

Edwin Borchard, Author of the Declaratory Judgment Act

Three weeks ago, I argued that the Biden Administration should use the declaratory judgment as a way of pre-empting lawless judges like Matthew J. Kacsmaryk and Reed O'Connor, both of (of course) Texas. I fleshed out the idea in a recent piece for The American Prospect.

Since then, the problem has only gotten worse, as O'Connor just struck down the administration's regulations on preventive care under the Affordable Care Act, threatening millions with the loss of crucial screening for cardiac, cancer, and HIV care. Something must be done, and DOJ's current strategy is failing.

But some are still unpersuaded. How can the Administration bring a lawsuit to prevent a lawsuit? Wouldn't that violate Article III's "case or controversy" requirement?

Not necessarily. People said the same thing about declaratory judgments themselves when Yale's Edwin Borchard proposed them back in the 1930's. But the Supreme Court upheld them, and did so with a legal standard that could allow them to go ahead here. That standard was most recent reaffirmed by the United States Supreme Court in MedImmune v Genentech, which stated:

> [Our cases] do not draw the brightest of lines between those declaratory-

> judgment actions that satisfy the case-or-controversy requirement and those that do not. Our decisions have required that the dispute be "definite and concrete, touching the legal relations of parties having adverse legal interests"; and that it be "real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.,* at 240–241. In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941), we summarized as follows: "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Essentially, this is a practical, "totality-of-the-circumstances" test, but it is one in which the administration, if it chose to do so, could set up well.

Suppose that the administration is about to issue a clean air regulation. As is the case with any regulation, it will have to issue a Notice of Proposed Rulemaking, and those with adverse interests — indeed, those who would want to sue — will have to comment on the regulation or risk losing for failure to exhaust their administrative remedies. Well, when they do so, that could certainly allow that there is "a substantial controversy between parties with adverse legal interests." That could be doubly so if parties — such as Texas and the others states — had already sued under similar circumstances (as they have). And it would be triply so if a court rejected the Declaratory Judgment only to see Texas turn around and sue. Judges might not like looking so foolish. Such a case would be definite and concrete: it would seek to uphold the regulation against possible challenges raised in comments.

Note, by the way, that this is a fairly liberal standard for Article III. In Aetna Life Insurance Co. v. Hayworth (1937), the case that upheld the Declaratory Judgment Act and that the Court still cites as the touchstone, there was no indication that there was even going to be a lawsuit. Aetna wanted a judgment that it was not liable under a life insurance policy after receiving a letter from the insured. Yet that was good enough for the Court.

It's no accident that the most recent statement from the Supreme Court involved a big biotech company like Genentech: declaratory judgment actions are common in

intellectual property cases where patent-holders want the security of knowing that they are not infringing against someone else. And this might be why the Supreme Court, always on the outlook to help large corporations, might have reaffirmed a relatively liberal interpretation of Article III in this case (which is certainly not its norm).

Genentech is also important for another reason: it disapproved of the stricter standard that had been put forward by the Federal Circuit (which handles patent and trademark cases and so sees many declaratory judgment cases). The Circuit court had said that for a declaratory judgment to satisfy Article III, there had to be a "reasonable apprehension" of litigation (and sometimes "reasonable apprehension of imminent" litigation). Nope, said the Supremes: this test conflicts with Supreme Court precedent. Declaratory judgment plaintiffs do not have to show that the other side will sue.

I will look into this more — as I said in the piece at TAP, if it were easy, then someone would have done it already. But one thing is clear: anyone saying that this isn't a "controversy" because of Article III just hasn't looked closely at the cases.

Once again: the Biden Administration's strategy so far against lawless ideologues like Kacsmaryk and O'Connor has so far failed. It is time for a new approach. It cannot do any worse than what it has gotten so far.