



The Vaccine Mandate Case May Mark the End of the ‘Work-Around’ Era

It gives the Supreme Court an opportunity to revive the separation of powers.

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Hours after President Biden’s Sept. 9 speech announcing a series of vaccine mandates for private-sector employees, his chief of staff, Ron Klain, retweeted an MSNBC anchor’s quip that wielding workplace-safety regulation to force vaccinations was “the ultimate work-around.” Congress has never enacted a law requiring American civilians to be vaccinated—assuming it even has the constitutional authority to do so, which is doubtful. The Supreme Court hears arguments Friday on two of the mandates, which are likely to meet the same fate as other recent attempts to circumvent Congress that the courts have rejected.

The Constitution vests the power to make laws in Congress and charges the president with the duty to execute them. That’s what many in Washington derisively call the “high school civics class” model of government. It’s slow, it’s cumbersome, it rarely approves measures that don’t enjoy widespread public support, and it forces compromise, moderation and tailoring of policies to address the circumstances of a vast and varied nation. The temptation of avoiding it via executive fiat is obvious.

All it seems to take is clever lawyering. The U.S. Code is littered with broadly worded laws, made all the more capacious by judicial deference to agencies’ interpretations of them. Rather than dutifully carry out Congress’s design, a president can set his own policy and then scour the statute books for language that can be contorted to authorize it. In a 2001 Harvard Law Review [article](#), then- Prof. Elena Kagan called the practice “presidential administration.” President Obama put it more plainly when he faced congressional resistance to his agenda: “I’ve got a pen to take executive actions where Congress won’t.”

But it isn’t quite that easy. The Clean Power Plan, Mr. Obama’s signature climate policy, set rigid and unattainable emission limitations for fossil-fuel power plants to force them out of operation and transform the energy market. It relied on an adventuresome interpretation of an obscure provision of the Clean Air Act. In 2016 the Supreme Court blocked it from taking effect, and the Trump administration later repealed it. (We represented Oklahoma in the litigation.)

Mr. Obama's immigration-reform measures—also taken in the face of congressional opposition—suffered a similar fate. Deferred Action for Childhood Arrivals—which allows illegal aliens who were brought to the U.S. as children to work and avoid deportation—remains in legal limbo nearly a decade after it was established, following setbacks in the courts. Its counterpart for parents of U.S. citizens and permanent residents was enjoined before it took force.

Mr. Biden has had a taste of defeat himself, in a case that prefigures the mandate challenges. After Congress declined to extend the Trump administration's nationwide eviction moratorium, the Biden administration acted on its own, relying on a 1944 statute authorizing the Centers for Disease Control and Prevention to undertake clearly delineated disease-prevention measures like fumigation and pest extermination. The justices, however, found it unthinkable that Congress had intended to confer on CDC so "breathtaking" an authority: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."

In other words, loose language in old laws isn't enough to support a presidential power grab. Yet that's all the support the administration has been able to muster for the vaccination mandates. The Occupational Safety and Health Administration mandate forcibly enlists all companies with 100 or more employees to administer a vaccination-or-testing requirement that reaches nearly 85 million employees. It relies on a narrow provision addressing workplace-specific hazards that has never been used to require vaccination. The mandate for Medicare and Medicaid providers (covering 10.3 million workers) rests on general provisions authorizing regulations necessary to administer those programs—which, again, have never been used to require vaccinations. None of these statutes contain even a hint that Congress authorized any agency to administer broad-based vaccination mandates touching millions of Americans.

Although the mandates are flawed in other ways, their lack of clear congressional authorization is the most striking defect. Excessive judicial deference to agencies' statutory interpretations is what enabled Mr. Obama's "I've got a pen" agenda and its revival under Mr. Biden. The result has been to distort the entire federal lawmaking apparatus. Members of Congress now lobby the executive branch to make law through regulation rather than legislate themselves. Agencies enact major policies that have the durability of a presidential term before they're reversed. And the president would sooner blame the courts for legal defeats than admit he lacks the power to do his allies' bidding.

The courts share blame for this state of affairs, having lost sight of the basic separation-of-powers principles that should guide questions of agencies' statutory authority. A decision rejecting the vaccination mandates because they weren't clearly authorized by Congress would serve as a shot across the bow signaling that the work-around era is over.

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