What May a President Do in Times of Emergency? *Kentucky v. Biden* Foreshadows Narrowing of Executive Power

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When a country is faced with a global pandemic that has the potential to kill millions of Americans, close businesses, and force students to transform their kitchen tables into a remote version of a classroom, the ability to quickly strategize and mobilize resources to combat the deadly virus is essential. Who gets to make these critical decisions regarding the health and safety of the American people is a question of the utmost importance. Elected officials are arguably best suited to issue—and rescind or modify—public health orders because they are politically accountable, and the American people can make their voices heard at the ballot box to determine who gets to make these sensitive and consequential decisions.[1] But the unelected branch of government, the judiciary, sometimes steps outside its traditionally modest role when it comes to public health orders.[2] When judges overstep their traditional boundaries, they are reining in the power of the executive branch led by the elected President, usurping such power for themselves, and in doing so, risking the legitimacy of the broader judiciary.

On September 9, 2021—approximately nine months after the development of COVID-19 vaccines—President Biden ordered the Occupational Safety and Health Administration (OSHA) to make private employers mandate vaccinations.[3] On the same day, the President announced that he would require federal contractors to do the same.[4] The order to OSHA ended unceremoniously when the Supreme Court held that although Congress "has indisputably given OSHA the power to regulate occupational dangers," it has not given the agency the power to order private individuals—84 million in total—to be vaccinated.[5] Kentucky, Ohio, and Tennessee challenged the mandate for federal contractors,

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[1] *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

[2] Kentucky v. Biden, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021), *aff'd as modified sub nom.* Kentucky v. Biden, 57 F.4th 545, 547 (6th Cir. 2023).

[3] The White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/ [https://perma.cc/4SQP-ZVB2].

[4] *Id.* ("If you want to do business with the federal government, vaccinate your workforce.").

[5] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022).

arguing that the Federal Property and Administrative Services Act, under which President Biden issued the order, did not actually grant him the authority to issue the order.[6] The district court agreed with the challengers that the President had exceeded his authority under the Act, and further, that the order violated the nondelegation doctrine and raised federalism concerns by intruding on an area traditionally reserved to the states.[7] The district court issued a preliminary injunction, preventing enforcement of the mandate not only against the state plaintiffs, but also against any federal contractors and subcontractors in the three states.[8]

The Sixth Circuit recently affirmed the district court's issuance of an injunction, but limited its scope, holding that the district court abused its discretion in extending the preliminary injunction's protection to non-party contractors in the plaintiff states.[9] The court's decision was paradigmatic of a flavor of jurisprudence, currently in vogue, that requires Congress to be exceptionally clear when it intends to confer authority on the executive branch.[10] This trend toward minimizing congressional delegation of authority has its detractors, who argue that, especially in times of emergency, the executive branch should be given significant leeway in deciding how to manage the nation's affairs, and specifically here, its health.[11] The Sixth Circuit's unanimous decision could be a stroke of luck for the challengers—a particularly favorable panel, perhaps—or it could represent an increased willingness on the part of lower courts, bound by Supreme Court precedent increasingly hostile to congressional delegation, to boldly strike down mask mandates, vaccine mandates, and even more. In the face of statutory language that could plausibly be read to confer authority on the President to order a vaccine mandate, the Sixth Circuit confidently proclaimed that the President lacked such authority.[12] With the stroke of a pen, three judges discarded a public health order issued while a pandemic was still raging, begging the question: under such a narrow view of congressional delegation, will our nation be prepared to handle another unprecedented catastrophe, such as the public health emergency caused by COVID-19, if the President is precluded from acting swiftly and boldly?

The Sixth Circuit held that the Federal Property and Administrative Services Act of 1949 did not confer on the President the authority to issue a vaccine mandate.[13] The government defended the President's action on two of the Act's provisions—one that authorizes the President to "prescribe policies and directives that [he] considers necessary to carry out this subtitle,"[14] and another

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[6] Kentucky v. Biden, 571 F. Supp. 3d at 727.
[7] *Id.* at 726–29.
[8] Kentucky v. Biden, 57 F.4th 545, 550 (6th Cir. 2023).
[9] *Id.* at 557.
[10] *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.
[11] *See, e.g.*, *id.* at 676 (Breyer, Sotomayor, and Kagan, J.J., dissenting).
[12] *Biden*, 57 F.4th at 555.
[13] *Id.*
[14] *Id.* at 551 (quoting 40 U.S.C. § 121(a)).

which explains that the Act's purpose is to "provide the Federal Government with an economic and efficient system" for "[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting."[15] The government contended that requiring contractors' employees to become vaccinated against COVID-19 advances the economy and efficiency of contractor operations "by decreasing the likelihood that those employees will miss work or transmit the virus to their coworkers."[16] Ensuring that federal contractor performance is more efficient enhances the overall efficiency of the federal procurement system "by enabling the government to avoid entering into costly extensions or paying millions of dollars in unanticipated leave expenses."[17] On its face, this syllogism is at least logical: if employees are vaccinated, they are less likely to miss work due to illness, making the federal contractors more efficient and productive and decreasing the risk of costly leave expenses.

The court was unpersuaded. Explaining that the government's "statutory arithmetic starts with a fundamental error" in "search[ing] for power in a powerless provision," the court acknowledged that the Act confers upon the President the authority to "carry out" the Act's provisions but explained that a purpose provision cannot possibly be carried out.[18] The provision of the Act that pertains to providing the federal government with an economical and efficient system of procuring contracts is a statement of purpose, not a substantive provision, and only substantive provisions confer authority.[19] This theory of statutory construction is consistent with,[20] if not slightly more extreme than,[21] the textualist trend in the Supreme Court's statutory cases.[22] Regardless of whether the Sixth Circuit's decision is correct as a matter of statutory interpretation, it raises challenging questions about the appropriate balance of power between Congress, the executive branch, and the courts.

While the Sixth Circuit relied upon what it considered to be traditional tools of statutory construction in reaching its result, the court also noted that historical practice can be a probative indicator of statutory meaning. In the court's view, the earliest invocations of the Property Act "dealt with the bread-and-butter of

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[15] *Id.* (quoting 40 U.S.C. § 101).

[16] Reply Brief for Appellants at 3, *Biden*, 57 F.4th 545 (No. 21-6147).

[17] *Id.*

[18] *Biden*, 57 F.4th at 551–52.

[19] *Id.*

[20] *See, e.g.,* Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 173 (2016) (explaining that prefatory clauses have "no bearing" on the scope of an operative provision).

[21] *See, e.g.,* Gundy v. United States, 139 S. Ct. 2116, 2127 (2019) (explaining that a purpose provision can be an "appropriate guide" to the meaning of the statute's operative provisions) (citation omitted).

[22] Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 55 (2018). The Supreme Court's interpretive tools are significantly more textualist in orientation than they were several decades ago as evidenced by, among other indicia, an increase in the use of linguistic canons. *Id.* at 55–56.

procurement—property management, sharing government vehicles, identifying unused property, and the like."[23] But using history as a guide to statutory meaning can be dubious, and the court recognized that not all historical practice under the Act is consistent with its decision.[24] President Carter, for example, had used the Act as authority for executive action that would have made contractors more efficient.[25]

Even setting aside the fact that history can present a mixed bag—a smattering of examples from which judges may be tempted to pick those that support their position[26]—the simple reality is that just because a President may not have exercised a certain grant of authority in the past does not mean that such authority was not conferred upon him. After all, "there is a first time for everything."[27] But the current Supreme Court's affinity for history, and its rigid view of the separation of powers has time and again led it to strike down congressional delegations of authority.[28]

At the core of this strain of jurisprudence is the question: who decides? Dissenting from the Court's decision to temporarily keep in place Title 42, which allowed the federal government to deny entry to certain aliens to prevent the spread of COVID-19, Justice Gorsuch, joined by Justice Jackson, criticized the majority for wading into a contentious policy issue and closed by reminding their colleagues, "We are a court of law, not policymakers of last resort."[29] The prevailing view of textualism, embodied in the Sixth Circuit's opinion in this case, is often championed by those who operate under the guise of judicial modesty.[30] To be sure, strict adherence to the text of a statutory provision can often lead to more modest results and can constrain judges, but is it modest to enjoin enforcement of a vaccine mandate in the midst of a global pandemic, displacing the considered judgment of the President and his experts? The answer to that question must be no.

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[23] *Biden*, 57 F.4th at 554.

[24] *Id.*

[25] *Id.* at 555.

[26] *Cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Judicial investigation of legislative history has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'" (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983))).

[27] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012).

[28] *See, e.g.,* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2242 (2020) (Kagan, J., concurring in part and dissenting in part). Justice Kagan criticized the Court for striking down the single-director structure of the CFPB on the ground that Congress had never created a similar agency structure in the past. *Id.*

[29] Arizona v. Mayorkas, 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting).

[30] *See* Roger Pilon, *Into the Pre-Emption Thicket:* Wyeth v. Levine, CATO SUP. CT. REV. 85, 99 (2008–2009) (discussing Justice Thomas's insistence on textualism and judicial modesty, and the interplay between them).

"Such an [entity] . . . clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."[31] One could be excused for confusing this statement from the Court's decision to strike down the single-director structure of the Consumer Financial Protection Bureau with a description of the district judge's decision to enjoin enforcement of the federal contractor vaccine mandate in three states. The message from the Court in cases such as Seila Law is clear: the accumulation of too much power in one entity is dangerous.[32] Yet a single judge, unconstrained by political accountability, has the authority to issue an injunction and usurp policymaking power. An exercise of judicial modesty that is not.

Although the Sixth Circuit modified the scope of the injunction, it did so after it had been in place for 14 months,[33] allowing contractors and subcontractors to operate without requiring that their employees get vaccinated. Around the time the injunction was issued, almost one million Americans had died from COVID-19 and almost four million had been hospitalized.[34] Who knows how many lives could have been saved or—more to the point of President Biden's order—how much money could have been saved by reducing the cost of worker shortages and leaves caused by COVID-19?

That a court may boldly usurp power from the political branches when it comes to issues of public health has not always been a given. In May 2020, for example, the Court denied a church's application for injunctive relief against California's COVID-19 restrictions, with Chief Justice Roberts maintaining that when officials act in areas "fraught with medical and scientific uncertainties, their latitude must be especially broad."[35] And "[w]here those broad limits are not exceeded," a public official's decision "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."[36] Justice Ginsburg's replacement by Justice Barrett has coincided with a greater willingness to second-guess public health orders,[37] and as the Court

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[31] *Seila Law*, 140 S. Ct. at 2192.

[32] *See id.*

[33] *See* Kentucky v. Biden, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021); Kentucky v. Biden, 57 F.4th 545, 557 (6th Cir. 2023).

[34] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 670 (Breyer, Sotomayor, and Kagan, J.J., dissenting) (commenting on how the COVID-19 pandemic had ravaged the lives of millions of Americans).

[35] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (internal quotation marks omitted).

[36] *Id.* at 1613–14 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545 (1985)).

[37] *See, e.g.,* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (enjoining enforcement of governor's restriction on religious services).

continues on this trajectory, lower courts, such as the Sixth Circuit in this case, have followed suit.[38]

The temptation to go too far is real. Rather than limiting the relief to the parties before the court, as is typical,[39] the district court issued a blanket injunction against enforcement of the mandate in three entire states.[40] When a court's remedy goes beyond the parties, ordering the government to refrain from action with respect to those who are strangers to the case, "it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies."[41] And in cases involving mask or vaccine mandates, which have become politically fraught, the danger that judges place ideology before law—or appear to—is more acute.

The Sixth Circuit corrected the district court's abuse of discretion, but only after fourteen months had passed and countless lives were affected by COVID-19.[42] What remains to be seen is how much of a diminishment of federal power the Sixth Circuit will countenance in future cases, and whether any district courts will, once again, usurp power that does not belong to them.

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[38] *See Biden*, 57 F.4th at 557; Louisiana v. Biden, 55 F.4th 1017, 1033–35 (5th Cir. 2022) (holding that the federal contractor vaccine mandate violates the major questions doctrine).

[39] Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit.").

[40] *See Biden*, 57 F.4th at 550.

[41] Dep't of Homeland Sec., 140 S. Ct. at 600 (Gorsuch, J., concurring).

[42] *See Biden*, 57 F.4th at 557.