

Incensed critics are calling Biden's proposed "vaccine mandate" an outrageous usurpation of power. They need to take a deep breath. It's not really a vaccine mandate, the only statutory issue is procedural, and there's no constitutional problem.

Calling Biden's order a vaccine mandate is misleading. It could just as well be considered a testing mandate with a vaccination opt-out. Biden has [directed](#) OSHA to develop a rule requiring "all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work." No one is threatened with a stark choice between being fired and an injection. They can keep their job by having a swab every week if they don't want the shot.

In terms of statutory authority, OSHA has a broad mandate to protect employee health and safety. There's no question that protection from workplace exposure to disease is part of that mandate. The only real question is about timing. Normally, it would take OSHA several years to make a rule governing a workplace hazard. There's a [special provision](#) of the statute short-circuiting that procedure when there's a need for action. Specifically, the fast-track process is allowed when employees are exposed to "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazard" and an emergency standard is "necessary to protect employees from such danger."

If a disease that has already killed hundreds of thousands isn't a "grave danger," I don't know what could possibly qualify. There may be some quibbling over whether this measure is "necessary." I assume OSHA can make the case that vaccination or testing are necessary measures to stop spread in the workplace, and it's not clear what less intrusive measure critics would propose instead. OSHA will have to marshal evidence to support its decision, but that really isn't likely to be terribly difficult.

What about constitutional issues? The general constitutionality of vaccine mandates has been settled for over a century. Some might argue that the emergency action provision is an unconstitutional delegation of power. There are two responses. First, remember the emergency provision actually narrows the universe of rules that OSHA can issue. If the narrowed provision is an unconstitutional delegation, presumably the broader one is too, and the whole statute would have to be struck down. That seems like a tough case to make. In addition, "grave threat" and "necessary" measures are pretty restrictive terms. If they constitute an unconstitutional delegation, almost everything is.

True, the Court did strike down the CDC's eviction moratorium. The eviction moratorium was vulnerable because the statute seemed to focus on traditional public health measures

like quarantines. (I had some doubts myself about the CDC's statutory authority, much as I sympathized with its decision to impose the moratorium.) Regulating evictions seems well beyond the normal domain of a public health agency. In contrast, protecting workers from disease seems to be entirely appropriate for an entity called the "Occupational Health and Safety Administration."

It's true that this regulation has a very broad scope. The Court has reminded us that emergencies don't expand an agency's statutory powers. By the same token, however, the scale of the response needed in an emergency shouldn't narrow an agency's statutory powers.

Maybe I'm wrong, and the Supreme Court will jump in to quash OSHA's effort. At that point, I I might have to give up on the hope that the Court is something more than a partisan institution.