

Keynote Address

JUSTICE JOHN PAUL STEVENS (RET).

Let me begin by expressing my admiration for the work performed by Justice Elena Kagan, who now occupies the seat of the Supreme Court that became vacant when I retired a few years ago. She has written opinion after opinion, both for the Court and the dissent, which expresses my reaction to a particular issue that is far more articulate and persuasive than anything that I might have written. The fact that she is performing so capably is particularly gratifying because it confirms my judgment that my retirement would benefit the public as well as myself. Thanks to Elena, I have never regretted my decision to retire. But as my former colleague, Bill Rehnquist, often said, there are occasions when even “Homer nods.” This morning, I plan to say a few words about one of those rare occasions—*Chaidez v. United States*,¹ decided about two years ago.

Under the Supreme Court’s decision in *Teague v. Lane*,² a person whose criminal conviction became final before the United States Supreme Court announced a new rule of constitutional law may not rely on that new rule as a basis for attacking his conviction. In *Chaidez*, the Court held that under *Teague* the petitioner could not rely on my opinion for the Court in *Padilla v. Kentucky*,³ as a basis for challenging the validity of her plea of guilty to mail fraud charges that subjected her to mandatory removal from the county.⁴

In *Padilla*, the Court had held that the defendant could challenge the validity of his conviction because his lawyer gave him incorrect advice about the deportation consequences of his plea.⁵ There was nothing new about the basic rule that every defendant has a constitutional right to competent counsel before entering a plea of guilty.

¹ 133 S. Ct. 1103 (2013).

² 489 U.S. 288 (1989).

³ 559 U.S. 356 (2010).

⁴ *Chaidez*, 133 S. Ct. at 1105.

⁵ *Padilla*, 559 U.S. at 360.

But, according to the majority in *Chaidez*, our ruling in *Padilla* was novel because we “resolved the threshold question before us by breaching the previously chink-free wall between direct and collateral consequences” of criminal convictions.⁶ This morning I shall make four brief comments about that “chink-free wall.”

First, unlike the *Teague* rule itself, as well as the constitutional law rules to which *Teague* applies, the distinction between collateral and direct consequences is the product of state court decisions, lower federal court decisions, and law review articles. There are no Supreme Court opinions endorsing the “chink-free wall” between collateral and direct consequences. Indeed, the Court’s opinion in *Chaidez* remains agnostic about the wall’s existence and even acknowledged that the Court “had never attempted to delineate the world of ‘collateral consequences.’”⁷

In an attempt to find support for the existence of this chink-free wall, the Court’s opinion curiously relies on a law review article entitled *Effective Assistance of Counsel and the Consequences of Guilty Pleas* by Gabriel Chin and Richard W. Holmes, Jr., for the proposition that exclusion of advise about collateral consequences from the Sixth Amendment’s scope was one of “the most widely recognized rules of American law.”⁸ The Court’s reliance is curious, in my view, because the article was critical of that distinction. The Court’s citation is even more puzzling because I, too, had relied on that article in my opinion for the Court in *Padilla*, but for a different proposition: prevailing professional norms require counsel to advise her client regarding the risk of deportation. The article thus illustrates how, in the unique context of immigration law, *Strickland* may be applied even if there is a “chink-free wall” between collateral and direct consequences.

Second, instead of “breaching” that wall, Part II of the Court’s opinion in *Padilla* concluded that deportation was “uniquely difficult to characterize as either a direct of collateral consequence” and therefore the distinction as “ill suited” to evaluating the petitioner’s

⁶ *Chaidez*, 133 S. Ct. at 1110.

⁷ *Id.* at 1108, n. 5.

⁸ See *id.* at 1109 (citing to Gabriel Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706 (2002)).

claim.⁹ There is, of course, a clear difference between declining to rely on a distinction and concluding that it must be changed. The Court in *Chaidez* faults the *Padilla* opinion for fully explaining why lower court doctrine was inapplicable instead of ignoring that precedent and simply discussing the *Strickland* standard.

Third, whether a particular consequence of a criminal conviction is appropriately characterized as “direct” or “collateral” is far less important than evaluating its impact on a particular individual. The use of such a glittering generality as the basis for evaluating the competence of any lawyer’s performance in a specific case is obviously unwise. My opinion in *Padilla* referenced a helpful amicus brief filed by the Asian American Justice Center to illustrate this point with real-world cases.¹⁰ For example, Maria Taganeca moved to the United States from Fiji when she was seven years old. Maria was enrolled in a community college and was taking care of her sick relatives when she was arrested while driving with some friends, one of whom had drugs in his possession. Although Maria did not have drugs on her person, she was charged under state law with possession of a controlled substance with intent to deliver. Her attorney advised her to plead guilty, without accurately informing her that accepting such a plea would render her deportable. Thankfully, Maria was eventually spared deportation after lengthy legal proceedings, but her case epitomizes the importance of legal advice about immigration consequences when a defendant is considering whether to plead guilty.

Or, for a different view, consider the issue from the perspective of a defense attorney. As Chin and Holmes point out, it is inconceivable that an attorney would make the following statement:

I represent someone charged with DUI, and due to my excellent advocacy the prosecutor accepted a guilty plea with a one-day sentence instead of the three days imposed in almost every similar case. As an interesting aside, my client and his family were then deported based on the conviction; I have no idea whether I could have negotiated a deal resulting in conviction of a non-deportable offense; status as an

⁹ *Padilla*, 559 U.S. at 366.

¹⁰ *See id.* at 397, n. 7.

alien does not affect the fine or length of incarceration, so I never considered it. The results of this case demonstrate my remarkable legal abilities.¹¹

As the hypothetical demonstrates, a competent attorney considers the real-world consequences of a defendant's guilty plea and should inform her client about the virtual certainty of deportation following a guilty plea.

Fourth, as explained in Part I of the Court's opinion in *Padilla*, as well as Part I of the Court's earlier opinion in *I.N.S. v. St. Cyr*,¹² it is Congress, rather than the Judiciary, that is responsible for the radical changes in our immigration law that have made deportation a virtual certainty in many offenses.¹³ For most of the twentieth century, immigration law contained only a narrow category of deportation offenses and gave judges broad discretionary authority to prevent deportation. The rules in this area of the law suffer from the same rigidity as the mandatory-minimum sentences that permeate the federal criminal code. While the courts can require counsel to provide adequate assistance to non-citizens facing potential deportation, only Congress can change the rules that create potential unfairness for literally thousands upon thousands of productive, but non-voting, residents. If Congress were to re-introduce discretion over removability decisions for judges or the Attorney General, the importance of counsel's advice about that possibility would no longer be as essential as it is today.

To be sure, there is some force to the argument that applying *Padilla* retroactively would potentially open the proverbial litigation floodgates. But, however large that flood may be, it is the result of Congress's unwise decision to eliminate discretion in removability proceedings. And, of course, only in meritorious cases will the non-citizens obtain relief. The fair administration of justice is never cost-free.

Ultimately, I agree with the sentiment aptly expressed by Justice Sotomayor in her *Chaidez* dissent: "In *Padilla*, we did nothing more

¹¹ Gabriel Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 718 (2002).

¹² 533 U.S. 289 (2001).

¹³ *Padilla*, 559 U.S. at 361; see also *St. Cyr*, 533 U.S. at 294–98.

than apply *Strickland*.¹⁴ Rather than announcing a new rule of constitutional law, we simply applied a familiar rule to the new set of facts that were the product of changes enacted by Congress. If, instead of mandatory deportation, Congress were to impose a novel form of punishment—perhaps something akin to the Philippine “cadena” described a century ago in the *Weems*¹⁵ case—I feel confident that the Court would not characterize a decision requiring counsel to advise her clients about the risk of that novel punishment as a “new rule of constitutional law.” Advice about the novel punishment of mandatory deportation is equally important.

Thank you for your attention.

¹⁴ *Chaidez v. United States*, 133 S. Ct. 1103, 1120 (2013).

¹⁵ *Weems v. United States*, 217 U.S. 349, 358 (1910).