Memorandum

Subject	Date
Plyler v. Doe -- "The Texas Illegal Aliens Case"	June 15, 1982

To: The Attorney General

From: Carolyn B. Kuhl C&K
John Roberts JR

Today the Supreme Court issued its opinion in Plyler v. Doe, the "Texas Illegal Aliens Case." The Court held unconstitutional the Texas statute which authorizes local school districts to deny enrollment to children who are not legally admitted to the United States and denies state funds for the education of such children. Justice Brennan wrote the majority opinion in which Justices Marshall, Blackmun, Powell and Stevens joined. The Chief Justice authored a dissent joined by Justices White, Rehnquist and O'Connor.

While the Court declined to hold that illegal aliens could be designated a "suspect class" for purposes of Fourteenth Amendment Equal Protection analysis and declined to hold that education is a "fundamental right," the Court nonetheless applied a "heightened level" of judicial scrutiny, requiring the state to show that the statute furthered some "substantial goal" of the state. Applying this standard, the Court determined that Texas had failed to make a sufficient showing of a substantial government interest furthered by the statute. The majority concluded that "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." Opinion of the Court at p. 27.

The dissent, written by the Chief Justice, chastizes the majority for "patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis" to achieve "an unabashedly result-oriented approach." Dissenting Opinion at p. 4. The Chief Justice articulates the need for judicial restraint in language similar to that you have used in recent speeches. For example,

> [T]he Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense."

Id. at 1-2.

It seems likely that the dissenting Justices had particularly tried to win over Justice Powell, but were unable to do so. The dissent notes with specific approval the warning Justice Powell had given in an earlier case, where he had written that raising the level of judicial scrutiny in Equal Protection cases according to the Court's view of the societal importance of the interest affected, tends to cause the Court to assume a "legislative role."

As you will recall, the Solicitor General's office had decided not to take a position before the Supreme Court on the Equal Protection issue in this case. The briefs for the State of Texas were quite poor. It is our belief that a brief filed by the Solicitor General's Office supporting the State of Texas -- and the values of judicial restraint -- could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case.

In sum, this is a case in which our supposed litigation program to encourage judicial restraint did not get off the ground, and should have.