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The Fifth Circuit in Texas v. United States Chose and Advocated the Term “Illegal Alien”

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On-Line Symposium on *Texas v. United States* -- Maritza Reyes: The Fifth Circuit in *Texas v. United States* Chose and Advocated the Term "Illegal Alien"

By Immigration Prof



This installment by Professor **Maritza Reyes** continues the on-line symposium on the Fifth Circuit's decision in [Texas v. United States](#).

My contribution to this symposium locates *Texas v. United States* in the current political discourse about immigration and immigrants. The decision speaks to the mood of the country as we continue to wrestle with the legacy of racism. In *Texas*, a two-judge majority panel of the Fifth Circuit Court of Appeals chose to use the term "illegal alien" in its decision. But it went beyond using the term. In footnote fourteen of its opinion, the majority essentially advocated the correctness of using the term. Therefore, beyond deciding the case and controversy, the Fifth Circuit majority put judicial imprimatur on the use of "illegal alien" at a crucial time in our nation's history when anti-immigrant sentiment is raging.

Currently, the term "illegal alien" is associated with Latinas/os, the group that has become the face of "illegal alien" in the minds of a segment of the American polity. This decision is one more instance in our nation's history when racialized politics guide the discussion on immigration law and policy albeit in camouflaged ways, such as by the use of a seemingly non-racial term—"illegal alien"—that nonetheless carries a racial meaning. Politicians and the media also use the term to signal their ideology.

Donald Trump has been notorious for his repeated use of the phrase "illegal alien" as he campaigns to become president of the United States. During the last Republican Debate, Trump said that he was very "happy" with the Fifth Circuit's decision. Immediately after he referred to the decision, he stated that "we have to stop illegal immigration." *A la* Trump, the Fifth Circuit has now added fuel to the "illegal alien" fire. The majority sanctioned the use of the term. In this way, the Fifth Circuit fed the current national rhetoric surrounding the national debate on immigration and border enforcement.

The Fifth Circuit cited three reasons for its support of the terminology. First, the majority cited *Garner's Dictionary of Legal Usage* for the contention that "[i]llegal alien is not an opprobrious epithet." Second, it referred to the Supreme Court's use of the term in *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012). Third, it cited to an article in the *Scribes Journal of Legal Writing* for the proposition that the use of the term "illegal alien" is both historically and generally accepted. I make some observations about each of these reasons below. Ultimately, it becomes evident that the majority made a choice and knew it was making a choice when it used the term "illegal alien" rather than "undocumented immigrant," "unauthorized immigrant," "undocumented alien," "unauthorized alien," "alien," or "noncitizen."

As to the first reason, the majority chose to use *Garner's Dictionary of Legal Usage* (Oxford 3d ed. 2011) as opposed to the more traditional *Black's Law Dictionary*. According to *Garner's Dictionary*, the term "illegal alien" is not a shameful description. However, *Black's Law Dictionary* (10th ed. 2014) states: "Although the term was originally a clinical legalism, today it is often viewed as a snarl-phrase. Many writers therefore prefer undocumented immigrant, which others object to as a euphemism. The nomenclature has become a political battleground." If the Fifth Circuit had cited the definition in *Black's Law Dictionary*, it would have provided a more balanced description of the term's current use in the United States, including as a "snarl-phrase." The majority admitted that presence without authorization is not a criminal offense. Therefore, technically, if illegality is equated with criminality, the term "illegal alien" is inappropriate. However, the two judges refuted this argument by quoting the explanation in *Garner's Dictionary*, which states that "illegal" should not be equated with criminality, "since many illegal acts are not criminal." Under this rationale, we should call anyone who violates a traffic law an illegal driver. If someone does not pay child support, we should call him or her an illegal parent. Police officers who violate civil rights laws would become illegal cops. Employers who violate employment laws would become illegal employers. Under the Fifth Circuit's reasoning, violators of any civil law would become illegal. Is the American polity ready to apply the term in this way? Are the same courts that use the term "illegal alien" ready to extend the "illegal" adjective to persons other than undocumented immigrants?

As to the second reason, the majority once again made a choice as to which source to cite. It cited the Supreme Court decision in *Arizona* to explain that "as the district court pointed out, [illegal alien] is the term used by the Supreme Court in its latest pronouncement pertaining to this area of law." *Texas*, at 5 (citing *Arizona*, 132 S. Ct. at 2497). I did not find the term "illegal alien" on the page cited (2497) by the Fifth Circuit in its opinion. Justice Kennedy delivered the opinion of the Court in *Arizona*. He quoted the term "illegal alien" in a quote from a Department of Homeland Security document and in a quote from *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002). *Arizona*, 132 S. Ct. at 2500, 2504. Moreover, Justice Rehnquist delivered the opinion of the Court in *Hoffman* and primarily used the term "undocumented alien." 535 U.S. at 140-51. As for Justice Kennedy's own choice of terminology in *Arizona*, in the first line of his opinion and throughout his opinion, Justice Kennedy used the term "alien," not "illegal alien." He also used the term "unauthorized aliens." *Id.* at 2503-04. The justice who used "illegal alien" outright in *Arizona* was Justice Scalia in his concurring in part and dissenting in part opinion. *Id.* at 2516-18. It is important to note that *Hoffman* (the case that Justice Kennedy quoted in *Arizona*) was decided before *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), a case in which Justice

Sotomayor delivered the opinion of the Court and used the term "undocumented immigrant." Therefore, if the Fifth Circuit majority wanted to cite the latest term used *by the Court*, it could have chosen "undocumented immigrant."

As to the third reason, the majority cited to an article in the *Scribes Journal of Legal Writing* that posits that the term "illegal alien" is historically and generally accepted. I would like to know by whom it is historically and generally accepted. In 2013, the *American Bar Association Journal* reported on the 30-day suspension of an Indiana lawyer who referred to his divorce client's spouse as an "illegal alien" in a letter to her lawyer. The Indiana Supreme Court apparently did not generally accept the use of the term. It found, *inter alia*, that the attorney's use of the term showed bias or prejudice. Moreover, did the two judges in *Texas* consider that there are many terms throughout our nation's history that were historically and generally accepted when they were used, but were nonetheless used pejoratively against groups of people? I can think of many denigrating terms, which I will not state here, that could take the place of "illegal alien" in the quote from the article that the Fifth Circuit majority used: "[I]llegal alien has going for it both history and well-documented, generally accepted use." But there are many law review articles that explain why undocumented immigrant is a better term. See *e.g.*, Note, *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1079 n.16 (2013) (citations omitted).

There is a plethora of sources the majority could have cited to support its use of more benign terminology, such as "undocumented immigrant." I wonder if the majority in *Texas* discussed the message that it would send with its analysis in that footnote. Did anyone in the judges' chambers question its necessity? Who were the law clerks who assisted the judges? As a former federal law clerk, I would have respectfully counseled against such a one-sided discussion in that footnote. If the judges insisted on including a footnote to support their use of the term, I would have advised them to just cite to prior decisions and use a brief parenthetical explanation, such as (using terminology used in prior opinions).

However, the Fifth Circuit went above and beyond using the term "illegal alien." It legitimized and promoted its use. And it did so at a time in our country when we are still dealing with the legacy of racism, including the use of certain terms meant to marginalize groups of people who are deemed inferior. The majority chose to use terminology that demeans human beings who live among us and contribute in many positive ways in our society. Some of them grew up in this country or are parents of U.S. citizens. The majority did not discuss the human aspect in its opinion. In fact, the terminology that it used together with the absence of the human perspective dehumanized the people covered by the "Deferred Action for Childhood Arrivals" (DACA) and "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA) programs. Yet, in footnote twenty-five (25), the majority chastised the dissenting judge for referring to the states as "plaintiffs" rather than as "sovereign states." This proves that the majority knew that judges choose among terminology and that the chosen terminology matters in the particular case and as precedent that can be used in law as in society.

KJ

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