

Can Congress Stop Biden's Vaccine Mandate?

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Constitutional accountability is coming for the Biden administration's COVID-19 "emergency temporary standard" (ETS)—better known as Biden's vaccine mandate. The rule, which would require businesses with more than 100 employees to enforce vaccination or weekly testing starting January 4, has run into a maelstrom of legal and political opposition.

Since the Occupational Safety and Health Administration (OSHA) published the final ETS last Friday, at least 27 states and countless private plaintiffs from around the country filed lawsuits. If history is any guide, OSHA now faces an uphill climb to defend the rule. The agency is relying on the "emergency" authority that allows it to bypass normal procedural safeguards, but that courts have reviewed with a jaundiced eye. Of OSHA's nine previous uses of this authority, six were challenged in court and only one was fully upheld.

In keeping with this pattern, the U.S. Court of Appeals for the Fifth Circuit paused the vaccine ETS the day after its issuance, citing "grave statutory and constitutional issues." Thanks both to federalism and separation-of-powers concerns—the federal government lacks a general public-health power and Congress hasn't even tried to legislate workplace vaccination—the mandate is likely to end up on the Supreme Court's emergency docket sooner rather than later.

The Court may end up kicking the can down the road, blocking the rule's implementation but hoping to wait out the pandemic without ruling on the merits. But lawmakers on Capitol Hill could force President Biden's hand before then. Senator Mike Braun (R-Ind.) announced that he is working to cancel the ETS under the Congressional Review Act (CRA)—and that he has a critical mass of signatures to force a Senate vote.

Under the CRA, Congress has a window of opportunity to revoke recently issued regulations, a mechanism that's been successfully used 20 times. Thirty Senate signatures are enough to compel an up-or-down vote on a "resolution of disapproval," which means Republicans can get a vote without nailing down a majority. That would put tremendous pressure on senators from the states that have sued to stop the rule, several of whom are Democrats up for reelection next year.

In other words, while nothing is certain in our 50-50 Senate, this has the makings of a robust majority that doesn't turn on Joe Manchin and Kyrsten Sinema.

Things get trickier in the House of Representatives. When it passed the CRA in 1996, Congress focused on avoiding the Senate filibuster. For the lower chamber, however, there is no compulsory language. That means Speaker Nancy Pelosi is under no obligation to set a vote on the measure, and would likely attempt to stifle it to avoid embarrassing the president.

But the House is a majoritarian institution, and if more than 50 percent of its members want something, they can get it through a "discharge petition." Under House rules, if a lawmaker convinces a majority of his or her colleagues (meaning at least 218) to sign such a petition, that triggers a vote.

To be sure, it's not as simple as persuading a handful of House Democrats to vote for something they already want. Speaker Pelosi and her allies have ways to slap down caucus dissidents. But are committee assignments and parking spots, among other carrots and sticks, enough to convince everyone to fall in line? After this month's elections in New Jersey and Virginia, will swing-district representatives walk leadership's plank on yet another controversy?

It comes down to a straightforward political calculation: if the vaccine mandate is unpopular enough with their constituents, moderate House Democrats could succumb to the same pressure as their Senate brethren. Given Pelosi's razor-thin majority and assuming a unified Republican front, five defectors are all the petition would need.

Of course, even if both houses of Congress voted to revoke the vaccine mandate, the CRA resolution would still need the president's signature to take effect. But forcing a veto would send a shot across the bow of a president whose approval ratings are already in steady decline. OSHA might be compelled to hold off on expanding its mandate to employers with fewer than 100 employees, or to withdraw the emergency rule sooner than planned. And any congressional action, particularly if both houses are involved, will signal to courts that the executive branch's legal reasoning really is out on a limb.

President Biden's unprecedented vaccine mandate has already had a rough start, but things will get even worse for it if we look beyond the judiciary for institutional checks and balances.

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