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European Languages

زبانهای اروپایی

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30.12.2022

Cruel and unconstitutional: US Supreme Court maintains Title 42 exclusion of migrants seeking asylum

On Tuesday, the US Supreme Court issued an order extending the federal policy known as Title 42 that bars most border migrants from filing asylum claims. The order combines cruelty towards the hundreds of thousands seeking sanctuary at the US-Mexico border with a green light to fascistic governors of Republican-ruled states who are usurping federal authority over immigration policy.

It is both an act of barbarism—Title 42 has been used to expel more than 2 million migrants since 2020—and a further manifestation of the deepening political crisis in the United States. Conflicts within the ruling elite threaten to explode into open warfare, whether in the streets, as on January 6, 2021, or through state governments defying the US Constitution and seeking to assert an independent power to oppress and persecute immigrant workers.

Title 42, a provision of the 80-year-old Public Health Act, was invoked by President Trump in March 2020 at the urging of his fascistic counselor Stephen Miller, who was in charge of immigration policy at the White House. Miller seized on the COVID-19 pandemic, not to safeguard the American people from a deadly virus, but to employ it as a pretext for a further crackdown on immigrants at the southern border.

Under Title 42, the Centers for Disease Control and Prevention (CDC) can bar migrants from entering the United States if they are believed to be carrying a communicable disease. The provision had never before been applied to *all* immigrants, regardless of their country of origin. And prior to the Trump administration, it had never been used as a weapon for an immigration restriction policy.

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As in other major policy areas, the Biden administration continued the war on immigrants launched by Trump, including the use of Title 42 to block migrants at the border who sought to file asylum requests. In the course of the past two years, under the supposedly more caring Democrats, the US Border Patrol and Immigration and Customs Enforcement (ICE) have proceeded with the same brutality as under Trump, using many of the same weapons.



Immigrants in a US detention center [Photo: Department of Homeland Security]

The massive surge across the southern border, with more than 2.4 million immigrants detained by the US authorities over the past two years, is due to the heightened crisis of world capitalism, not to any warmer welcome from Biden compared to Trump.

Worsening poverty and oppression in Central America and Haiti, dominated and exploited for more than a century by American imperialism, are major driving forces. An additional factor this year is a huge influx of refugees from Venezuela and now Nicaragua, under the impact of US economic sanctions which have targeted the two regimes (which do not have repatriation agreements with Washington, a legal requirement for using Title 42 against asylum seekers).

The same factors are at work in Europe, where refugees from Africa and the Middle East, fleeing imperialist wars and the resulting collapse of entire societies, are seeking refuge. These include millions from Afghanistan, Iraq, Syria, Libya and other countries targeted by American bombs and missiles and US or US-proxy troops, along with similar victims of British and French imperialism.

In the United States, Republican state governors are exploiting the border crisis, seeking to whip up fear and hatred of immigrants as part of the further shift of the Republican Party

in the direction of fascism. They are exploiting the border crisis both to undermine the Biden administration politically and to assert the authority of their states in a way that flagrantly challenges the US Constitution, under which border policy and its enforcement are reserved for the federal government.

Title 42 presented a legal conundrum to the Biden administration. While it relied on this measure as a weapon against immigrants, invocation of public health grounds for exclusion of refugees cut across its broader effort to shut down all COVID-19 mitigation measures and declare the pandemic over, so that corporate profit-making could resume full blast regardless of the consequences for working people.

Last spring, the CDC declared that COVID-19 no longer represented such a danger that Title 42 measures were justified. The Biden administration prepared a shift to other immigration restriction methods, but Republican state attorneys general filed suit against the Department of Homeland Security, which oversees US immigration policy, and obtained a temporary court order to block the lifting of Title 42.

A separate lawsuit by the families of migrants caught up in the Title 42 repression led to an injunction from a different court, setting a December 21, 2022 date for ending Title 42.

The Republican state governments sought to intervene in this suit, against the migrants.

The migrants' advocates pointed out the cynical hypocrisy of the Republican-ruled states: Of the 19 states claiming that the pandemic continued to make exclusion of migrants necessary, 12 were suing the federal government to lift all public health restrictions on the grounds that the pandemic was over.

The conflicting court rulings gave the Supreme Court the opportunity to intervene with a blatantly partisan and anti-Constitutional action, siding with the Republican governors against the Biden administration. The court set a hearing for arguments in late February or early March on the question of whether states had legal standing, i.e., the right to sue the federal government on this issue. This delays any lifting of Title 42 until a ruling by the high court, which could come as late as the end of June.

In the meantime, Texas Governor Greg Abbott has effectively usurped the authority to make immigration policy, deploying the Texas National Guard to set up barbed-wire fencing along the Mexican border in the El Paso area, the current focus of migrant entry into the United States. These soldiers are arresting immigrants who try to cross over, separating men from women and children, and sending the men across the state to be tried for trespass, convicted and sent to prison. Once they serve their sentences, they will be

turned over to ICE for deportation. All this is flagrantly unconstitutional and illegal, in addition to being cruel and heartless.

President Biden could stop this border lawlessness in a minute simply by federalizing the Texas National Guard, a procedure carried out with regularity during the wars in Afghanistan and Iraq and employed by a succession of administrations in the 1950s and 1960s, Republican and Democratic, to enforce racial integration against the resistance of racist southern Democratic governors seeking to defend segregation. Biden does not do this, in part because he and Abbott agree on the fundamental policy of sealing off the US-Mexico border and blocking immigrants, and in part because there is some doubt whether an order to federalize the National Guard would be obeyed.

The White House issued a brief and mealy-mouthed statement in response to the Supreme Court ruling, saying the administration would comply with it “while advancing our preparations to manage the border in a secure, orderly and humane way when Title 42 eventually lifts...”

The president, vacationing in the Virgin Islands, told reporters, “The court is not going to decide until June, apparently, and in the meantime, we have to enforce it.”

The right-wing justices who comprised the 5–4 majority in the Supreme Court decision issued their ruling without comment. But the dissenting opinion, written by right-wing Justice Neil Gorsuch, with the concurrence of liberal Justice Ketanji Brown Jackson, pointed out that the court majority was not responding to any genuine public health emergency.

“The current border crisis is not a COVID crisis,” Gorsuch wrote. “And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency. We are a court of law, not policymakers of last resort.”

This, of course, is not true. The Supreme Court, like all the political institutions of the American government, is an instrument of the US financial oligarchy for enforcing its interests. It acts as a last line of defense for corporate America against any popular demands for reform or redistribution of wealth, and has played a particularly noxious role in recent decades as the spearhead of a systematic assault on democratic rights, culminating in last June’s *Dobbs* decision repealing *Roe v. Wade* and allowing states to criminalize abortion.

The defense of the rights of immigrants, and of all democratic rights, cannot be carried out through appeals to any of the political institutions of the capitalist class, including the

Democratic Party and the Biden administration. It requires the mobilization of the working class as an independent political force, organized and led by its own revolutionary party and fighting for a socialist program.

Such a program includes upholding the right of all working people to live and work in the country of their choice, and to move about freely without regard to such historical anachronisms as borders and nation-states. The program of working class struggle must be based on internationalism, the unity of workers of all countries in a common struggle against the global capitalist system.

WPRLD SOCIALIST 29.12.2022