

IMMIGRATION INADMISSIBILITY AND COVID-19 VACCINATION: WHO BENEFITS AND WHO IS LEFT BEHIND?

ALEXIS MANSON*

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INTRODUCTION

Since March 2020, COVID-19 has been at the forefront of policy around the world, ranging from social distancing regulations and mask mandates to travel bans and more recently, vaccine mandates. With over 4.5 million deaths globally from COVID-19 and over 650,000 deaths nationally, the pandemic raises concerns as to the United States' ability to counteract biological attacks.¹ In an attempt to respond to and reign in the threat that COVID-19 continues to pose to the United States, the Biden administration has announced vaccine mandates covering members of the U.S. armed forces,² businesses with 100 or more employees,³ and immigrants.⁴ In response, a

* Alexis Manson, J.D. Candidate, 2023, Georgetown University Law Center; B.A. International Affairs, *summa cum laude*, 2019, University of Georgia. © 2021, Alexis Manson.

1. WHO Coronavirus (COVID-19) Dashboard, WORLD HEALTH ORG. (Sept. 30, 2021, 5:15 PM), <https://perma.cc/77LT-TD8R>.

2. Lolita C. Baldor, *COVID Vaccines to be Required for Military under New US Plan*, AP NEWS (Aug. 9, 2021), <https://perma.cc/HA7R-VGP9>.

3. Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates that Could Cover 100 million Americans*, CNN (Sept. 9, 2021, 9:01 PM), <https://perma.cc/2ASN-JJ8Z>.

4. Bryan Pietsch, *U.S. Will Require Most New Immigrants to Get Coronavirus Vaccine*, WASH. POST (Sept. 15, 2021, 4:40 AM), <https://perma.cc/HCW3-33JM>.

number of lawsuits have been filed challenging the legality of these mandates.⁵ This Current Development evaluates the Biden administration's vaccine mandate for immigrants, with a particular focus on weighing the needs and vulnerabilities of immigrants with U.S. biosecurity concerns. Ultimately, this analysis argues that the current immigrant vaccine mandate fails to protect U.S. national security and leaves behind thousands of vulnerable migrants.

I. COVID-19 AS A BIOSECURITY CONCERN

The COVID-19 pandemic presents a biosecurity threat to the United States that must be addressed.⁶ The pandemic has exposed the nation's vulnerability to biological threats, which may result in terrorists more often resorting to biological attacks.⁷ Notably, over the course of the pandemic thus far, former President Donald Trump was hospitalized while holding office, the Joint Chiefs of Staff were required to quarantine, and the *USS Theodore Roosevelt* was evacuated.⁸ The consequences of the lack of preparedness for the COVID-19 pandemic demonstrate the dangerous effects that biological threats can have on the U.S. government causing diversion of resources and decreasing military readiness.⁹

Both former President Trump and President Biden have acknowledged that biosecurity threats, including pandemic-level diseases, are important issues in national security.¹⁰ Congress has also begun to address the biosecurity threat posed by pandemics such as COVID-19. The International Pandemic Preparedness Act, proposed by Senator James Risch, would require the National Intelligence Council to submit an annual estimate "regarding the risks posed to the national security interests of the United States by the emergence, reemergence, and overseas transmission of pathogens with pandemic potential," and calls for the establishment of a Committee on Global Health Security and Pandemic and Biological Threats within the National Security Council.¹¹ Further, this proposed legislation calls for the "adoption of a United Nations Security Council resolution that . . . declares pandemics, including the COVID-19 pandemic, to be a threat

5. See, e.g., *America's Frontline Doctors v. Wilcox*, 2021 U.S. Dist. LEXIS 144477, case no. EDCV 21-1243 JGB (KKX) (C.D. Cal. July 30, 2021); *Plata v. Newsom*, 2021 U.S. Dist. LEXIS 190446, case no. 01-cv-01351-JST (N.D. Cal. Sept. 27, 2021).

6. See, e.g., Representative Eric M. Swalwell & R. Kyle Alagood, *Biological Threats Are National Security Risks: Why COVID-19 Should Be a Wake-up Call for Policy Makers*, 77 WASH. & LEE L. REV. ONLINE 217, 218 (2020) ("The outbreak of a highly contagious disease like COVID-19 strikes at the core of national security and the nation's interest in protecting its citizens from harm.").

7. *Id.* at 235.

8. *Id.* at 218.

9. *Id.* at 219, 233.

10. *Id.* at 224; WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Dec. 2017), 9; WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 12, 21 (Mar. 2021).

11. International Pandemic Preparedness and COVID-19 Response Act of 2021, S. 2297, 117th Cong. §§ 209(b)(1), 203(b)(2) (2021).

to international peace and security.”¹² There is little dispute that ending the pandemic is vital for protecting U.S. national security interests, and immunization is a clear path towards doing so.

II. LEGAL FRAMEWORK FOR THE COVID-19 IMMIGRANT VACCINE MANDATE

The new COVID-19 vaccination immigration mandate requires those who must undergo an immigration medical examination be vaccinated in order for their immigration application to be complete.¹³ Waivers are available for (1) those under the age limit for the vaccines, (2) those who have a “contraindication or precaution” to the vaccine, and (3) those in locations where COVID-19 vaccines are not routinely available or are in limited supply such that “it would cause significant delay for the applicant to receive their vaccination.”¹⁴ An applicant for immigration may request a religious or moral waiver for the vaccine; however, if the waiver is denied and/or the applicant refuses the vaccine, they will be denied their immigrant visa.¹⁵ If an applicant for immigration has not been vaccinated for COVID-19 at the time of their medical examination, the civil surgeon conducting the exam may vaccinate the applicant.¹⁶

The legal framework for the immigrant vaccine mandate comprises a number of sources. 42 U.S.C. § 264 authorizes the Surgeon General to “make and enforce regulations as in his judgment are necessary to prevent the introduction, transmission or spread of communicable diseases from foreign countries into the States. . . .”¹⁷ Section 264(b) states that the President may, by way of Executive Orders, allow for “the apprehension, detention, or conditional release of individuals. . . for the purpose of preventing the introduction, transmission, or spread of such communicable diseases. . . .”¹⁸ In 2003, President George W. Bush issued Executive Order 13295 specifying a list of communicable diseases subject to § 264(b), including Severe Acute Respiratory Syndrome (SARS).¹⁹ Executive Order 13674, issued in 2014 by President Barack Obama, revised Executive Order 13295 and expanded the section regarding SARS to cover all “[s]evere acute respiratory syndromes.”²⁰ COVID-19 is classified as a “severe acute respiratory syndrome,” and therefore is an “inadmissible” condition.²¹ Furthermore, the Advisory Committee for Immunization Practices (ACIP) recently added COVID-19 vaccines to its

12. S. 2297 § 101(1)(A) (2021).

13. Bill Chappell, *The U.S. Will Require Would-Be Immigrants to Prove They've Been Vaccinated for COVID*, NPR (Sept. 15, 2021, 2:51 PM), <https://perma.cc/T5VL-HMJP>.

14. *Immigrant, Refugee, and Migrant Health: COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (last visited Oct. 5, 2021), <https://perma.cc/ATM3-VPHR>.

15. *Id.*

16. *Id.*

17. 42 U.S.C. § 264(a).

18. 42 U.S.C. § 264(b).

19. Exec. Order No. 13,295 (Apr. 4, 2003).

20. Exec. Order No. 13,674 § 1 (July 31, 2014) (emphasis added).

21. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 14.

list of recommended vaccinations, which is one of the two criteria that must be met before the Centers for Disease Control and Prevention (CDC) can require an immunization for immigration applicants.²²

The COVID-19 pandemic and corresponding vaccine campaign is not the first instance in U.S. history during which mandated immunizations caused constitutional concerns. In 1905, the U.S. Supreme Court was faced with similar questions concerning a Massachusetts mandate of the smallpox vaccination in *Jacobson v. Massachusetts*.²³ In response to defendant/appellant Jacobson's allegation that the compulsory smallpox vaccination was a constitutional violation of his personal liberties, the Supreme Court held that the vaccination program was constitutional because it had a "real and substantial relation to the protection of the public health and safety," and emphasized that "upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."²⁴ Contrarily, in *Schloendorff v. Society of New York Hospital*, Judge Cardozo stated, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."²⁵ This statement gave rise to the right of informed consent.²⁶ It may seem that vaccine mandates are unacceptable under the right of informed consent but scholars have argued that the goals of informed consent are consistent with the need to mandate vaccines.²⁷

More recently, the Illegal Immigration Reform and Responsibility Act of 1996 required individuals applying for permanent residency in the United States "to receive all of the vaccinations recommended by the ACIP," which controversially included the Gardasil vaccination, a vaccine for women against human papillomavirus (HPV).²⁸ This mandate did not apply to men, nor did the government mandate the vaccine for U.S. citizens.²⁹ The Gardasil

22. CDC Requirements for Immigrant Medical Examinations: COVID-19 Technical Instructions for Civil Surgeons, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/ATM3-VPHR> (last visited Oct. 7, 2021). The second requirement is that the vaccine must either 1) "protect against a disease that has the potential to cause an outbreak," or 2) "protect against a disease that has been eliminated in the United States or is in the process of being eliminated." *Immigrant, Refugee, and Migrant Health: Vaccination*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/68E2-4N4Z> (last visited Oct. 7, 2021).

23. *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

24. *Id.* at 27, 31.

25. *Schloendorff v. Soc'y of N.Y. Hospital*, 211 N.Y. 125, 129 (1914).

26. Wendy E. Parmet, *Informed Consent and Public Health: Are they Compatible When It Comes to Vaccines?*, 8 J. HEALTH CARE L. & POL'Y 71 (2005).

27. *See id.* at 84–106 (discussing each of the goals of informed consent: compensation, injury reduction, trust-building, and respecting patients' right to choose).

28. 8 U.S.C. § 1182(a)(1)(A)(ii); *see, e.g.*, Elizabeth R. Sheyn, *An Accidental Violation: How Required Gardasil Vaccinations for Female Immigrants to the United States Contravene International Law*, 88 NEB. L. REV. 524, 539 (2010); Elizabeth J. Chen, Note, *Equal Protection: Why the HPV Vaccine Should be Mandated for Both Boys and Girls*, 38 WASH. U. J.L. & POL'Y 289, 300–01 (2012); Miriam Jordan, *Gardasil Requirement for Immigrants Stirs Backlash*, WALL STREET JOURNAL (Oct. 1, 2008, 12:01 AM), <https://perma.cc/9NAD-KJV7>.

29. Sheyn, *supra* note 28, at 525.

vaccine was subject to many of the waivers that are available for COVID-19 vaccine today.³⁰

Some scholars opposing the Gardasil vaccine mandate argued that it violated principles of international human rights.³¹ For instance, the Universal Declaration of Human Rights (UDHR), which is considered by many to be customary international law, states that individuals “are entitled to equal protection against any discrimination.”³² Additionally, the UDHR provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”³³ which scholars have read as a protection from “unwanted medical treatment.”³⁴ Such scholars refer to Article 7 of the International Covenant on Civil and Political Rights, which follows the language of UDHR Article 5, but specifies “no one shall be subjected without his free consent to medical or scientific experimentation.”³⁵ Comparing the controversial aspects of the Gardasil vaccine mandate with the COVID-19 mandate, the latter does not seem to be subject to the same international law concerns as the former, as the COVID-19 vaccinations do not have the high costs and questionable efficacy that the Gardasil vaccine had.³⁶

III. IMMIGRANTS’ VULNERABILITY TO COVID-19

Despite allegations that migrants crossing the southern border of the United States are the cause of a surge in COVID-19 cases,³⁷ “[t]he number of arriving migrants is far too small to be driving the enormous increases in cases across the [United States].”³⁸ Migrants who have just crossed the border are not so much the *cause* of spikes in COVID-19 cases but are more often catching COVID-19 while being held in Immigration and Customs Enforcement (ICE) detention centers. Since February 2020, 28,399 migrants have tested positive for COVID-19 while in ICE detention centers.³⁹ While it is impossible for Customs and Border Patrol officers to ensure that every

30. *Id.* at 540. Waivers were available for those whom the Gardasil vaccine was not “medically appropriate,” and those who requested a religious or moral exemption. COVID-19 vaccines have an additional waiver option based on vaccine availability in the country of an applicant’s medical exam. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 14.

31. *See, e.g.*, Sheyn, *supra* note 28, at 551.

32. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 7 (Dec. 10, 1948).

33. *Id.* at Art. 5.

34. Sheyn, *supra* note 28, at 552.

35. *Id.* at 553 (citing G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966)).

36. Sheyn, *supra* note 28, at 532–33 (“the use of such an abbreviated review period, combined with the high price of Gardasil, suggests that Merck, Gardasil’s manufacturer, may have valued profits over safety”).

37. Joel Rose, *Some Republicans Claimed Migrants Fueled A COVID-19 Surge. Doctors Say It’s Not True*, NPR (Aug. 9, 2021, 4:35 PM), <https://perma.cc/L8MA-GNLU>.

38. Jude Joffe-Block, *EXPLAINER: How Do Border Policies Affect US Infection Rates?*, AP NEWS (Aug. 9, 2021), <https://perma.cc/VBD4-N92W> (discussing that the positivity rate of migrants released by Customs and Border Patrol in McAllen, Texas, is on par with that of the local population).

39. *ICE Detainee Statistics*, IMMIGR. & CUSTOMS ENF’T, <https://perma.cc/S4S5-7GZ4> (last visited Oct. 4, 2021).

migrant crossing the border has been vaccinated for COVID-19 (or set them up to be vaccinated), the least that could be done is for ICE to offer vaccines to detained migrants and an opportunity to consult with a doctor in their first language about the vaccine.⁴⁰ An August 2021 report from ICE to Congress stated that 6,000 out of about 25,000 detainees had refused the vaccine.⁴¹ Providing detained migrants with comprehensive information about the COVID-19 vaccine and giving them the opportunity to make an informed decision about immunization could protect vulnerable migrants, ICE workers, their families, and the communities in which formerly detained migrants live when they are released from ICE custody.

Unauthorized immigrants to the United States come from largely unvaccinated countries and are more vulnerable than other immigrants to COVID-19 because of their vaccination status, lack of healthcare access, tendency to hold essential jobs, and fear of deportation.⁴² The new U.S. COVID-19 vaccine mandate for immigrants only applies to lawful immigrants, refugees, and status adjusters, and therefore largely will not apply to those from the most vulnerable countries.⁴³ In Mexico, only 36 percent of the population is fully vaccinated; Guatemala, 15 percent; while El Salvador is 53 percent vaccinated.⁴⁴ Mexico is averaging 7,167 new cases of COVID-19 per day, with 2,423 in Guatemala.⁴⁵ Low vaccine rates and high numbers of new infections in Latin America such as these are due to a lack of manufacturing capacity in the region and therefore, a shortage of vaccines.⁴⁶ The majority of immigrants affected by the vaccine mandate are those who are more likely to have better access to the vaccine in their home countries, or can seek vaccination without serious barriers in the United States, meaning that thousands of migrants without adequate vaccine access in their home countries will continue to go unprotected.

40. *Vaccine FAQs in Correctional & Detention Centers*, CTNS. FOR DISEASE CONTROL & PREVENTION (Jun. 1, 2021), <https://perma.cc/WN6E-MNPP> (emphasizing the importance of vaccinating migrants being held in detention facilities, but explaining that the CDC is not responsible for coordinating vaccine distribution to or within ICE facilities).

41. Camilo Montoya-Galvez, *ICE Ramps Up Vaccination of Immigrants in U.S. Custody, But Thousands Have Refused*, CBS NEWS (Aug. 13, 2021), <https://perma.cc/ZT9D-D853>.

42. DEP'T OF HOMELAND SEC., COVID-19 VULNERABILITY BY IMMIGRATION STATUS: STATUS-SPECIFIC RISK FACTORS AND DEMOGRAPHIC PROFILES 9 (May 2021), <https://perma.cc/JZM9-RPZJ>.

43. *Immigrant, Refugee, and Migrant Health: Medical Examination FAQs*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://perma.cc/MJ9L-YGHJ> (last visited Oct. 1, 2021) (explaining that immigrants, refugees, and status adjusters are the only migrants who are required to have a medical examination for entry into the United States; the medical examination includes a check for compliance with vaccine requirements).

44. *World Vaccination Tracker*, N.Y. TIMES, <https://perma.cc/J5LW-R4XT> (last visited Oct. 3, 2021). Mexico, El Salvador, and Guatemala are the top three countries of birth for unauthorized immigrants in the United States. DEP'T OF HOMELAND SEC., *supra* note 42, at 8.

45. *COVID-19 Tracker: Latin America and the Caribbean*, REUTERS, <https://perma.cc/L9HW-ND79> (last visited Oct. 3, 2021).

46. *PAHO warns that only one in four people in Latin America and the Caribbean has been fully vaccinated against COVID-19*, PAN AM. HEALTH ORG. (Sept. 1, 2021), <https://perma.cc/F6EX-MKAT>.

CONCLUSION

The United States should expand its efforts to counsel unauthorized immigrants being held in detention centers and preparing to cross the border on the benefits of the COVID-19 vaccine. Although ensuring unauthorized immigrants are vaccinated at border crossings is near to impossible, disseminating information on COVID-19 vaccines would ensure that any migrants being held in ICE detention centers would be able to make an informed decision about getting vaccinated. In addition, the United States should prioritize vaccine dose donations to countries in South and Central America. As of September 21, 2021, the United States has donated 4.8 million vaccine doses to Mexico,⁴⁷ 4.5 million to Guatemala,⁴⁸ and nearly 3.2 million doses to El Salvador.⁴⁹ Compared with the populations of each of these countries, this amount of vaccine doses is severely inadequate.⁵⁰ Accordingly, in its current state, the U.S. immigration vaccine mandate fails to protect U.S. citizens or bolster United States against significant biosecurity threats, leaving behind millions of vulnerable immigrants.

47. *Mexico: COVID-19 Vaccine Distribution*, U.S. DEP'T OF STATE, <https://perma.cc/LAGH-SG53> (last visited Oct. 5, 2021).

48. *Guatemala: COVID-19 Vaccine Distribution*, U.S. DEP'T OF STATE, <https://perma.cc/WUK3-66DJ> (last visited Oct. 5, 2021).

49. *El Salvador: COVID-19 Vaccine Distribution*, U.S. DEP'T OF STATE, <https://perma.cc/J8TB-HB9U> (last visited Oct. 5, 2021).

50. *See Population, total – Mexico, Guatemala, El Salvador*, WORLD BANK (2020), <https://perma.cc/3ZFP-AELT>. The populations of Mexico, Guatemala, and El Salvador are 128,932,753, 16,858,333, and 6,486,201, respectively.