The Federal Government v. The American People – Injunction Opinion

By Paul Engel

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- These cases are not about the validity of these "vaccine" mandates, only whether or not to enjoin them until they've worked their way through the courts.
- The court has decided to "split the baby", enjoining the OSHA mandate while lifting stays against the HHS one.
- Not one attorney or justice quoted the Constitution in either their oral arguments or the court's opinion.

In a previous post I reviewed the oral arguments before the Supreme Court in two sets of cases involving federal vaccine mandates. It did not take long for the court to decide those cases. However, as is often the case, the reporting on these cases has been fairly atrocious. I've heard several respected people claim that the court "struck down" the OHSA mandate, while others lamented the court decided not to protect healthcare workers. While the opinions the court offered are split, we need to remember that the court was only dealing with whether or not to enjoin these mandates until these cases have worked their way through the court system. The actual opinions regarding these injunctions are a mixed bag, but certainly not the definitive outcome you may have read or heard. So let us look at the opinions without the hype or hyperbole and see if we can find a clue as to the state of the

justice system in America today.

For those of you who did not read my article on the oral arguments, let me set the stage. Four cases were combined into two. Two cases involved the Occupational Safety and Health Administration (OSHA) mandate, National Federation of Independent Business (NFIB) v. OSHA and Ohio v. OSHA, while the other two involved the Health and Human Services (HHS) healthcare worker mandate, Biden v. Missouri and Becerra v. Louisiana. In the OSHA cases, the appellants were asking for an injunction staying the enacting of the mandate, while in the HHS cases, the Biden Administration wanted stays against the mandate overturned. Let's start with the OHSA case.

NFIB v. OSHA & Ohio v. OSHA

Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate.

NFIB v. OSHA & Ohio v. OSHA

The court determined that NFIB and Ohio were likely to win their cases on the merits, but this was only part of the justification for the court issuing their stay. While the reason the court believed the appellants will win is covered in detail in the opinion, let's cut through that and get to the point.

Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." … It is instead a significant encroachment into the lives—and health—of a vast number of employees.

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OSHA, as an administrative agency, was created by law.

Therefore, OSHA only has the power delegated by Congress in that law. While Justice Gorsuch's concurrence does make mention of the limits placed on the United States by the Constitution, there is constitutional argument made by the court as a whole. The question raised before the court, and which most of the court focused on, was whether or not Congress authorized the types of actions OSHA took when issuing their Emergency Temporary Standard (ETS).

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures. … And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

The dissent protests that we are imposing "a limit found no place in the governing statute." … Not so. It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating "occupational" hazards and the safety and health of "employees."

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As the majority of the court put it, the organic (originating) act that created OSHA gave it the power to regulate occupational hazards of employees, not any hazard that an employee may face while at work.

Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

NFIB v. OSHA & Ohio v. OSHA

Of course, those who dissented from the opinion have a different point of view, which I'll look at later. For now,

let’s look at how the majority dealt with the dissenters’ opinions.

The dissent contends that OSHA’s mandate is comparable to a fire or sanitation regulation imposed by the agency. … But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, “cannot be undone at the end of the workday.” … Contrary to the dissent’s contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not “part of what the agency was built for.”

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA’s indiscriminate approach fails to account for this crucial distinction– between occupational risk and risk more generally–and accordingly the mandate takes on the character of a general public health measure, rather than an “occupational safety or health standard.” 29 U. S. C. §655(b) (emphasis added).

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The idea that a vaccine mandate is compatible to fire or sanitation regulations is patently ridiculous. No OSHA fire or sanitation regulation impacts the workers after they’ve left the worksite, neither does it involve injecting something into the employee’s body. And while the court believes that Congress has authorized OSHA to regulate the healthcare decisions of researchers or those who work in crowded spaces,

nothing in the Constitution delegates to the United States that power. And while not law in the United States, the requirement that someone take an experimental pharmaceutical is a violation of the Nuremberg Code, a set of standards created in 1947 which physicians must follow when experimenting on human subjects.

Justice Gorsuch wrote a concurring opinion, which Justices Thomas and Alito joined:

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing work- place safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

NFIB v. OSHA & Ohio v. OSHA

Justice Gorsuch was mostly right, because this case does revolve around the question of who decides. The issue at hand though, regarding if and when to take an experimental pharmaceutical, is not between the states and the feds, but between governments and the people. If governments can require you become a medical test subject, then they are no different than the government officials who chose people for Dr. Mengele's tests.

Justice Gorsuch went on:

The federal government's powers, however, are not general but

limited and divided. … Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." … We sometimes call this the major questions doctrine. …

OSHA's mandate fails that doctrine's test. The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA.

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I find it interesting that while Justice Gorsuch claims that Congress can only act within a "constitutionally enumerated source of authority", no such source was ever cited, either during oral arguments or in this decision.

Justice Gorsuch concluded with:

The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA.

NFIB v. OSHA & Ohio v. OSHA

While Justice Gorsuch was wrong that the power to respond to the pandemic resides in the States and Congress, he was correct that it does not reside in OSHA. Justice Breyer, joined by Justices Sotomayor and Kagan disagreed.

Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has

by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID–19's continuing threat in those spaces.

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It seems justices are just as susceptible to emotional tirades devoid of evidence as much of the rest of the public. COVID is not a grave danger to this country, and it turns out it never truly was. Of the over 800,000 deaths the CDC touts on its website, they've admitted that 75% of those deaths were with COVID, not necessarily of COVID. Conveniently lost in Justice Breyer's argument is the fact that even with that inflated number, they represent only 1.3% of those who tested positive for COVID and only .25% of the population as a whole.

https://covid.cdc.gov/covid-data-tracker/#cases_totaldeaths

Lost on these three justices is the fact that they are not medical experts. They claim to be experts in the law, but all of them missed the basic fact that the Constitution is the supreme law of the land:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;… shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

Not only are the justices bound to the Constitution, but it clearly states that any power not specifically delegated to the United States by it, belongs to someone else.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S Constitution, Amendment X

Biden v. Missouri & Becerra v. Louisiana

While the court found that OSHA most likely exceeded its mandate by imposing a vaccine mandate on private employers, it overturned a stay against HHS doing the same thing on healthcare workers.

One such function—perhaps the most basic, given the Department's core mission—is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety. Such providers include hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and more. To that end, Congress authorized the Secretary to promulgate, as a condition of a facility's participation in the programs, such "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." …

Relying on these authorities, the Secretary has established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds.

Biden v. Missouri & Becerra v. Louisiana

Lost on the court is a point made by the dissent.

Covered employers must fire noncompliant workers or risk fines

and termination of their Medicare and Medicaid provider agreements. As a result, the Government has effectively mandated vaccination for 10 million healthcare workers.

Biden v. Missouri & Becerra v. Louisiana

Once again we see the dangers of succumbing to the siren song of government money. First they offer something "free", then they threaten to withhold it if you don't comply with their wishes. There may be some justification for the federal government to set conditions for accepting their money, but fining companies for not firing employees who do not submit to medical experimentation goes far beyond the powers Congress delegated to HHS, much less what the Constitution delegated to the United States.

In his dissent, Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett, brought the central question into focus.

The Government begins by invoking two statutory provisions that generally grant CMS authority to promulgate rules to implement Medicare and Medicaid. The first authorizes CMS to "publish such rules and regulations . . . as may be necessary to the efficient administration of the [agency's] functions." 42 U. S. C. §1302(a). The second authorizes CMS to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs" under the Medicare Act. §1395hh(a)(1).

The Government has not established that either provi- sion empowers it to impose a vaccine mandate. Rules carrying out the "administration" of Medicare and Medicaid are those that serve "the practical management and direction" of those programs.

Biden v. Missouri & Becerra v. Louisiana

Does the government, with the power to regulate the Centers for Medicaid/Medicare Services (CMS), also have the power to

regulate the employment standards of those who provide the services? If they do, does that include fining those who do not comply with the new rules, rather than simply not renewing their contracts?

Conclusion

I believe Justice Gorsuch made the point in his concurrence on the NFIB v. OSHA case.

It seems, too, that the agency pursued its regulatory initiative only as a legislative "'work-around.'"

FIB v. OSHA & Ohio v. OSHA

That is exactly what these four "mandates" were: A way to get around not only Congress, but the Constitution itself. And when it comes to the Supreme Court, their answer was pretty much to "split the baby". The only difference between these cases was the scope of the mandate and the agency that issued it. The court basically said that Congress did not delegate the power to OSHA to deal with public safety issues, but it did to HHS. The court did so with no definitive evidence that Congress delegated such power to HHS, much less that this was a power delegated to the United States in the first place.

These cases show the American people two crucial points. First, the United States government today acts more like a kingdom than we've had since 1776. The laws don't matter, the Constitution doesn't matter. Only what those in government think is best for everyone, regardless of the cost we bear or the rights we loose. Second, those who are looking for the courts to protect their rights are trusting in a corrupt system. When the supreme law of the land is set aside for the political machinations of Congress and the opinions of judges, then we are no longer a constitutional republic, but a banana republic. If there are no consequences for the evil deeds done by this administration, supported by justices who have turned their backs on their oaths, then all talk of "liberty and

justice for all” is nothing more than a fairy tale we tell ourselves or a mantra to help us sleep while our country collapses around us. We may as well begin our pledge of allegiance the words “Once upon a time…”

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[BIO: Paul Engel founded The Constitution Study in 2014 to help everyday Americans read and study the Constitution. Author and speaker, Paul has spent more than 20 years studying and teaching about both the Bible and the U.S. Constitution. Freely admitting that he “learned more about our Constitution from School House Rock than in 12 years of public school” he proves that anyone can be a constitutional scholar. You can find his books on Amazon and Apple Books. You can also find his books, classes and other products at the Constitution Study website (https://constitutionstudy.com).]