
Wayne Gretzky: Shoot The Puck

The eyes of nearly everyone are upon Texas – on Amarillo, specifically, where comically lawless federal Judge Matthew J. Kacsmaryk will soon decide if the FDA illegally approved the medication mifepristone, sometimes thought of as the "abortion pill." One might think that it's somewhat too late to challenge a two-decade old approval based upon impeccable science. One would be wrong. This is Kacsmaryk, a professional bigot who got his job precisely to enjoin perfectly legal policies, and implement the "Democratic Party Exception" to Articles I and II of the Constitution.

This deeply affects environmental policy. Lawless district judges in the Fifth Circuit make a specialty of these things: a few months ago, in Louisiana v Biden, knuckledragger Judge James D. Cain enjoined a Biden Administration social cost of carbon policy that didn't even exist yet.

This lawlessness is fostered because these judges sit in district divisions with only a single (or perhaps two) active judges. Kacsmaryk is hearing this case because comically corrupt Texas Attorney General Ken Paxton, who is under indictment for corruption and still has not faced trial, chose to file in Amarillo, where Kacsmaryk is the only sitting active judge.

What to do?

There is no easy answer, but it seems to me that the Justice Department has been

pusillanimous when it comes to fighting these tactics — *which it knows will happen.* The best answer is to attempt to beat these guys at their own game. To wit:

- Any time that the administration is about to issue a controversial rule, or gets wind that a rule will be challenged, it should first immediately file for a declaratory judgment of legality in a friendly venue: possibly the District of Columbia, where the judges — even a couple of the Trump judges — are sane, and the DC Circuit maintains a majority of pro-legality judges.

A declaratory judgment in and of itself does not stop political litigation elsewhere, of course, so DOJ's motion should include a prayer to enjoin Attorneys General from challenging the rule anywhere else but that court — in other words, demanding jurisdiction to hear challenges (which could be claim precluded because of the underlying declaratory judgment action).

In other words, don't wait and play defense. Go on offense and try to stop this kind of outrageous forum-shopping.

Will it work? Not necessarily. Lawful judges will not hear these cases just because DOJ asks. They could rule that declaratory judgments are improper or premature. They might refuse to issue the injunction or claim jurisdiction. DOJ might draw a lawless Trump judge.

Thus, counsel from the Great One, Wayne Gretzky, to whom is often attributed a crucial and wise quote, namely:

> You Miss 100% Of The Shots You Don't Take

DOJ has to take the shot. Otherwise, we will continue to descend into lawlessness.