

SCOTUS and CONGRESSIONAL RULES

The SCOTUS has just heard oral arguments over the Trump “Remain in Mexico” policy. What is interesting, is the Trump policy is just that. It’s a policy fashioned out of existing law. Not a new rule.

The problem is the Department of Homeland Security was permitting, by rule, illegal and legal foreigners to enter and remain in the United States, if they claimed asylum. The rub was they got to stay in-State until their hearing on whether they were eligible for asylum. That hearing time frame was one-to-two years and 90% never showed. The illegals gamed the system to gain entry into the United States. Why? They can’t vote but they do get social benefits and many do not pay payroll tax. But why do the democrats want to let them in? Simple. They are counted in the census. The census determines the number of house seats which in turn determines the appropriation of federal funding and voting majority in Congress. Bingo! Which is why Trump wanted the census to determine how many citizens were in the country to allocate tax dollars.

But back to the Remain in Mexico policy. Current immigration law states, if a foreigner applies for asylum to the United States, he is to be held until it is determined he qualifies for asylum. If not, he is returned to his country. But when the immigration holding facilities overflowed the courts ruled that they must be let go pending their hearing. What is interesting here is the lower courts did not rule the law unconstitutional. Instead, the lower courts *made new rules*. Yup, Congress said hold, lower courts said release.

Trump then fashioned a rule to have the immigration officers make an on-the-spot determination if the asylum request was bona fide. An existing immigration law permits the officer to do just that, if the foreigner is apprehended within 50 miles of the border. Nope, the courts ruled that such an administrative decision was not allowed for asylum, even though congresses said it was. Again, the lower courts did not rule the law unconstitutional. The court simply *made new rules*.

So the dogmatic Trump did an end-around. Existing law also says that *if* the foreigner traversed another country that offered asylum, he had to apply there first. So, using the law as written, Trump returned all asylum seekers, coming from Mexico, back to Mexico because Mexico offers asylum to foreigners.

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Now Trump could have just simply returned them as the law *required* but he provided a humanitarian aspect that no one talks about. He persuaded the Mexican government to temporarily house the returnees while their asylum application was adjudicated. On their hearing date, they were escorted back into the United States for their hearing. If their asylum application was approved (90% are not) they got to stay, otherwise they were returned to Mexico.

The bureaucrats within DHS didn't agree and stopped following the rule.

Trump doubled down and issued an Executive Order to DHS to cease most all immigration applications from Mexico during the COVID pandemic. The current DHS on its own initiative (with Biden's approval) has decided to write new onerous rules to negate and do away with Trumps EO.

The lower courts have just halted that "re-write" until the DHS authority to do so could be resolved. That "rule making process" issue with Title 42 dovetails exactly with the "Remain in Mexico" issue now before SCOTUS in a round-about way. The lower courts are looking at the DHS "lack of process" that circumvented the Presidential EO (Title 42) as a violation of the Administrative Procedure Act (APA). SCOTUS on the other hand is looking at the rule making process "used" to amend the Trump stay in Mexico policy as a violating the Administrative Procedure Act (APA). In both instances the APA requires the spawned "rule" to be struck down, if the APA process was not followed (5 U.S. Code § 553). Our excitement comes from a buried nugget within the 5th court of appeals ruling that is now before SCOTUS. The 5th circuit stated the executive department and courts alike must adhere to APA.

It was surprising that SCOTUS took the case, as their own precedence says their review of an EO is limited... until now. Maybe, maybe (hoping and wishing) they are going to slap down lower courts that "fashion" rules out of thin air.

But that never stopped Two Smart Farts from going out on the proverbial limb. We looked into our cloudy jar of mayonnaise that's been sitting on the porch for almost a week and this is what we predict, sort of

SCOTUS is about to make a landfall ruling:

First focus on NOT FOLLOWING THE LAW;

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Second, who and what executive orders effect.

We think #2 is going to be the biggest. By law, an EO can only effect executive employees and “their environment and actions”, however neither can supplant what Congress determines for everyone else. KaPut!

On #1. SCOTUS is going to crush the liberal left. When Congress dictates a specific way to execute a law, it cannot be changed by others. Second, when Congress gives authority for rule making you must follow Congresses RULES and INTENT when changing those very rules. KaPut!

With bated breath being punctuated by the forceful pouring of scotch, Two Smart Farts do not wait for SCOTUS to do the right thing but rather, anxiously hold our breath to see if SCOTUS acts.

A quick and easy fix would be to codify Title 42 without regard to the pandemic. Meaning all asylum application must be done “Out of Country”. It should garner enough votes to get to Biden’s desk. If not, voting citizen should see clear the true disrespect the democrats have for the country. If Biden vetoes the bill, then impeachment would be warranted based on his disdain for the country and his violation of his oath of office to protect the States from invasion (Article 4, Section 4).

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