

Presidential Pandemic Powers: The President the Founders Gave Us for the Era of COVID-19

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ABSTRACT

In Federalist No. 47, James Madison warned, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.” In 1793, only six years after the ratification of the Constitution, yellow fever waged war in Philadelphia, the de facto capital at the time. Then-President George Washington was concerned about the balance of power between the presidency and Congress and wished to avoid the appearance of a king, or even worse, a tyrant. He asked Madison for advice as to whether he could call Congress to meet in a place outside of Philadelphia. Madison took a strictly textualist approach: the President could change the time, but not the place, of congressional meetings, regardless of the emergency facing the nation’s leaders.

*Almost 250 years later, the United States is facing the COVID-19 pandemic, an emergency not unlike that faced by the first President, but concern for the separation of powers and the avoidance of tyranny has seemingly evaporated. On September 9, 2021, President Biden, in one of the broadest strokes of power claimed by a U.S. President, announced a plan to mandate vaccination and testing in private businesses with more than 100 employees. The original meaning of Article II suggests such action may lack constitutional support; especially in times of crisis, the President was expected to and still should keep within the bounds of the Constitution’s explicitly delegated authority and allow Congress to legislate in response to emergencies facing the nation. This Note will argue that, in addition to the Supreme Court’s findings in *National Federation of Independent Business v. Department of Labor*, the Biden Administration’s vaccine mandate goes beyond the scope of the original powers of the President, as demonstrated by the early American Presidents’ responses to epidemics of their day and the Youngstown framework of emergency powers.*

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I. INTRODUCTION

James Madison warned in *Federalist No. 47*, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹

In 1793, yellow fever waged war on Philadelphia, the de facto capital at the time.² Then-President George Washington was extremely concerned about the balance of power between the presidency and Congress and wished to avoid the appearance of a king, or even worse, a tyrant. He asked James Madison for advice on whether he could call Congress to meet in a place outside of Philadelphia.

1. THE FEDERALIST NO. 47, at 216 (James Madison) (Mary Carolyn Waldrep & Jim Miller eds., 2014).

2. Sarah Pruitt, *When the Yellow Fever Outbreak of 1793 Sent the Wealthy Fleeing Philadelphia*, HISTORY (Jun. 11, 2020), [history.com/news/yellow-fever-outbreak-philadelphia](https://perma.cc/V2U5-ZKT2) [https://perma.cc/V2U5-ZKT2]; *Yellow Fever Breaks Out in Philadelphia*, HISTORY (Oct. 9, 2020), <https://www.history.com/this-day-in-history/yellow-fever-breaks-out-in-philadelphia> [https://perma.cc/EM9Z-GADG].

Madison took a strictly textualist approach, looking to Article II of the Constitution in which “[the President] may, on extraordinary Occasions, convene both Houses, or either of them.”³ Because of this text, Madison explained that the President could change the time, but not the place, of congressional meetings.⁴ In *Youngstown Sheet & Tube Company v. Sawyer*, Justice Jackson explained why the framers of the Constitution may have omitted emergency powers from the text of the Constitution: “They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation We may also suspect that they suspected that emergency powers would tend to kindle emergencies.”⁵

Almost 250 years later, the United States is facing an emergency—the COVID-19 pandemic—not unlike that faced by the first President, but concern for the separation of powers and the avoidance of tyranny has seemingly evaporated. On September 9, 2021, President Biden, in one of the broadest strokes of power claimed by a U.S. President, announced a plan to mandate vaccination in private businesses with more than 100 employees.⁶ Four months later, the Supreme Court heard an emergency appeal brought by the National Federation of Independent Business regarding the “vax-or-test” mandate. In a per curiam opinion on January 13, 2022, the Court stayed the mandate, finding that it exceeded the Occupational Safety and Health Administration’s (OSHA) authority.⁷ A discussion of the original meaning of Article II, however, still provides valuable insight by illuminating the Founders’ envisioned role of the President; especially in times of crisis, the President was expected to, and still should, keep within the bounds of the Constitution’s explicitly delegated authority, allowing Congress to legislate in response to emergencies facing the nation.

This Note will argue that, in addition to the Supreme Court’s findings, the Biden Administration’s vaccine mandate goes beyond the scope of the original powers of the President and is therefore unconstitutional. First, this Note will analyze the original understanding of executive emergency powers implied in the Constitution. Second, this Note will analyze the response of Presidents to epidemics from the late 1770s to the early 1810s. Third, this Note will compare the original emergency powers and the Founders’ responses to epidemics in the late 18th century and early 19th centuries to President Biden’s vaccine mandate of 2021 and, using this history, will analyze the vaccine mandate under the *Youngstown* framework. A brief conclusion then follows, emphasizing the unconstitutional

3. U.S. CONST. art. II, § 3.

4. Hilarie M. Hicks, *Executive Power in an Epidemic*, MONTPELIER’S DIGIT. DOORWAY (Mar. 31, 2020), <https://digitaldoorway.montpelier.org/2020/03/31/executive-power-in-an-epidemic/> [https://perma.cc/792C-ZVDJ].

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952).

6. Joseph Biden, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, WHITE HOUSE (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/2ZGF-VC7B].

7. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 664–65 (2022).

nature of the president's vaccine mandate and Congress's primary role in health emergencies such as COVID-19.

II. ORIGINAL POWERS OF THE PRESIDENT IN EMERGENCIES

A. *The Framers Rejected the Crown's Prerogatives*

As the Framers drafted the Constitution, they expressly rejected the British Crown's sweeping power and prerogatives. The Founders did not write the Constitution in isolation; they sought a new government in the Revolutionary War. The acts of the British government, and specifically the actions taken by King George III, were the catalysts for that war, the prime purpose of which was removing the Crown's power over those living in the New World. After the Articles of Confederation failed, largely due to weak federal power,⁸ the new Founders returned to Philadelphia to again try to empower the federal government *just enough* to allow the system to work. However, many had doubts about creating a single-headed "executive" branch, which spurred true constitutional limitations on the executive's power.

State constitutions that had already taken effect influenced many of the men who arrived at the Constitutional Convention. Renowned legal historian Julius Goebel noted that "executive" was:

[A] noun . . . [that] was not then a word of art in English law—above all it was not . . . in reference to the crown. It had become a word of art in American law through its employment in various state constitutions adopted from 1776 onward [It reflected] the revolutionary response to the situation precipitated by the repudiation of the royal prerogative.⁹

This prerogative, as defined by Locke, was the "[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it."¹⁰ Such a concept of prerogative came "straight from the pages of the Stuart Kings' doctrine of High Prerogative,"¹¹ which encompassed a long list of non-statutory powers, including the power to execute laws, conduct foreign affairs, and summon parliament,¹² and allowed "the executive to take

8. *10 Reasons Why America's First Constitution Failed*, NAT'L CONST. CTR. (Nov. 17, 2020), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed> [<https://perma.cc/AH6D-2NPW>].

9. Julius Goebel, *Ex Parte Clío*, 5 COLUM. L. REV. 450, 474 (1954); David Gray Adler, *The Law: The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 PRES. STUDIES Q. 376, 380 (2012).

10. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 92 (Peter Laslett ed., Cambridge University Press 1960) (1689).

11. See Adler, *supra* note 9, at 377.

12. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172–73 (2019).

extraordinary action in emergency situations where institutional or temporal constraints make it too difficult or impractical for the legislature to act effectively.”¹³

As evidence of this rejection of royal prerogative, in Thomas Jefferson’s 1783 work, *Draft of a Fundamental Constitution for Virginia*, he stated, “[b]y Executive powers, we mean no reference to those powers exercised under our former government by the Crown as of its prerogative We give them these powers only, which are *necessary to execute the laws* (and administer the government),” highlighting only one, limited power (execution of laws) within the broad scope of prerogative powers the monarchy held in Britain.¹⁴

This view was not Jefferson’s alone. Edmund Randolph proposed the Virginia Plan at the Constitutional Convention, which provided for an executive “with power to carry into execution the national laws; [and] to appoint to offices in cases not otherwise provided for.”¹⁵ James Wilson had a similar view: executive power was limited to “executing the laws, and appointing officers.”¹⁶ James Madison agreed, thinking it necessary “to fix the extent of the Executive authority . . . as certain powers were in their nature Executive, and must be given to that departmt[.],” and added that “a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer.”¹⁷ Madison believed the definition of the executive’s authority should be precise, “confined and defined.”¹⁸

In a draft reported by Wilson—and supported by Madison—the phrase “[t]he Executive Power of the United States shall be vested in a single Person,” first appeared.¹⁹ This draft, which also included the power to grant reprieves and pardons as well as “faithful” execution of the laws, was referred to the Committee on Style, which drafted the clause that now appears in the Constitution: “The executive power shall be vested in a president of the United States of America. . . . [H]e shall take care that the laws be faithfully executed.”²⁰

The majority of the debate about executive power centered almost exclusively on whether the executive should be led by a single individual or multiple people.²¹ Notably, there was no disagreement with the defined scope of power

13. Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives*, 48 AM. J. POL. SCI. 429, 430 (2004); see Thomas Jefferson, *Thomas Jefferson: Writings* 422 (Merrill D. Peterson ed., 1984); see also Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), <https://founders.archives.gov/documents/Jefferson/01-31-02-0142> [<https://perma.cc/5C7A-CRAD>].

14. Adler, *supra* note 9, at 380 (emphasis added); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 177 (1928); Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives*, 48 AM. J. POL. SCI. 429, 430 (2004).

15. See Adler, *supra* note 9, at 380; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 62–63 (Max Farrand ed., 1937).

16. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 66.

17. *Id.* at 66–67.

18. *Id.* at 70.

19. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937).

20. *Id.* at 597, 600; see Adler, *supra* note 9, at 380.

21. See Adler, *supra* note 9, at 381.

promulgated by Madison and Wilson. Any fears about the executive power were allayed by Wilson, second only to Madison as a Framers of the Constitution, who assured the other delegates that “the Prerogatives” of the Crown were not a “proper guide in defining the executive powers.”²² Wilson was a leader of the “strong executive” wing of the delegates, and neither Wilson nor any other delegate proposed executive power that went beyond Wilson’s notion of merely executing laws and making appointments.²³ Hamilton, also a strong pro-executive, proposed an executive in line with Wilson’s views, who would execute laws, make treaties, and appoint ambassadors—subject to Congress’s approval.²⁴ No delegate proposed another idea of executive power nor challenged these limited powers.²⁵

With this knowledge and mindset, the Constitutional Convention designed the scope of executive power. Benjamin Franklin, more acquainted with the prerogatives of the Crown than most at the Convention, noted Americans’ denunciation of governmental systems and institutions that “smacked of too much Prerogative.”²⁶ Instead of mirroring the powers of a monarch, the Framers rejected royal prerogative, noting that the “prerogatives” of the Crown were ill-suited to the republican, American project.²⁷ The Framers’ fear of monarchical executive power was reflected in the type of *limited* power they gave to the President.

Through these attitudes, the Framers seemed to also reject a similar notion, the Lockean prerogative. Locke wrote that “the Laws themselves should in some Cases give way to the Executive power,” and defined prerogative as “nothing but the Power of doing Publick good without a Rule.”²⁸ The Founders’ understanding of “executive” and use of both the Vesting Clause and the Take Care Clause negate support for their inclusion of the Lockean prerogative. If the Framers had vested legal authority in the executive to suspend enforcement of the laws or to create its own laws, the Framers would have resurrected the old prerogative which the American Revolution rejected.²⁹

B. Emergency Powers at the Founding Were Limited to Wartime

The Framers anticipated emergencies and allocated power as they thought appropriate for the executive, allowing the President to only address *wartime* emergencies.

22. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 65.

23. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 11 (5th rev. ed. 1984).

24. See Adler, *supra* note 9, at 381–82.

25. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 65.

26. BENJAMIN FRANKLIN, AUTOBIOGRAPHY AND OTHER WRITINGS 135 (Ormond Seavey ed., 1949) (emphasis in original); CHARLES MOORE, THE NORTHWEST UNDER THREE FLAGS: 1635-1796, at 91 (Harper & Brothers Publishers 1900).

27. See Adler, *supra* note 9, at 381.

28. See LOCKE, *supra* note 10, at 375, 378.

29. See Adler, *supra* note 9, at 383.

Alexander Hamilton, one of the most outspoken supporters of the Constitution, was also one of the most ardent supporters of executive power. He was aware of the possibilities of emergencies; he wrote, “[e]xtraordinary exigencies demand extraordinary means.”³⁰ He also understood, as he said at the New York Ratifying Convention, that “[t]he contingencies of society are not reducible to calculations: They cannot be fixed or bounded, even in imagination.”³¹ However, other writings demonstrated his understanding of these “exigencies” as limited to wartime emergencies. In *Federalist No. 23*, Alexander Hamilton described the need for government flexibility to address “national emergencies”:

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. . . . The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.³²

Hamilton continued, “the circumstances which may affect the public safety are [not] reducible within certain determinate limits . . . there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy.”³³ In his support for the Constitution, the pro-executive Framers highlighted national exigencies which endanger “the safety of nations” and “public safety” and allow the executive to exercise power “under the direction of the same councils which are appointed to preside over the *common defense*.”³⁴ Such a view of “exigency” by one who supported, more than most, vesting power in the executive is limited to wartime emergencies.

Furthermore, emphasizing the importance of the executive as the “definition of good government,” Hamilton wrote that a single executive is “essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property . . . to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”³⁵ Again, the importance of the executive is tied to “protection . . . against foreign attacks,” “steady administration of laws,” “protection of property,” and

30. Letter from Alexander Hamilton to John Jay (Mar. 14, 1779), <https://founders.archives.gov/documents/Hamilton/01-02-02-0051> [https://perma.cc/MPX2-48JN].

31. ALEXANDER HAMILTON: WRITINGS 505 (Joanne B. Freeman ed., 2001).

32. THE FEDERALIST NO. 23, at 105 (Alexander Hamilton) (Mary Carolyn Waldrep & Jim Miller eds., 2014).

33. *Id.*

34. *Id.* (emphasis added).

35. THE FEDERALIST NO. 70, at 312 (Alexander Hamilton) (Mary Carolyn Waldrep & Jim Miller eds., 2014).

the “security of liberty against . . . ambition . . . faction, and . . . anarchy.”³⁶ Aside from law enforcement, the President’s powers are primarily aimed at physical attacks and the vague notion of “ambition.”³⁷

Even Madison, a strict Constitutionalist and critic of broad federal power, understood that emergencies would arise, and the new country would need to be prepared to address those emergencies. He argued, like Hamilton, at the Virginia Ratifying Convention that “no government can exist, unless its powers extend to make provisions for every contingency.”³⁸ He also remarked that “as I hope we are considering a government for a perpetual duration, we ought to provide for every future contingency.”³⁹ However, his planning for “every future contingency” allocated minimal power to the President to address those contingencies and left the rest of the power to other branches of government.

In *Federalist No. 41*, Madison asserted that “[t]he means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose Constitutional barriers to the impulse of self-preservation.”⁴⁰ Even when allowing for some extra-constitutional power for “self-preservation,” Madison limited that power to respond to the “means and the danger of the attack” and to provide for “security.”⁴¹ Madison’s strict constitutionalism left contingencies to be dealt with in the confines of the text—largely supporting the majority understanding that the Constitution gives the broadest powers to the President in wartime, given the President’s explicit authority as the Commander-in-Chief and the express power to deal with foreign affairs. Again, the Federalists could allow for some inherent emergency powers, as they knew emergencies would arise—but those exigencies contemplated were limited to wartime emergencies.

Jefferson, taking an even stricter view than Madison, believed that “even the slightest derogations from the enumerated powers of the Constitution amount to undemocratic usurpation of authority, which originates in the people.”⁴² Should the President need additional, necessary powers, Jefferson appealed for a constitutional amendment:

36. *Id.*

37. *Id.*

38. James Madison, *General Defense of the Constitution* (Jun. 6, 1788), <https://founders.archives.gov/documents/Madison/01-11-02-0062> [<https://perma.cc/R4H6-3RNQ>].

39. James Madison, *Speeches in the Virginia Convention, June 5th to 24th*, in 5 THE WRITINGS OF JAMES MADISON 123, 155 (Gaillard Hunt ed., 1900).

40. THE FEDERALIST NO. 41, at 182 (James Madison) (Mary Carolyn Waldrep & Jim Miller eds., 2014).

41. *Id.*

42. Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives*, 48 AM. J. POL. SCI. 429, 433 (2004); see also THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 422 (Merrill D. Peterson ed., The Library of America 1984); Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), <https://founders.archives.gov/documents/Jefferson/01-31-02-0142> [<https://perma.cc/5C7A-CRAD>].

[W]hen an instrument admits two constructions[,] the one safe, the other dangerous, the one precise[,] the other indefinite, I prefer that which is safe & precise. . . . [O]ur peculiar security is in possession of a written Constitution. [L]et us not make it a blank paper by construction.”⁴³

Notably, it was *after* his time as the President that Thomas Jefferson’s views changed; he took on a stronger and more expansive view of executive power, rather than the strictly constitutional approach in the immediate years following the signing of the Constitution. In a letter he wrote to John B. Colvin in 1810, Jefferson wrote that a “strict observance of the written laws is doubtless one of the high duties of a good citizen: but it is not the highest. [T]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”⁴⁴ However, his examples of proper use of the emergency power, when describing this idea of “necessity” and “self-preservation,” point only to wartime emergencies:

[W]hen, in the battle of Germantown, Gen Washington’s army was annoyed from Chew’s house, he did not hesitate to plant his cannon against it, altho’ the property of a citizen. when he besieged Yorktown, he levelled the suburbs, feeling that the laws of property must be postponed to the safety of the nation. while that army was before York, the Gov^r of Virginia took horses, carriages, provisions & even men, by force, to enable that army to stay together till it could master the public enemy; & he was justified. a ship at sea in distress for provisions meets another having abundance, yet refusing a supply; the law of self preservation authorises the distressed to take a supply by force⁴⁵

In a hypothetical, Jefferson posed an appropriations issue about the purchase of Florida which, in fact, turned on (i) the time between the “emergency” and when Congress could make a decision, and (ii) receiving post-hoc congressional approval. Even this theory was based on actual events that were, notably, in the face of war after the Chesapeake affair in 1807.⁴⁶

43. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), <https://founders.archives.gov/documents/Jefferson/01-41-02-0255> [<https://perma.cc/6Y2E-9LST>].

44. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), <https://founders.archives.gov/documents/Jefferson/03-03-02-0060> [<https://perma.cc/E7G2-M4BP>].

45. *Id.*

46. *Id.* (describing a hypothetical in which the President learned, in 1805, of the opportunity to purchase “the Floridas for a reasonable sum” that had not been appropriated by Congress, but Congress would meet three weeks later; if the President knew that Congress would not be able to make the appropriation until months later when the circumstances would have changed, he could have made the purchase due to the benefits of the Floridas to the country and knowing the “act would have been approved.— [A]fter the affair of the Chesapeake we thought war a very possible result. [O]ur magazines were illy provided with some necessary articles, nor had any appropriations been made for their purchase. [W]e ventured however to provide them and to place our country in safety, and stating the case to Congress they sanctioned the act.”).

To Jefferson, the only “laws” that rise above those that are written are the laws of necessity, self-preservation, and public safety. Even if Jefferson’s post-presidency views—which had changed from his theory of presidential power when he was merely a Framers—were legitimate to interpret the *original* understanding of Article II emergency powers, these views were based on real, wartime events and were still limited to decisions that must be made within a short period of time (when Congress was unavailable to make the decision) and post-hoc congressional ratification.

III. EARLY AMERICAN EPIDEMICS

Indicative of an understanding that the executive’s emergency powers were limited to wartime, many of those who expressed early views of limited executive power in emergencies faced health epidemics, not unlike COVID-19, as Presidents of the United States. Their responses to the epidemics they faced as Presidents inform later generations of the original understanding of limited emergency power in the context of health epidemics. After the passage of the Constitution, original federal power available to respond to epidemics lied primarily in the hands of Congress, not the President. Congress legislated to provide presidential assistance to enforce states’ health-related laws. Congress did not delegate broad authority to the President to make health-related laws for the nation—nor did such authority independently exist in the Constitution.

A. General Washington (*Pre-Constitution*)

Prior to the hard-won victory, then-General Washington led colonial troops in battle against the Red Coats. When smallpox broke out, General Washington struggled with how to address the epidemic, at one point making an inoculation mandate then rescinding it.⁴⁷ However, on February 5, 1777, in a letter to John Hancock, then the President of the Continental Congress, General Washington made the final call, writing from Morristown, New Jersey:

The small pox has made such Head in every Quarter that I find it impossible to keep it from spreading thro’ the whole Army in the natural way. I have therefore determined, not only to inoculate all the Troops now here, that have not had it, but shall order Doctr Shippen to inoculate the Recruits as fast as they come in to Philadelphia.⁴⁸

Fearing the spread of smallpox during the war, General Washington ordered the inoculation of all American troops in 1777. Over the course of several months, 40,000 troops were inoculated and quarantined, the first mass inoculation

47. Dave Roos, *How Crude Smallpox Inoculations Helped George Washington Win the War*, HISTORY (May 18, 2020), <https://www.history.com/news/smallpox-george-washington-revolutionary-war> [https://perma.cc/7P9V-WKCE].

48. Letter from George Washington to John Hancock (Feb. 5, 1777), <https://founders.archives.gov/documents/Washington/03-08-02-0268> [https://perma.cc/A86U-NG7Z].

in military history, followed by a second round of inoculations during the 1778 winter in Valley Forge.⁴⁹ General Washington's decision to do so was pivotal in ensuring American victory in the Revolutionary War.

Notably, General Washington's decision preceded the Constitutional Convention and potentially fell within the powers that would come to be known as those of the Commander-in-Chief, as he directed and led the revolutionary troops (similar to the Commander-in-Chief leading the U.S. Army and Navy) and mandated inoculation in that capacity.⁵⁰ This "exigency" mandate, though health-related, was ordered as a result of the *ongoing Revolutionary War* and to maintain the health of the active-duty soldiers for that end—to continue to fight in the crucial battles for independence.

B. *President Washington (Post-Constitution)*

1. 1793 Yellow Fever Outbreak

With the experience of the 1777 inoculation mandate, General Washington later became President Washington, the first executive to test the powers allocated to him by the Constitution. Like his time as the leader of the colonial troops, health crises affected his time as President.

In 1793, only five years after the ratification of the Constitution, yellow fever killed 10% of the population of Philadelphia, the *de facto* capital of the United States at the time, in mere months.⁵¹ Congress had an upcoming session scheduled for that December in the city, and President Washington was concerned about Congress meeting among an epidemic-stricken population.⁵² However, President Washington also seemed concerned about the separation of powers between the President and Congress as he tried to find a solution.⁵³ He asked James Madison for advice as to whether he could call Congress to meet in a place outside of Philadelphia:

Time presses, and the malady at the usual place of meeting is becoming more & more alarming. What then, do you think is the most advisable course for me to pursue in the present exigency? Summon Congress to meet at a certain time & place in their legislative capacity? Simply to state facts, & say I will meet the members at the time & place just mentioned, for ulterior arrangements? or leave matters as they are,

49. Andrew Lawler, *How a Public Health Crisis Nearly Derailed the American Revolution*, NAT'L GEOGRAPHIC (Apr. 16, 2020), <https://www.nationalgeographic.com/history/article/george-washington-beat-smallpox-epidemic-with-controversial-inoculations> [https://perma.cc/3L57-7X4N].

50. U.S. CONST. art. II, § 2, cl. 1.

51. Michael E. Ruane, *Yellow Fever Led Half of Philadelphians to Flee the City. Ten Percent of the Residents Still Died*, WASH. POST (Apr. 4, 2020), <https://www.washingtonpost.com/history/2020/04/04/yellow-fever-led-half-philadelphians-flee-city-ten-percent-residents-still-died/> [https://perma.cc/45GV-BXV7].

52. See Hicks, *supra* note 4.

53. *Id.*

if there is no power in the Executive to alter the place, legally?⁵⁴

Madison took a strictly textualist approach—that the President could change the time, but not the place, of congressional meetings.⁵⁵ After quoting Article I of the Constitution, Madison recommended that Washington simply alert Congress to the danger and suggest, rather than mandate, an alternate location for Congress to choose to meet. Madison proposed a message which President Washington could send to Congress:

Whereas a very dangerous and infectious malady which continues to rage in the City of Philada. renders it indispensable that the approaching Session of Congress should be held, as well as the Executive Department be for the present administered, at some other place: And whereas no regular provision exists for such an emergency; so that unless some other place be pointed out, at which the members of Congress may assemble in the first instance, great embarrassments may happen: Under these peculiar circumstances I have thought it incumbent on me to notify the obstacle to a meeting of Congress at the ordinary place of their Session; and to recommend that the several members assemble at [] in the State of [] at which place I shall be ready to meet them.⁵⁶

When asked for his perspective, Jefferson took an even stricter approach to changing the meeting location of Congress, writing, “I think we have nothing to do with the question, and that Congress must meet in Philadelphia, even if it be in the open fields, to adjourn themselves to some other place.”⁵⁷

President Washington, Madison, Jefferson, and the other Framers of the Constitution had likely never considered the particular scenario of an epidemic breaking out in the capital while Congress was in recess. There were no explicit instructions or powers laid out in the Constitution for what a President may do in an epidemic.⁵⁸ Nonetheless, these Founders would not use expediency, exigency, or emergency as an excuse to ignore the separation of powers set out in the

54. Letter from George Washington to James Madison (Oct. 14, 1793), <https://founders.archives.gov/documents/Washington/05-14-02-0146> [<https://perma.cc/6P69-3E6J>].

55. See Hicks, *supra* note 4.

56. Letter from James Madison to George Washington (Oct. 24, 1793), in JAMES MADISON PAPERS, <https://www.loc.gov/item/mjm012976/> (accessed Nov. 9, 2021) [<https://perma.cc/F57X-WKS6>]; Letter from James Madison to George Washington (Oct. 24, 1793), <https://founders.archives.gov/documents/Washington/05-14-02-0200> [<https://perma.cc/WC3W-LK7K>].

57. Letter from Thomas Jefferson to George Washington (Oct. 17, 1793), <https://founders.archives.gov/documents/Washington/05-14-02-0159> [<https://perma.cc/D2WV-SH8Z>]. Alexander Hamilton also doubted the health crisis was an “extraordinary occasion” and suggested that the President may “recommend” a meeting at another location. See Letter from George Washington to Alexander Hamilton (Oct. 14, 1793), <https://founders.archives.gov/?q=%20Author%3A%22Washington%2C%20George%22%20Dates-From%3A1793-10-14&s=1111311111&r=2> [<https://perma.cc/A45Y-U2VP>]; Letter from Alexander Hamilton to George Washington (Oct. 24, 1793), <https://founders.archives.gov/documents/Washington/05-14-02-0196> [<https://perma.cc/VDE9-CT2L>].

58. See Hicks, *supra* note 4.

Constitution. Unlike the British Monarch, the President of the United States would not be allowed the prerogative of calling Congress into session at places of his own choosing—even if doing so would mitigate health concerns in an epidemic.

Congress later passed a law explicitly allowing the President to relocate Congress in the event of an epidemic—underscoring that *Congress* may allocate *specific, limited* powers to the President during a health crisis.⁵⁹

2. An Act Relative to Quarantine

In response to the continued yellow fever epidemic and local efforts to mandate quarantine to diminish the spread of the illness, the Act Relative to Quarantine gave President Washington—and subsequent Presidents—the power to *assist states* in enforcing *their own* quarantine laws through the use of Treasury revenue officers and military offices in the War Department.⁶⁰ This Act Relative to Quarantine demonstrates that both President Washington and Congress understood their constitutional roles when faced with health epidemics, especially after their experience in the 1793 yellow fever outbreak in Philadelphia. Following that event, Congress, not the President, acted to support states' efforts to respond to and control infectious disease outbreaks. President Washington, by signing and supporting such a law, reiterated his understanding of the president's limited constitutional role in responding to health emergencies and his commitment to following the wills of Congress and the states in these types of emergencies.

C. *President Adams*

John Adams, the second President of the United States, also led the executive branch during epidemics of yellow fever and other infectious diseases in the country. Passed during President Adams's tenure, the Act Respecting Quarantines and Health Laws used a model of federal agencies to provide assistance to state authorities to enforce quarantines and other health laws adopted by the states. The Act also provided a mechanism by which the Secretary of the Treasury could evacuate federal employees from the scene of an epidemic. If an epidemic struck the seat of the government, the President would also have the discretion to direct the removal of public offices.⁶¹

59. An Act to authorize the President of the United States, in certain Cases, to alter the Place for holding a Session of Congress, 1st Cong. (1793), <https://archive.org/details/lawsounitedstat03unit/page/30/mode/2up?view=theater> [<https://perma.cc/7XNJ-RUTJ>].

60. An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796) (repealed 1799), <https://archive.org/details/lawsounitedstat03unit/page/314/mode/1up?view=theater> [<https://perma.cc/979X-J92F>]. For a brief description of state quarantine laws and federal public health initiatives, see Morris Kagan, *Federal Public Health*, 16 J. HIST. MED. 256, 264–65, 276–77 (1961).

61. An Act respecting quarantines, and health laws (Feb. 25, 1799), <https://babel.hathitrust.org/cgi/pt?id=uc1.b4908795&view=1up&seq=285> [<https://perma.cc/55GY-VJKZ>].

Similar to his predecessor, President Adams, by signing and abiding by this law, demonstrated his understanding of the President's limited role in responding to health-related exigencies. The legislative branch was responsible for designing the country's response to these emergencies, not the President, and Congress did so in this case by allocating to the President some discretionary power for removal of public offices. This further proves that these powers did not exist in the President's constitutional authority originally; Congress had to designate and allocate this specific authority, to remove public offices during health epidemics, for the President to be able to act.

D. President Jefferson

Early in his presidency, Thomas Jefferson corresponded with Benjamin Waterhouse about smallpox vaccination, pioneered by Edward Jenner in 1796.⁶² He wrote of vaccination with seemingly overwhelming approval: "Every friend of humanity must look with pleasure on this discovery."⁶³ In 1806, President Jefferson allowed his name to be attached to the procedure, effectively endorsing vaccination as the President of the United States.⁶⁴ He worked with Dr. Waterhouse to establish the vaccine, and President Jefferson provided for the vaccination of physicians and more than 200 people living at or near Monticello, including slaves, family members, and neighbors.⁶⁵ He also collected his own vaccine matter from those inoculated at Monticello and distributed it to other areas of Virginia and Washington, D.C., making smallpox vaccination more widely available.⁶⁶

In his 1805 State of the Union address, President Jefferson referred to an unnamed epidemic and instructed Congress that "[a]lthough the health laws of the States should be found to need no present revisal by Congress, yet commerce

62. Thomas Jefferson (Mar. 21, 1803), in 1 THOMAS JEFFERSON'S LIBRARIES 428–32 (Emily Millicent Sowerby ed.), http://tjlibraries.monticello.org/transcripts/sowerby/L_429.html [<https://perma.cc/GA6K-E2FQ>]; Gaye Wilson, *Inoculation*, JEFFERSON MONTICELLO, https://www.monticello.org/site/research-and-collections/inoculation#footnote10_5gsdpxg [<https://perma.cc/HQB2-WASM>].

63. Letter from Thomas Jefferson to Benjamin Waterhouse (Dec. 25, 1800), <https://founders.archives.gov/documents/Jefferson/01-32-02-0249> [<https://perma.cc/MAR6-MEYJ>]; see also Letter, Monticello, Virginia, May 14, 1806, to The Rev. Doctr. G. C. Jenner.

64. Brandon Dillard, *Disease and Inoculation in the 18th Century*, JEFFERSON MONTICELLO, <https://www.monticello.org/research-education/blog/disease-and-inoculation/> [<https://perma.cc/WU4W-DWN6>].

65. Gaye Wilson, *Inoculation*, JEFFERSON MONTICELLO, https://www.monticello.org/site/research-and-collections/inoculation#footnote11_8irbd36 [<https://perma.cc/FM9V-USQ6>].

66. Letter from Thomas Jefferson to John Vaughan (Nov. 5, 1801), <https://founders.archives.gov/documents/Jefferson/01-35-02-0464> [<https://perma.cc/8E7A-E8DB>]; see also Letter from Thomas Jefferson to Dr. John Shore (Sept. 12, 1801), <https://founders.archives.gov/documents/Jefferson/01-35-02-0215> [<https://perma.cc/7Z23-B9X9>]; Letter from Thomas Jefferson to Benjamin Waterhouse (Sept. 17, 1801), <https://founders.archives.gov/documents/Jefferson/01-35-02-0243> [<https://perma.cc/V2X6-Y66U>].

claims that [Congress's] attention be ever awake to them."⁶⁷ He also supported widespread inoculation, writing, "I think it is important . . . to bring the practice of the [smallpox] inoculation to the level of common capacities, for to give to this discovery the whole of value, we should enable the great mass of the people to practice it on their own families & without an expense, which they cannot meet."⁶⁸ Notably, President Jefferson, who was outspoken in support of science and inoculation, did not seize the opportunity to either act on his own accord as the President or to pressure Congress to pass widespread legislation. His support for inoculation merely laid the groundwork for President Madison's Act to Encourage Vaccination during the War of 1812.

E. President Madison

By the time President Madison took office, smallpox remained a highly contagious killer. The War of 1812, however, provided the opportunity to pass a law on vaccination for the "general welfare" of the U.S. public—exactly what President Jefferson had supported in the previous presidential term.

After the War of 1812 broke out, Congress passed, and President Madison signed, the first federal healthcare law aimed not just at a small group of the population but at the general public—An Act to Encourage Vaccination.⁶⁹ It was also the first example of the federal government as a whole, rather than just the President, endorsing a specific medical practice. However, the Act to Encourage Vaccination was just that—a law aimed to *encourage* vaccination by making vaccines more accessible.⁷⁰ To do so, Congress aimed to "preserve genuine vaccine matter" and made distribution of vaccines through the national postal

67. Thomas Jefferson, Fifth Annual Message to Congress (Dec. 3, 1805) in 15 ANNALS OF CONGRESS 11–12 (1805), https://avalon.law.yale.edu/19th_century/jeffmes5.asp [<https://perma.cc/U2K4-KT5P>].

68. Letter from Thomas Jefferson to Joseph Redman Coxe (Apr. 30, 1802), <https://founders.archives.gov/?q=%22inoculation%20to%20the%20level%20of%20common%20capacities%22&s=1111311111&sa=&r=1&sr=> [<https://perma.cc/F4WD-MDPE>].

69. An Act to Encourage Vaccination (1813), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112203964624&view=1up&seq=398&skin=2021> [<https://perma.cc/PK33-5MUQ>]; *An Act to Encourage Vaccination*, STATUTES & STORIES (Feb. 17, 2020), https://www.statutesandstories.com/blog_html/an-act-to-encourage-vaccination-1813/ [<https://perma.cc/UH45-P259>]. The first federal quarantine law was aimed at sailors, granting federal consent to Maryland's law imposing a duty on vessels coming into Baltimore to pay for a health officer at the port. See Act for the Relief of Sick and Disabled Seamen, 1 Stat. 605 (Jul. 16, 1798), http://memory.loc.gov/cgi-bin/ampage?collid=llsl&fileName=001/llsl001.db&recNum=728&_ga=2.203829904.1618280539.1524761929-1165927539.1524761929 [<https://perma.cc/STK3-YK9L>]; *Act for the Relief of Sick and Disabled Seamen*, STATUTES & STORIES (Apr. 29, 2018), https://www.statutesandstories.com/blog_html/act-for-the-relief-of-sick-and-disabled-seamen/ [<https://perma.cc/F5D4-G7CQ>]; see also K. Vanderhook, *Origins of Federal Quarantine and Inspection Laws* (2002) (Third Year Paper, Harvard Law School) (on file with the Harvard University Library system), <https://dash.harvard.edu/bitstream/handle/1/8852098/vanderhook2.html> [<https://perma.cc/67CH-9969>].

70. See Letter from James Smith to James Madison (Feb. 26, 1813), <https://founders.archives.gov/documents/Madison/03-06-02-0068> [<https://perma.cc/F8MG-8QNV>].

service, to any citizen of the United States, free of charge.⁷¹ The act also provided for the President to appoint a National Vaccine Agent, Dr. James Smith, to oversee the law's implementation, primarily by ensuring the authenticity and quality of vaccine matter.⁷²

In this health *and wartime* crisis, President Madison notably relied first on Congress to create such a far-reaching program. On his own, President Madison did not mandate widespread vaccination, even though federal vaccination mandates existed in other countries. In fact, committees in the House of Representatives acknowledged that by 1810, Denmark had practically eliminated smallpox by implementing compulsory vaccination.⁷³ After discussing these successes in Europe, Representative Condict noted that “under our free Government, no compulsory measures can be resorted to,” but understood that the federal government could help by appointing “an agent to furnish an ample supply of vaccine matter, and distribute it to those who may apply through the Post Office Department, free of postage.”⁷⁴ Even more demonstrative, some localities in the United States may have adopted something close to mandatory vaccination programs during outbreaks of infectious illnesses.⁷⁵ Notably, with this knowledge and option, neither Congress nor President Madison resorted to such a mandate.

In 1816, only three years later, Congress proposed an amendment for compulsory military vaccination.⁷⁶ Representative Condict noted, in support of this amendment, soldiers at Guierre, Naples who had been infected and died as a result of smallpox.⁷⁷ This proposed amendment would appear in line with the wartime-related emergency powers that the President has as Commander-in-Chief, exercised by General Washington prior to the Constitutional Convention to mandate smallpox inoculation, which may have informed some members' understanding of the powers of the President as Commander-in-Chief. Representative Atherton argued that Art. I Sec. 8 of the Constitution did not grant Congress the authority to spend money on this kind of vaccination effort, but proponents responded by citing the bill's benefits to the military and Congress's power under the General Welfare

71. See An Act to Encourage Vaccination (1813), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112203964624&view=1up&seq=398&skin=2021> [<https://perma.cc/PK33-5MUQ>].

72. Jonathan L. Stolz, *Vaccinating Against Smallpox to Stop Deadly Spread Also Involved Presidential Support*, VA. GAZETTE (Sept. 17, 2021), <https://www.dailypress.com/virginiagazette/opinion/va-vg-ed-stolz-vaccines-0915-20210917-ze4tcnjqbzbnjgzo5hx6ik5ke-story.html> [<https://perma.cc/YH2T-RUUF>].

73. H.R. REP. NO. 17-48 (1822); see Rohit Singla, *Missed Opportunities: The Vaccine Act of 1813 (1998)* (Third Year Paper, Harvard Law School) (on file with the Harvard University Library system), <https://dash.harvard.edu/bitstream/handle/1/10015266/rsingla.pdf?sequence=1&isAllowed=y> [<https://perma.cc/ZX4Q-W4GJ>].

74. 39 ANNALS OF CONG. 1637 (1822).

75. See, e.g., H.R. REP. NO. 20-215, at 2–3 (1828) (noting that after outbreak of smallpox, a very general vaccination has been resorted to in Washington, D.C.); Letter from Comm. of Physicians to Mayor of Balt. (1821), in 2 VACCINE INQUIRER 80–81 (1822) (instructing district officials to seek out all unvaccinated poor and report the same for vaccination).

76. 29 ANNALS OF CONG. 1455 (1816).

77. *Id.*

Clause.⁷⁸ However, Mr. Jackson of Virginia pointed out the bill's unconstitutionality, highlighting that no part of the Constitution authorized such a grant of authority and that no such power could be inferred from the general clause of the Constitution.⁷⁹ Ultimately, the amendment failed 88-57, and Congress rejected a vaccination mandate for the military.⁸⁰

IV. PRESIDENT BIDEN'S VACCINATION MANDATE

On September 9, 2021, President Biden announced a plan to require all businesses with more than 100 employees mandate that their employees be vaccinated against COVID-19 or undergo weekly testing.⁸¹ This plan did not become an agency rule until November 5, 2021.⁸² However, instead of undergoing the normal rulemaking process which allows for public commenting, the President's plan was enacted as an "emergency temporary standard" by the Occupational Safety and Health Agency (OSHA), which acts under the purview of the Department of Labor. This standard allows OSHA to create a rule that takes immediate effect, bypassing the years-long process of commenting and rulemaking which courts have found helpful to avoid constitutional problems regarding the separation of powers. The OSHA rule, while requiring vaccination or weekly testing, did not require employers to cover the costs of weekly testing for those who are not vaccinated and would have imposed heavy fines on businesses that did not comply with the rule. This OSHA rule is not within the original powers of the President, as demonstrated by the text and the Founders' historical practice. The rule also falls outside the scope of presidential emergency powers under modern jurisprudence, which is consistent with the Founders' conception of presidential powers in health epidemics and emphasizes the primary role of Congress.

A. President Biden's Mandate is Not Within the Original Powers of the President

President Biden's vaccination mandate goes far beyond the scope of the emergency powers allocated to the President by the original Framers and the text of the Constitution. Congress has the primary power to create substantive solutions and allocate federal resources to assist states' public health efforts, evidenced by the Founders' and their contemporaries' understanding of "executive" as a rejection of wide-sweeping prerogative outside of wartime powers and the early Presidents' responses to epidemics of their own day.

As a preliminary matter, the use of "emergency" powers should be limited by the time passed since the beginning of the pandemic. Emergency actions taken nearly two years after the nation's first shut-down pose serious problems for the

78. U.S. CONST. art. I, § 8, cl. 1; *see also* 30 ANNALS OF CONG. 469–70 (1817).

79. 30 ANNALS OF CONG. 469–70 (1817).

80. *Id.*

81. Biden, *supra* note 6.

82. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021), <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard> [<https://perma.cc/9SQ4-EBW6>].

President's use of an emergency-type power. During the health crises early in the nation's history, Presidents acted swiftly in response, often within the first few months of the pandemics. The crisis faced by President Washington led to the deaths of 10% of Philadelphia's population in mere months, yet even that scenario did not permit him to stretch his constitutionally allocated powers.⁸³ In contrast, COVID-19 has led to the deaths of 0.30% of the U.S.'s total population over the course of two years.⁸⁴

Furthermore, early American Presidents likely had more reason to exercise emergency power than their modern counterparts, given the significant length of time between sessions of Congress during that era. For example, when President Washington faced the yellow fever outbreak in Philadelphia in 1793, Congress was in the middle of what would become a nine-month adjournment.⁸⁵ Without consistent congressional meetings, President Washington was practically the only federal officer "on duty" to address these kinds of crises. Even so, President Washington remained within his constitutional powers and supported both Congress's and states' efforts to control health epidemics. Later, when Congress met more frequently⁸⁶ and the public health emergencies that did arise were not so imminent, Presidents Adams, Jefferson, and Madison wholly left policymaking and legislating to Congress.⁸⁷ Today, with the nearly constant meetings of Congress—the longest break being only a month for the August recess—and almost two years' worth of congressional sessions, Congress has had the time and opportunity to respond to the COVID-19 pandemic.

In fact, Congress has used many opportunities to do exactly that. Congress has taken numerous steps, similar to those of early Congresses, to combat the effects of the pandemic. Congress passed five separate coronavirus relief bills which provided far-reaching economic assistance to businesses and individuals, resources to federal agencies and states to assist state efforts, and insurance coverage for COVID-19 testing early in the pandemic.⁸⁸ Like the Act to Encourage Vaccination in 1813, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in 2020, making vaccines free

83. Ruane, *supra* note 51.

84. *COVID-19 Dashboard, Cases and Deaths by Country*, JOHNS HOPKINS UNIV. & MED. CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/map.html> [<https://perma.cc/GS96-G7HJ>]; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> [<https://perma.cc/PH8K-37KF>].

85. *1st to 9th Congresses (1789-1807)*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Institution/Session-Dates/1-9/> [<https://perma.cc/4WGT-CM8T>].

86. *Id.*

87. *See supra* at III.B.–III.D.

88. Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); CARES Act, 15 U.S.C. § 116 (2020); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182 (2021); American Rescue Plan Act, Pub. L. No. 117-2, 135 Stat. 4 (2021).

and easily accessible throughout the country.⁸⁹

Congress also provided funds and instructions to the following executive departments and agencies, similar to the instructions given to the Treasury officers in the early 19th century: the Department of Defense; the Federal Emergency Management Agency; the Centers for Disease Control and Prevention; Substance Abuse and Mental Health Services Administration; Centers for Medicare and Medicaid Services; Department of Health and Human Services; Department of State; U.S. Agency for International Development; and the Department of Labor.⁹⁰ Throughout the COVID-19 pandemic, Congress has taken the primary federal role in legislating substantive solutions by using its constitutional power of the purse⁹¹ and giving clear instructions to executive agencies and the President of the United States.

The *only* founding-era precedent for compelled vaccination by the President, without pre-approval by Congress, is General Washington's inoculation mandate in 1777. However, that mandate targeted only active-duty members of the Continental Army, not the general public. It also occurred prior to the framing and signing of the Constitution, which rejected broad emergency powers by vesting power in an "executive" and limiting emergency powers to wartime. Importantly, a mandate was never considered or implemented during Washington's term as the President—even though he faced two serious epidemics—and Congress explicitly rejected a mandate during President Madison's tenure and the War of 1812. President Biden's mandate for widespread vaccination and weekly testing has no basis in the original meaning of the Constitution or in our nation's founding-era history.

B. President Biden's Mandate Also Falls Outside His Emergency Powers Under Modern Jurisprudence

President Biden's vaccination mandate also lacks support from modern emergency power jurisprudence, which is consistent with founding-era history and the Founders' conception of the President's limited executive power during emergencies.

In *Youngstown Sheet & Tube Co. v. Sawyer*, President Truman, faced with a strike by the United Steelworkers of America, seized steel mills to continue production of steel for the U.S. military during the Korean War.⁹² Even though the President exercised this power during a wartime emergency, where historical analysis has shown the President's emergency power to be strongest, the Supreme Court held that the President's executive authority did not extend so far

89. See CARES Act, *supra* note 88.

90. See, e.g., *id.*; see also Kellie Moss et al., *The Coronavirus Aid, Relief, and Economic Security Act: Summary of Key Health Provisions*, KFF (Apr. 9, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-coronavirus-aid-relief-and-economic-security-act-summary-of-key-health-provisions/> [https://perma.cc/H3CR-N727].

91. U.S. CONST. art. I, § 9, cl. 7.

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–84 (1952).

as to allow seizures of steel mills.⁹³ Justice Jackson’s well-known concurrence outlines three categories of presidential power: first, a President’s authority is “at its maximum” when he acts “pursuant to an express or implied authorization of Congress”; second, a President’s action is in a “zone of twilight” when he acts “in absence of either a congressional grant or denial of authority,” and “congressional inertia, indifference or quiescence may . . . enable, if not invite, measures on independent presidential responsibility”; and third, the President’s power is “at its lowest ebb” when he “takes measures incompatible with the expressed or implied will of Congress” because he can “rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁹⁴ In reaching this conclusion, Justice Jackson noted the “prerogative exercised by George III, and the description of its evils in the Declaration of Independence” led him “to doubt that they were creating their new Executive in his image.”⁹⁵ This *Youngstown* framework parallels the history of congressional action (and presidential *inaction*) in health emergencies. The framework places primary power in the hands of Congress and allows the President to act *only* when Congress has approved of certain actions, when Congress has delegated specific powers, or when the President has his own inherent constitutional powers to act independently of Congress.

Applying the *Youngstown* framework to President Biden’s vaccine mandate, the mandate does not fall within the first category because it was not implemented pursuant to an express or implied authorization from Congress. As acknowledged by a majority of the Supreme Court,⁹⁶ no existing federal law clearly authorizes the imposition of a national vaccine mandate, and “[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”⁹⁷ The Biden Administration relied on 29 U.S.C. § 655(c)(1), the statute that allows the Occupational Safety and Health Administration to create “Emergency Temporary Standards” (ETS) when the Secretary of Labor finds workers are exposed to “grave danger”:

The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.⁹⁸

However, the Administration’s argument that it properly relied on the ETS standard to enact the vaccine mandate is weak. ETS standards were not used for

93. *Id.* at 589, 640.

94. *Id.* at 635–38.

95. *Id.* at 641.

96. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 664–65 (2022).

97. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

98. 29 U.S.C. § 655(c)(1).

thirty years before the pandemic, and the case law supporting the Secretary of Labor's authority to find "grave danger" (in those cases more than thirty years ago) is premised upon workplace hazards involving chemicals and toxic agents connected to the work being performed, such as pesticides, asbestos, and carcinogens.⁹⁹ Furthermore, six of these nine pre-pandemic ETS standards were challenged, and of those six, five of the rules were either stayed or vacated.¹⁰⁰ Importantly, none of the past ETS rules required employees to be vaccinated against a "substance" or "agent" that was "determined to be toxic or physical harmful."¹⁰¹

Even though the definition of toxic substances or harmful physical agents in the Code of Federal Regulations includes "biological agent" and "virus" as examples,¹⁰² OSHA has *never* used the ETS standard to mandate a medical procedure or vaccination in relation to an infectious, transmissible disease.¹⁰³ OSHA has regulated biological hazards under a separate section, § 6(b)(5), which uses the more substantial notice-and-comment rulemaking process. For example, OSHA used § 6(b)(5) authority to prevent HIV and Hepatitis B in the workplace through the Bloodborne Pathogens standard, and it regulated airborne contaminants through the Respiratory Protection standard.¹⁰⁴ The only OSHA standard dealing with vaccination was for workers who could be exposed to blood or other infectious materials at work which could lead to Hepatitis B; under that standard, employers must *offer* vaccines, but employees are not required to receive them, and employees have the option to sign an acknowledgement of risk instead of being vaccinated.¹⁰⁵ Importantly, the COVID-19 "vax-or-test" ETS and the agency's toxic substance or harmful physical agent definitions should not be entitled to judicial deference because such deference would allocate more power to OSHA than Congress allowed—with no end in sight to OSHA's ability to mandate vaccinations, force business shut-downs, and close schools in the name of "workplace safety."¹⁰⁶ OSHA is only empowered to regulate *workplace* safety,

99. CONG. RSCH. SERV., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19, at 18 (Mar. 24, 2022).

100. *Id.*

101. *Id.*

102. 29 CFR § 1910.1020 (2010), <https://www.govinfo.gov/content/pkg/CFR-2010-title29-vol6/pdf/CFR-2010-title29-vol6-sec1910-1020.pdf>.

103. CONG. RSCH. SERV., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19, at 18 (Mar. 24, 2022).

104. 29 C.F.R. § 1910 (2021), <https://www.govinfo.gov/content/pkg/FR-1998-01-08/pdf/97-33843.pdf> [<https://perma.cc/E4FT-FUJN>]; 29 C.F.R. § 1910.1030 App. A (2021), <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030AppA>, [<https://perma.cc/A66V-RBSH>]; 29 C.F.R. § 1926 (2021), <https://www.govinfo.gov/content/pkg/FR-1998-01-08/pdf/97-33843.pdf> [<https://perma.cc/64GA-QVDW>].

105. 29 C.F.R. § 1910 (2021); 29 C.F.R. § 1910.1030 App. A (2021).

106. Jacob Sullum, *Here Are the Arguments That Persuaded the 5th Circuit To Block OSHA's Vaccine Mandate for Private Employers*, REASON (Nov. 7, 2021), <https://reason.com/2021/11/07/here-are-the-arguments-that-persuaded-the-5th-circuit-to-block-oshas-vaccine-mandate-for-private-employers/> [<https://perma.cc/A2HP-XJPV>].

not any risk employees may encounter equally inside and outside the workplace.¹⁰⁷

Even if the ETS provision, 29 U.S.C. § 655(c)(1), was an express or implicit authorization of power, Congress cannot delegate such broad law-making power. Both historical practice and current doctrine under the Administrative Procedure Act (APA) prohibit delegation of decisions of vast “economic and political significance” without Congress, at the very least, speaking clearly to delegate that power.¹⁰⁸

An economy-wide vaccination requirement—or, should employees choose not to be vaccinated, a testing and masking requirement—is a mandate of huge economic and political significance and therefore is outside the permissible scope of agency deference. As a policy matter, it is difficult to imagine a more economically or politically significant decision than a rule requiring vaccination of roughly 100 million Americans, or alternatively imposing weekly testing requirements that cost \$148 on average.¹⁰⁹ One individual paying for testing once a week for a year would pay an estimated \$7,696. This figure would be multiplied by the thousands of workers who choose not to be vaccinated and instead choose to enroll in the testing protocol to maintain employment. The costs are even more significant for the people who choose not to be vaccinated and do not have the funds to test each week; the cost of their unemployment benefits would be vast.

Further, the political costs of mandating vaccination are enormous, with a President taking unprecedented power over personal health decisions to mandate a novel vaccine. The Framers used federal agencies to *facilitate* executive enforcement of existing, duly enacted, health-related federal and state laws. President Washington’s and President Adams’s acts related to quarantine merely worked through existing federal agencies, such as the Treasury, to allocate resources and assist states in enforcing pre-existing health laws. The Act to Encourage Vaccination, passed during President Madison’s tenure, created a national federal agency to disseminate “genuine vaccine matter” free of charge through the postal service. However, such a delegation of power did not allow the President broad decision-making authority to determine who to send vaccine matter to, what to charge, or, importantly, whether anyone should be *forced* to be vaccinated. No power to make personal health decisions was allocated to the President—only the power to *encourage* individuals to make certain health-

107. See 29 U.S.C. § 655(b) (instructing the Secretary to set “occupational safety or health standards”) (emphasis added).

108. 5 U.S.C. §§ 701–706; see *Indus. Union Dep’t. AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (“Benzene Case”); *Am. Textile Manufacturers. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (“Cotton Dust Case”); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665, 667 (2022) (Gorsuch, J., concurring, at 667).

109. Lauren McCarthy, *Biden’s New Vaccine Requirements Draw Praise, Condemnation and Caution*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/live/2021/09/09/world/covid-delta-variant-vaccine> [<https://perma.cc/E8G8-VUR8>]; Nisha Kurani et al., *COVID-19 Test Prices and Payment Policy*, PETERSON-KFF HEALTH SYS. TRACKER (Apr. 28, 2021), <https://www.healthsystemtracker.org/brief/covid-19-test-prices-and-payment-policy/> [<https://perma.cc/BQ2N-QK53>].

related decisions. Additionally, General Washington's inoculation mandate in 1777 was targeted to a specific sector of the population over which he had immediate responsibility, not the public more broadly. After the creation of the executive branch, Presidents did not have broad power in emergencies, and early Congresses even rejected a limited-scope vaccination mandate for the military. A President, rather than Congress or even states,¹¹⁰ has *never* mandated vaccination. Allowing such a mandate to take effect would set a dangerous precedent regarding federal executive power over personal health decisions.

Second, Congress has not been silent regarding President Biden's authority during the pandemic. Congress allocated specific workplace regulation powers to OSHA, not broad-ranging powers to control medical decisions and reduce medical risks that also occur outside of the workplace. Additionally, Congress provided funds and specific unemployment-related instructions to the Department of Labor, OSHA's parent. Notably, however, Congress did not grant COVID-related workplace authority to the agency. Congress also considered multiple bills related to vaccines—including the 2020 CARES Act, which was aimed at making vaccines free of charge and easily accessible—but it never required vaccination or provided a law mandating vaccination for the executive branch to enforce.¹¹¹ In fact, the Senate voted, in a joint resolution, to disapprove of the ETS.¹¹² Here, there is no overlapping authority between Congress and the President or a “twilight zone” of power;¹¹³ the relevant power lies solely in the hands of Congress, and it has acted to disapprove of the vaccine mandate.

The vaccine mandate, then, falls into *Youngstown* category three, where the President's power is at its “lowest ebb.”¹¹⁴ However, the President does not inherently have emergency authority to mandate vaccination during an epidemic. First, as cited previously, Justice Jackson noted that King George III's exercise of prerogative was the most prominent example that must have influenced the Founders. Their description of the evils of royal prerogative in the Declaration of Independence demonstrates they did not intend to create “their new Executive in his image.”¹¹⁵ The Constitution does not vest in the President wide-ranging powers in emergencies—only those powers to execute existing law and only those powers necessary during *wartime* emergencies. General Washington's inoculation mandate during the Revolutionary War, with respect to which he notified the Continental Congress, may have been contemplated as the Framers allocated the Commander-in-Chief title and associated powers to the executive. Undermining this theory, the early Congress rejected, even in wartime, an

110. The Supreme Court has held that states may mandate vaccination because of their general police power to protect the public health and safety of their citizens. *See* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Notably, the President does *not* have the general police power.

111. CARES Act, *supra* note 88.

112. S.J. Res. 29, 117th Cong. (2021).

113. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952).

114. *Id.*

115. *Id.* at 641.

amendment to President Madison's Act to Encourage Vaccination which would have made vaccination compulsory for members of the military. Only Congress—and the states—had authority to respond with substantive solutions to health epidemics. From President Washington's actions during the 1793 yellow fever outbreak to President Madison's Act to Encourage Vaccination, the President's powers during health crises were limited to signing and executing the laws passed by Congress. President Biden's vaccine mandate goes far beyond his inherent presidential powers and is therefore unconstitutional.

V. CONCLUSION

Pandemics are not a new threat to the United States. In the country's early years, health epidemics plagued the country even more frequently and required more urgency than the COVID-19 pandemic does today. The Framers of the Constitution did not design the government in a vacuum. Instead, the Founders knew that health "emergencies" did, could, and would happen, and they still limited the President's expanded emergency powers to wartime exigencies. Additionally, "[t]here are indications that the Constitution did not contemplate that the title Commander-in-Chief *of the Army and Navy* [would] constitute [the President] also Commander-in-Chief of the country, its industries and its inhabitants."¹¹⁶

Through their actions, the first four Presidents demonstrated their understanding that their power to act in health emergencies was limited to what was expressly included in the Constitution, unless Congress allocated additional, specific powers via statute. Presidents Washington, Adams, Jefferson, and Madison signed laws, supported Congress's and the states' efforts to respond to epidemics, and even encouraged vaccination—but these Presidents could not, and did not, act on their own to respond to health crises.

President Biden's vaccination mandate is incompatible with the constitutional authority of the executive. As demonstrated by the Founders' writings, the actions of early American Presidents, and the *Youngstown* framework—which is consistent with the Founders' conception of executive authority—the original understanding of presidential emergency power underscores President Biden's limited power to respond to the COVID-19 pandemic. President Biden does not have inherent constitutional authority to mandate vaccination or costly testing procedures, and Congress did not delegate authority allowing him to mandate these measures.

Although the Supreme Court stayed the vaccine mandate based on questions of administrative law, the per curiam decision did not consider the original meaning of Article II of the Constitution or the history of the early Presidents who first responded to epidemics. These early American experiences provide valuable

116. *Id.* at 643–44 (emphasis added).

context and set a strong precedent against expansive presidential powers—related to vaccination and testing mandates or not—during national health exigencies.

In the founding era, it was *Congress* that allocated resources to support states' health efforts. It was *Congress* that allowed the President to move public offices in highly infectious areas. It was *Congress* that provided for free distribution of vaccine material to encourage widespread vaccination. When health emergencies arose, it was *Congress* that responded. And so it should be today.