and was not

resolved for several months.² The central problem was that the larger and wealthier States, such as Virginia, did not wish to be outvoted by the more numerous smaller states. If Virginia contributed a significant share of wealth to the new government, she wished to have an equally significant say in how that wealth was spent. However, other states felt that the slave population, which could not vote, should not be counted as part of the general population for purposes of representation.³ Citizens, voters, all slaves,⁴ and all inhabitants were suggested as categories and rejected.⁴ The debate raged over several months until the drafters agreed to count

the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Thus, the broader, more inclusive word "Persons" was consciously chosen instead of narrower terms. The only persons specifically excluded were "Indians not taxed" and two-fifths of the slave population.

Given this language, we believe that the Framers of the Constitution intended the census to count all persons, including aliens, who claimed the United States as their residence. Because slaves were included in the definition of the Framers' notion of persons for purpose of the apportionment clause it is clear that the Framers intended the term "persons" in the apportionment clause to include those who were not part of the body politic. As we shall show below, aliens were counted in the earliest censuses.

² See generally 2 P. Kurland & R. Lerner, The Founders' Constitution 90-115 (1987).

³ Madison summed up the argument thus:

[B]ut does it follow, from an admission of numbers for the measure of representation, or of slaves combined with free citizens as a ratio of taxation, that slaves ought to be included in the numerical rule of representation? Slaves are considered as property, not as persons. They ought therefore to be comprehended in estimates of taxation which are founded on property, and to be excluded from representation which is regulated by a census of persons.

No. 54, The Federalist Papers 336 (C. Rossiter ed. 1961).

⁴ See, e.g., 1 The Records of the Federal Convention of 1787, at 35 (inhabitants), 486, 580 (equal counting of slaves) (M. Farrand ed. 1966) (Farrand).

II. The Fourteenth Amendment

After the Civil War, Congress revised the apportionment provision to remove the "three fifths" clause. The issue of whom to count was again the subject of passionate debate because of the conflicting political ends that various groups wished the census to serve. The key problem for the Republicans, who dominated the Reconstruction Congress, was how to ensure that they retained political power when the heavily Democratic Southern States were readmitted to the Union.⁵ Once blacks were counted in the census as full persons, the Southern States would gain several representatives in Congress. It was expected, however, that the states gaining this additional political strength would limit their suffrage to white male voters (as many Northern states did).⁷ Therefore, the drafters of the Fourteenth Amendment examined several formulations for the census that would permit the Northern states to retain their power.

The first proposals would have based representation on the number of legal voters or citizens.⁸ However, it was discovered that several Northern states would lose representation under

⁵ As Rep. Blaine stated bluntly:

The effect contemplated and intended by this change is perfectly well understood, and on all hands frankly avowed. It is to deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, so long as that population shall be denied political rights by the legislation of those States.

Cong. Globe., 39th Cong., 1st Sess. 141 (1866).

⁶ It was estimated that the former Confederate states would increase their population base by forty percent, adding twelve Representatives to their pre-war total of eighteen. Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Ford. L. Rev. 93, 94 (1961). See Cong. Globe, 39th Cong., 1st Sess. 404 (1866) (statement of Rep. Davis) ("This will give ten additional Representatives to the late slave States.").

⁷ Cong. Globe, 39th Cong., 1st Sess. 358 (1866) (statement of Rep. Blaine).

⁸ Cong. Globe, 39th Cong., 1st Sess. 10 (1865) ("legal voters who are not either natural-born citizens or naturalized foreigners") (statement of Rep. Stephens); id. at 359 (1866) ("citizens of the United States") (statement of Rep. Conkling); id. at 404 ("male adult voters") (statement of Rep. Lawrence); id. at 2942 ("male electors" over the age of 21) (statement of Rep. Hendricks).

those formulas.⁹ Many Northern states had lost much of their male population to western pioneering and their population consisted of a disproportionately large number of women, children, and aliens.¹⁰ Rep. Conkling, in explaining why he had changed his draft from "citizens" to "persons," said:

"Persons," and not "citizens," have always constituted the basis.

Again, it would narrow the basis of taxation and cause considerable inequalities in this respect because the number of aliens in some States is very large and growing larger now, when emigrants reach our shores at the rate of more than a State a year.

Again, many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these States are to pass upon this amendment. It must be made acceptable to them. For these reasons, the committee has adhered

⁹ H. Flack, The Adoption of the Fourteenth Amendment 98-102 (1908) (Flack).

¹⁰ As Sen. Wilson said, in criticizing a proposal to count only voters:

How [does this affect] the loyal States? It throws out of the basis at least two and a half millions of unnaturalized foreign-born men and women, and by this we lose at least fifteen Representatives in the other House and fifteen presidential electors; and they do not go from East to West, but from North to South. . . . A great result of this proposition would be to cast out of the calculation of the basis of representation two and a half millions of persons who are now included. In 1860 there were in the loyal States 3,856,628 unnaturalized persons of foreign birth, and in the rebel States 233,651. I estimate that Massachusetts would lose one Representative certainly, and probably two, by the change; that New York would lose at least four, Pennsylvania two, Ohio two; and other States would lose in their representation.

Cong. Globe, 39th Cong., 1st Sess. 1256 (1866). See also id. at 141 (statement of Rep. Blaine); id. at 411 (statement of Rep. Cook); id. at 2986-87 (statement of Sen. Wilson).

to the Constitution as it is, proposing to add to it only so much as is necessary to meet the point aimed at.

Cong. Globe, 39th Cong., 1st Sess. 359 (1866). The use of the word "persons" was therefore retained in order to continue the inclusion of aliens in the census.¹¹

This formulation was chosen notwithstanding the fact that critics violently attacked it as undemocratic and as including those who were not part of the body politic.

It gives representation to women, children, and unnaturalized foreigners, all declared by the laws of the States unsafe or unnecessary depositaries of political power. It disregards the fundamental idea of all just representation, that every voter should be equal in political power all over the Union.

If in any State there shall be a large influx of unnaturalized foreigners, as in the great cities of the East, that State will gain additional representation therefrom. If in any State there shall be an excess of women or children, or both, these will give additional representation and political power.

The dominions of Brigham Young, if incorporated in the Union, would become the paradise of politicians, rich in unequal political power, because of the multitudinous wives and innumerable children of the Saints of Utah.

With what grace can we say to the South, "You shall have no representation for freedmen not enfranchised," while we insist upon representation for aliens and women and children not enfranchised?

Cong. Globe, 39th Cong., 1st Sess. 404-05 (1866) (statement of Rep. Lawrence). Inclusion of millions of unnaturalized foreigners in the basis of representation was specifically attacked and strenuous arguments were made that their exclusion was appropri-

¹¹ Rep. Bingham's discussion of the issue was not atypical: "Under the Constitution as it is now and it always has been, the entire immigrant population is included in the basis of representation." Cong. Globe, 39th Cong., 1st Sess. 432 (1866).

ate.¹² Notwithstanding this and similar statements,¹³ the Republicans held firm and passed the amendment apportioning representation on the basis of the "whole number of persons in each State, excluding Indians not taxed."

Given this legislative history, we believe that it is fair to conclude that the Fourteenth Amendment was not intended to change the prior practice of counting aliens in the census for purposes of apportionment. In fact, the practice was specifically retained by the drafters of the Amendment as necessary to ensure the continued representation of their sectional interests. We therefore conclude that the Fourteenth Amendment requires that the census include aliens for the purpose of apportioning representatives among the states.

Nor do we believe that there is anything in the text or history of the Fourteenth Amendment to suggest the fact that aliens are here illegally is relevant to whether they are "persons in each State;" to be counted for the purposes of apportionment. The plain language of the Fourteenth Amendment requires the United States to count all "persons in each State, excluding Indians not taxed." Aliens for whom a particular state is their usual place of abode are "persons" and they are "in" that state, regardless of their legal status under the immigration laws. Such aliens, illegal or legal, must be counted.¹⁴

Moreover, in determining that aliens should be counted for apportionment the Framers of the Fourteenth Amendment did not distinguish between legal and illegal aliens. Unlike the Office of Legal Policy, we do not believe the absence of such a distinction may be simply attributed to Congress' lack of familiarity with the concept of an illegal alien. Congress had made it illegal for certain aliens to be in the United States prior to the adoption of the Fourteenth Amendment in 1866.

¹² See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2987 (1866) (statement of Sen. Sherman).

¹³ Id. at 2800-03 (1866) (statement of Sen. Stewart), 2939 (statement of Sen. Hendricks).

¹⁴ OLP claims that the legal status of aliens is relevant, because the Bureau of the Census counts all resident aliens, such as students, but not transient aliens, such as tourists. The census practice, however, can be explained on the simple principle that it counts only those for whom the state is their usual place of abode. The principle is the same one that also explains why a Virginian who is visiting New York on census day is deemed to be a Virginian: that is the state that he claims as his usual place of abode. This principle would also probably preclude counting the members of an invading army, at least until they established control of the government. OLP Memorandum, at 5-6.

In particular, Congress had passed a statute in 1863 entitled "An Act to prohibit the 'Coolie Trade' by American Citizens in American Vessels."¹⁵ This law, which was the precursor of the so-called Chinese Exclusion laws, made it a criminal offense for Americans¹⁶ to bring certain Chinese workers to the United States.¹⁶ Violation of the law could result in forfeiture of the vessel carrying the Chinese aliens, a fine or imprisonment. Chinese who were not "coolies" could not emigrate unless they¹⁷ obtained a certificate of approval from the American consul. Thus, Congress had placed restrictions on the entry of certain aliens prior to 1866 and there were no doubt Chinese coolies who had entered the United States since the passage of the law without the appropriate consular certificates and who were counted in the next census.¹⁸

¹⁵ Act of February 19, 1862, 12 Stat. 340 (1862). Even before 1863 Congress had passed statutes restricting the presence of certain aliens in the country. The Alien Enemy Act, passed in 1798, authorizes the President to arrest, secure, and deport any alien in the United States who is from a country that is hostile to the United States. Act of July 6, 1798, 1 Stat. 577 (1798), codified at 50 U.S.C. 21. The President had exercised his authority to exclude enemy aliens under this statute prior to 1866 (see, Lockington v. Smith, 15 F. Cas. 758 (C.C. Pa. 1817); Lockington's Case, Brightly N.P. 269 (Pa. 1813)), and the courts had discussed its impact on aliens. See Bagwell v. Babe, 22 Va. (1 Rand.) 272 (1823) (allowing \$225 damages for assault on alien where President had not yet authorized removal); Clark v. Morey, 10 Johns. 69, 72 (N.Y. 1813) (Kent, Ch.) (alien enemies may sue and be sued until the President exercises his authority under the Alien Enemy Act). See also Case of Fries, 9 F. Cas. 826, 830-36 (C.C. Pa. 1799) (No. 5,126) (Justice Iredell's defense of the law) (dictum).

¹⁶ 12 Stat. 340, sec. 1.

¹⁷ Id., sec. 4.

¹⁸ As one early scholar noted in criticizing the Fourteenth Amendment,

The principle that those classes which had not the right of suffrage should not be represented, the principle upon which the section pretended to be based, was violated nevertheless. Even the answer [that aliens would eventually become citizens] does not apply to the case of the Chinese, for here were aliens who were not expected to become citizens and could not become such under the laws of the United States, and yet under the section they would be represented.

Flack, supra note 9, at 127. The issue of whether the American-born children of Chinese aliens could be citizens was discussed during the debate over the Fourteenth Amendment, see Cong. Globe,

III. Consistent Practice

The United States has, since 1790, followed a consistent administrative practice of counting all aliens for purposes of apportionment. The first census act directed that "every person whose usual place of abode shall be in any family [on census day] shall be returned as of such family."¹⁹ The basic principle underlying the census, therefore, was to count all persons who claimed a residence in the United States as their usual place of abode. Second, the United States in fact counted all aliens in the first census.²⁰ Thus, prior to the Civil War, we believe that Article I, section 2 was intended to require that all "free Persons" be included in the census count for purposes of apportionment and that the term "free Persons" included aliens.²¹

After the passage of the Fourteenth Amendment and after the passage of the first comprehensive immigration act the census continued to count aliens. For two hundred years, the unchang-

¹⁸ (Cont.) 39th Cong., 1st Sess. 498, 573, 574, 2890-92 (1866), and the discussion shows, as the Supreme Court has said, "that the application of the Amendment to the Chinese race was considered and not overlooked." United States v. Wong Kim Ark, 169 U.S. 649, 699 (1898). The issue of whether States could permit Chinese aliens, given their peculiar status, to vote was also raised during the debate. Cong. Globe, 39th Cong., 1st Sess. 357 (1866).

¹⁹ Act of March 1, 1790, sec. 5, 1 Stat. 101, 103 (1790). This section remained unchanged in subsequent censuses and has been the standard test for the census ever since. See, e.g., Act of Feb. 28, 1800, sec. 5, 2 Stat. 11, 13 (1800); Act of March 26, 1810, sec. 5, 2 Stat. 564, 567 (1810); Act of March 14, 1820, sec. 5, 3 Stat. 548, 552 (1820); Act of March 23, 1830, sec. 5, 4 Stat. 383, 386 (1830).

²⁰ Testimony of Dr. Lewis Kincannon, Deputy Director, Bureau of the Census, April 18, 1988, Before the Subcomm. on Census and Population of the House Comm. on the Post Office and Civil Service, at 1. They have also been counted in all subsequent censuses. Id. The 1820 and 1830 censuses included aliens as a specific category. Act of March 14, 1820, 3 Stat. 548, 550 (1820) ("Foreigners not naturalized"); Act of March 23, 1830, 4 Stat. 383, 389 (1830) (four categories of aliens).

²¹ Given the dependence of the United States in its early years on immigration, it is not surprising that aliens were intended to be counted. They were often active members of the body politic who frequently enjoyed the right to vote and even held office. See, e.g., Woodcock v. Bolster, 35 Vt. 632, 638-41 (1863); Stewart v. Foster, 2 Binn. 110 (1809) (Pennsylvania); Kan. Const. of 1859, art. V, sec. 1. See also Minor v. Happersett, 88 U.S. (12 Wall.) 162, 177 (1874) (noting nine states that allowed aliens to vote).

ing basis for inclusion of an individual has been whether the person claims the United States as his "usual place of abode."²² Moreover, subsequent Congresses have recognized that a constitutional amendment is necessary if illegal aliens are to be excluded. The 71st and 72d Congresses debated passage of constitutional amendments that would have excluded aliens in the count for apportionment.²³ Indeed, the Senate Legal Counsel issued an opinion in 1929, based on a review of both the Fourteenth Amendment and the original Constitutional language, which concluded that illegal aliens could not be excluded.²⁴ When a bill to exclude aliens was introduced in 1940, Rep. Celler reviewed the legislative history of the amendment, the Supreme Court case law on the word "person" in the Fifth and Fourteenth Amendment, and prior congressional efforts to pass an amendment to exclude illegal aliens, and concluded:

For 150 years we have included aliens in the count. We cannot, by mere resolution of this body or the adjoining body, change that constitutional requirement. If you strike out aliens you have parted with a principle of government upon which the fathers agreed some 150 years ago, which they thought a reasonable adjustment of the whole problem. When we use the word "persons" we include all peoples. We include even those who do not choose to vote, and, I may say to the gentleman from Mississippi, we even include convicts, who have lost their citizenship, who have lost the right to vote. We include children under age, insane people, persons under disability. All are counted including -- now -- Negroes -- originally two-fifths of the Negroes. We include women and minors; we include all persons, and it would be rather anomalous now for the first time to say that we shall not include aliens as now being persons.

86 Cong. Rec. 4372 (1940).²⁵ The legislation was defeated. Such a consistent interpretation of the Constitution is entitled to deference.

²² Act of March 1, 1790, sec. 5, 1 Stat. 103 (1790).

²³ See H.R. Rep. 2761, 71st Cong., 3d Sess. (1931); H.R. Rep. 823, 72d Cong., 1st Sess. (1932).

²⁴ See 71 Cong. Rec. 1821 (1929).

²⁵ Rep. Celler also noted that "a very exhaustive study" had revealed that the only country which did not count aliens when conducting a census was Nazi Germany. 86 Cong. Rec. 4373 (1940).

IV. Court Precedent

The Supreme Court has held that illegal aliens are persons within the meaning of the Equal Protection Clause of section 1 of the Fourteenth Amendment.²⁶ Plyler v. Doe, 457 U.S. 202, 210, 215 (1982):

Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.

. . .

. . . That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territory. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction -- either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States -- he is entitled to the equal protection of the laws that a State may choose to establish.

Therefore, the Court held that the Equal Protection Clause of the Fourteenth Amendment applies to illegal aliens, just as the Due Process Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment had previously been held to apply to illegal aliens.²⁷ We believe that the if the word "person" in the first section of the Fourteenth Amendment includes illegal aliens, it also includes them when it is used in the second section of the same Amendment, in the absence of persuasive

²⁶ "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. The Department of Justice urged this position on the Supreme Court. Brief for the United States as Amicus Curiae in No. 80-1538 and Brief for the United States in No. 80-1934, at 24, Plyler v. Doe, 457 U.S. 202 (1982).

²⁷ Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

reasons or evidence to the contrary.²⁸

We note that the Court in Plyler expressly rejected an argument that although illegal aliens were "persons", they were not "persons within its [a state's] jurisdiction."

Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons within its jurisdiction while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not "within the jurisdiction" of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase "within its jurisdiction. . . . As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.

Plyler, 457 U.S. at 211 and n.10 (emphasis in the original).²⁹

The argument rejected by the Supreme Court in Plyler is very similar to that in OLP's assertion that although illegal aliens are "persons" they are not "persons in each State" within the meaning of the apportionment clause.³⁰ In view of this reading of "person within its jurisdiction" in section 1, we believe that the Court would not find persuasive the argument that "persons in each State" in section 2 of the same Amendment refers only to

²⁸ It is a basic rule of statutory construction that each section should be construed with other sections "so as to produce a harmonious whole." 2A Sutherland on Statutory Construction sec. 46.05, at 90 (Sand's 4th ed.).

²⁹ The Court went on to emphasize that prior Due Process and Equal Protection cases had reflected a "territorial theme" that ensured that all those within a State's boundaries were protected. Id. at 212. "[T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory." Id. at 215 (emphasis omitted).

³⁰ OLP Memorandum at 4.

persons who are in the United States legally.³¹

Second, although no court has ruled on the issue whether illegal aliens should be included in the census, one court has stated in dictum that they must be included. Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980), aff'd per curiam, No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, 450 U.S. 995 (1981) (FAIR). After noting that aliens are "persons," the court said:

The Framers must have been aware that this choice of words would include women, children, bound servants, convicts, the insane -- and aliens, since the same article of the Constitution grants Congress the power "to establish a uniform rule of naturalization."

³¹ OLP Memorandum at 20. In its Supplemental Memorandum, see note 1, OLP appears to argue that Plyler is irrelevant because while the Due Process and Equal Protection Clauses "are to some extent applicable to all persons present in a State," the "persons in each State" in the apportionment clause does not apply to all persons since it excludes transient aliens. OLP Supplemental Memorandum, at 11. We are not persuaded by this argument. The issue in Plyler was whether illegal aliens were "persons." The Court concluded that they were and expressly rejected the argument that the phrase "within its jurisdiction" permitted states to deny illegal aliens equal protection of the law on the basis of their illegal status. For similar reasons, the argument that the phrase "in each state" permits the federal government to exclude illegal aliens from the census solely on the basis of their illegal status should be rejected.

The Court in Plyler did not address the issue of transient aliens. While it is true that transient aliens are within the scope of the Equal Protection Clause and not within the scope of the Apportionment clause, the differing purposes of these clauses explains the reason for this differential treatment. The Equal Protection Clause is intended to protect anyone present in the jurisdiction, including transients. The Apportionment clause, however, is clearly not intended to count those who have no intention of remaining in the jurisdiction, because such transients will clearly not remain in the jurisdiction for the period covered by the census. Indeed, this same principle explains why a Virginian visiting New York is covered by the Equal Protection Clause but is not to be counted as a person in New York for purposes of the apportionment clause. In short, while there is clear reason to treat transients differently from non-transients under the apportionment clause, we do not perceive any rationale in either the history or the purpose of the clause to treat aliens differently solely on the basis of their illegal status. In the absence of a clear rationale for differential treatment,

Art. I, sec. 8, cl. 4. We see little on which to base a conclusion that illegal aliens should now be excluded, simply because persons with their legal status were not an element of our population at the time our Constitution was written.

486 F. Supp. at 476. While this discussion was dictum, we believe it is indicative of the reception the courts would give to the argument that illegal aliens can be excluded from the census.

V. Other Issues Raised by OLP Memorandum

The OLP Memo argues that the phrase "the whole number of persons in each State"

is not present by itself, but rather as a modifier of the phrase "their [i.e. the States'] respective numbers," as in the phrase "their Governor." Therefore, just as the person who is a State's Governor remains so even when temporarily out of the State, so do the long-term residents of a State remain part of its "number" even when temporarily absent. In other words, such language implies that some, but not all, of the persons physically present in a State on census day -- as well as some persons not physically present -- should be counted in its apportionment base, namely those persons who in some sense belong to the State, having a primary and stable abode there.

OLP Memorandum, at 4 (emphasis in the original). If this is simply another way of stating that only lawful residents can be "persons in each State" within the meaning of the Fourteenth Amendment, we must disagree. Nothing in the history of the Fourteenth Amendment suggests aliens are "in a state" only if they are in the state legally. As noted above, the Supreme Court has rejected a similar argument concerning the meaning of "persons within its jurisdiction" in section 1 of the Fourteenth Amendment.

If OLP is arguing that a person must "belong" in some other sense -- perhaps, to the body politic in order to be counted,³² we believe that this argument is fundamentally inconsistent with the intent of the census clauses in both the original Constitution and the Fourteenth Amendment. As shown in sections I and II

³¹ (Cont.) we believe that the reasoning of Plyler is controlling.

³² OLP Memorandum, at 2.

above, the framers of both Article I, sec. 2 and the Fourteenth Amendment intended to include in the census a variety of groups that were not part of the body politic, including women, children, and aliens. The decision to include these groups in the basis for representation was made consciously and over the objections of those who denounced the decisions as unprincipled and undemocratic. The Framers of both sections of the Constitution were politicians driven by a desire to achieve the consensus necessary to obtain larger goals: establishment of the Constitution and adoption of the post-Civil War Amendments. That this may result in the inclusion of individuals who do not have the same ties to the country as citizens is true, but the decision to include such individuals was intentional.

Finally, if OLP is simply arguing that as a factual matter only those for whom a state is a "primary and stable abode" should be counted as persons in such a state, we are not sure how this formulation advances their argument, because we do not perceive how the "primary and stable abode" test clearly distinguishes between illegal aliens and legal aliens, a class of persons that OLP admits must be counted. Illegal aliens no less than legal aliens may as a matter of fact reside in a particular state primarily and continuously.

Second, OLP argues at some length that "whole number of persons in each State" means "inhabitants" and that "inhabitants" are those "persons with a primary and stable residence" in a State.³³ We have three responses to this argument. First, the question presented by the language of the Constitution is whether illegal aliens are "persons in each State." The word "inhabitant" was not used by the Founding Fathers,³⁴ even though it had been used in the Articles of Confederation,³⁴ and was considered

³³ OLP Memorandum, at 9-13 (emphasis in the original).

³⁴ Perhaps it was rejected as too confusing a term -- Madison found it to be so. The Federalist Papers, *supra* note 3, No. 42, at 269-271. In discussing the defects of the naturalization laws under the Articles he remarked:

In the fourth article of the Confederation, it is declared "that the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall, in every other, enjoy all the privileges of trade and commerce," etc. There is a confusion of language here that is remarkable. Why the term free inhabitants in one part of the article, free citizens in another, and people in another . . . cannot easily be deter-

by the draftsmen.³⁵ Instead, the word "persons" was chosen, and as we have shown above, it was intended to include aliens.³⁶

Second, whatever the word "inhabitant" meant in 1787, the task at hand is to evaluate what the word "persons" meant to the drafters of the Fourteenth Amendment in 1866. As we have said above, the question is what groups the drafters intended to include within the census. Our research has shown that the choice of the word "persons" in 1866 was the result of a deliberate decision to include aliens in the basis for representation without any distinction between legal and illegal aliens.

Third, even if we concluded that "persons" and "inhabitants" were interchangeable expressions, we do not believe that we would conclude that an alien's illegal status would preclude him from being characterized as an "inhabitant". As principal support for its position that the term "inhabitants" may be interpreted to exclude illegal aliens, OLP's memorandum observes that Samuel Johnson's 1785 dictionary defined "inhabitant" as a "resident," which in turn was defined with reference to an "abode," which was defined with reference to "continuance" in place. OLP Memo at 11. As we have noted before, however, illegal aliens no less than legal aliens may as a matter of fact reside for continuous periods of time in a state. OLP has simply not adduced any

34 (Cont.) mined. . . . By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with citizenship but with the privilege of residence. What would have been the consequence if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them? . . . The new Constitution has accordingly with great propriety, made provision against [such a result] by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

(Emphasis in the original.)

35 1 Farrand 590, 595; 2 *id.* at 350 n.12, 571.

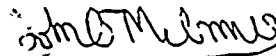
36 Moreover, the Framers of the Fourteenth Amendment distinguished between the term "persons" and "inhabitants" in section 2 itself: they chose to use the term "person" in the sentence describing those who should be counted for purposes of apportionment and the term "inhabitants" in the sentence describing the reduction in representation that would result from denying "male inhabitants" the right to vote.

evidence suggesting that the Johnson's definition of "inhabitant" or, for that matter, any other definition has ever turned on the legality of person's residence.

VI. Conclusion

Our examination of both the original census provision, Article I, sec. 2, and its replacement, section 2 of the Fourteenth Amendment, has led us to conclude that it is not possible to exclude illegal aliens from the census.

Please let us know if we can be of further assistance.



John O. McGinnis
Deputy Assistant Attorney General
Office of Legal Counsel

cc: Stephen J. Markman
Thomas M. Boyd