

“I THINK THE CRITICAL TERM HERE IS” LITTERING PROLONGED MENTAL HARM

Here’s how our crack 9th Circuit Judge Jay Bybee played word games so as to consider bottles of water left for migrants traversing the Arizona desert “litter” even if they weren’t “garbage.”
(h/t Balkinization)

1The regulation suffers from several grammatical challenges. The regulation begins with three gerunds listed in series—“littering, disposing, or dumping”—followed by an object introduced by a preposition—“of garbage, refuse sewage, sludge, earth, rocks or other debris.” 50 C.F.R. § 27.94(a). “Littering,” however, does not really match the phrase that follows—it makes little sense to say “the littering . . . of garbage, refuse sewage, sludge, earth, rocks, or other debris.” We don’t ordinarily think of littering in terms of sewage, sludge, or rocks. Moreover, the “of” before “garbage” doesn’t make sense; neither “littering” nor “dumping” requires it. The regulation was probably intended to read: “[L]ittering, or disposing of or dumping garbage, refuse sewage, [etc.] . . . is prohibited.”

[snip]

Largely ignoring the term “littering,” the majority focuses instead on the term “garbage,” which it defines as “food waste” or “discarded or useless material” Maj. Op. at 13296. The majority concludes that because the water in the bottles is “intended for human consumption,” the bottles have value, and, therefore, are not garbage.

Maj. Op. at 13296. The majority holds that “given the common meaning of the term ‘garbage,’ . . . § 27.94(a) is sufficiently ambiguous in this context that the rule of lenity should apply.” Maj. Op. at 13298.

I think the critical term here is not “garbage,” but “littering.” Millis’s citation was not for dumping garbage but for “littering in a National Wildlife Refuge.”

Mind you, when the issue was whether waterboarding someone constituted prolonged mental harm, Bybee was not really a stickler for precise meanings.

Which I guess means Bybee is consistent: he has the remarkable ability to read a phrase with that meaning that will cause the utmost pain to brown people.