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COMMENTARY

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# The Conflict of Public Health Law and Civil Liberties Part II: The Vaccine Mandates and What the Supreme Court Decided

We are now beginning to understand both the science of the COVID-19 virus and its mutations, and the social and legal impact of the pandemic upon all our lives. Two years of quarantine, masking, limits on public school attendance, vaccination mandates and cancelled public meetings have caused serious social change and continuing challenges to our laws, and to our public trust in governance. The cost of COVID-19 across the world has been both economic and non-economic, social and spiritual, as well discussed by John Tierney in an excellent review "The Panic Pandemic."*[1] Some of the measures taken by the States and the Federal Government are now becoming suspect, as we analyze the results of attempts to limit the pandemic. Hopefully, when and if continued viral pandemics occur, we will respond more intelligently.

Therefore, it remains more important than ever to allow the science to prevail over the political pressures we see every day. Fortunately, the basic epidemiology and virology of COVID-19 and its variants has positively influenced the civil and constitutional law that has evolved over the past 2 years, and has not been ignored by the Court.

Two Supreme Court decisions rendered January 13, 2022, were cognizant of much of the basic science. Those decisions allowed for the development of a more rational public health law policy that respects the tension between necessary restrictions on public behavior and our valued civil liberties.

The Court recognized the evolving scientific data that both state and federal agencies must use when promulgating any restrictions on ordinary civil liberties. In all such cases, the agency issuing the rules must use a rational basis to review the research, and cannot ignore any disputes if they are based on scientific findings rather than mere personal opinion. Religious and medical exemptions to vaccination, as well as quarantine requirements, are usually written into a rule, but the granting of the exemptions must not be illusory in practice.

As previously reviewed,[2] the authority to develop public health law in the past has resided in the states, and not the federal government. The Court observed:

"The question before us is not how to respond to the pandemic, but who holds the power to do so."[3]

Also, "The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it."[4]

Two major issues were decided by the Court. The first was the constitutionality of the federal vaccination mandates directing all healthcare providers† funded by Medicaid and Medicare to require their employees to be vaccinated. The Court noted that providers had on multiple previous occasions been "obligated to satisfy a host of conditions that address the safe and effective provision of healthcare," "...and most pertinent here, [were] the programs that hospitals must implement to govern the 'surveillance, prevention, and control of....infectious diseases.'"[4] Therefore, the Court felt that the mandatory vaccination requirements of medical staff (unless exempt for medical or religious reasons) were within the historical practice of Medicare and Medicaid, and were within the powers given by Congress to the Department of Health and Human Services.

The second case[3] reviewed directives from another agency, the Department of Labor/Occupational Safety and Health Administration (OSHA). The Department of Labor also issued a vaccination mandate that required nearly all smaller businesses to direct their employees to be vaccinated or to be tested frequently. If the employees did not

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* *See also* COVID lessons. *First Things, The Public Square*. February 2022;320:68-69, for a review and Commentary of the article by Tierney.

† "Providers" as defined by statute are "hospitals, nursing homes, ambulatory surgical centers, hospices and rehabilitation centers, and more," in short, institutions and care centers, not physicians or nurses.


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comply, they should be "removed from the workplace." The Court did not find that OSHA had congressional authority for such directives. The statute that established OSHA anticipated that the agency would govern occupational safety. Any emergency risk to the workers must come from a "grave danger from exposure to substances determined to be toxic or physically harmful." The dangers covered by OSHA were risks from "occupational" exposure and not from public health problems, such as the pandemic. Because the spread of COVID-19 is just as likely from exposure "at home, in schools, during sporting events and everywhere else that people gather," the unique setting of a workplace did not broadly empower OSHA to address a *universal risk* such as COVID-19.[3]

These two cases will provide the precedents for a number of cases now in the federal courts contesting mandatory vaccination requirements. The Court relied in both cases on the fundamental principle of the separation of powers.

"Administrative agencies are creatures of statute. They possess only the authority that Congress has provided."[3]

The Executive Branch controls the agencies that are first established by Congress. However, the Executive branch cannot order an agency to exercise authority not given to it by Congress. Unfettered directive power by the Executive branch over agency law would destroy the authority of Congress.

The COVID pandemic is far from over, and future viral pandemics will continue to challenge our nation in every arena of public and personal life. As we address these issues, we can all hope for civility and understanding of honest opinions and reputable science. The right to freedom of speech, as guaranteed by the First Amendment, is too important to lose due to mishandling of the pandemic.

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## References

1. Tierney J. The panic pandemic. *City Journal*. Summer 2021.
2. Harris CE. The conflict of public health law and civil liberties: the role of research data and first amendment law. *Am J Med.* 2021;134:1312–3.
3. Concurring opinion by J. Gorsuch, J. Thomas and J. Alito in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 595 U.S. (2022).
4. Majority opinion in *Joseph Biden Jr. President of the United States v. Missouri et.al.*, 595 U.S. (2022).