

# When a president's impatience supersedes freedom



When [President Biden](#) announced that the Occupational Safety and Health Administration (OSHA) would impose a national vaccine mandate on employers, he said his "[patience \[was\] wearing thin](#)" with those Americans who had opted against vaccination. Of course, Biden is entitled to his views on the benefits of vaccination, just as everyone else has an opinion on the matter. But in a free country, the president doesn't get to meddle in our lives whenever he furrows his brows in annoyance. Or so we were taught in civics class.

Yet, the practical reality is that modern presidents wield far greater powers than the Constitution permits. Under accepted norms dating back to the New Deal era, the president now holds extraordinary power that the

Founding Fathers never intended; with the wave of a pen, he can force millions of Americans to bend to his will. So, setting aside our views on the efficacy of vaccination or the propriety of government mandates, it is worth stepping back to consider how the present controversy fits within the larger context of our ever-expanding regulatory state and what we might call the "imperial presidency."

It is easy to forget that the president possesses relatively limited powers aside from his prerogative to decide military and foreign policy. The president has constitutional authority only to execute the law, not to make law. Even if he thinks he knows best, the president can't require us to get a vaccine any more than he can force us to eat our vegetables or brush our teeth. That is because only Congress gets to make laws in our system.

Of course, the president and his advisers maintain that it is within their power to impose a vaccine mandate because Congress gave the executive branch sweeping regulatory powers by authorizing OSHA to establish workplace safety and health standards. But nowhere in OSHA's governing statutes did Congress give the power to mandate vaccines as a condition of employment. The Occupational Safety and Health Act authorizes "[emergency regulation](#)" only when employees are exposed to grave danger from "substances or agents determined to be toxic or physically harmful or from new hazards." And while the agency wants to interpret this as giving a blank check to make essentially any rule in response to any potential health concern, it is obvious that Congress conferred authority only for OSHA to safeguard employees against workplace-specific hazards.

Congress did not give OSHA the power to address public health issues in the world at large. But the president and OSHA are reaching beyond what Congress intended by manipulating the statutory text. And this is nothing new. It's a textbook play for presidential administrations intent on pushing for

ever-more expansive regulatory powers. Whenever a president's political priorities stall in Congress, or when seeking legislative approval is a non-starter, the answer is to bring in government lawyers who can find a creative way of bypassing Congress.

Let's be clear: This isn't a one-party problem. Recall that former [President Trump](#) did something similar. In a transparent attempt to bypass Congress, the White House dictated a [federal eviction moratorium](#) through the Centers for Disease Control and Prevention (CDC) in September 2020. The eviction moratorium would remain in place (with repeated renewals) until September 2021, when the [Supreme Court made it unmistakably clear](#) that the CDC lacked statutory authority to prevent evictions.

And this is a continuing problem. [President Obama](#) rebuked Congress for not doing its job when it failed to advance his agenda; he then invoked his power of the "[pen and phone](#)" — meaning that he was going to do whatever he could through the federal bureaucracy. And as it turns out, federal agencies can do a whole lot by acting on their own. When the president, whatever his party, decides he wants to pursue some new regulatory policy, crafty government lawyers inevitably will find some tenuous statutory hook. Sometimes they will latch on to a single word or phrase and read it out of context. Sometimes they will ignore the plain meaning of statutes by reading ambiguity into clear text. And sometimes, they will exploit [open-ended and nebulous language](#) to advance their regulatory priorities.

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But if "separation of powers" means anything, it must mean that we expect Congress to speak clearly and unequivocally when taking away our freedoms. That is the way the system is supposed to work. But if the

president can make whatever rules he might like by stretching federal statutes to the breaking point, then we have suffered a grievous breakdown in our constitutional order — with real-world implications for all of us.

As James Madison presciently warned, there can be no liberty when the power to make law is held by the very hands that enforce the law. Such a regime is “the very definition of tyranny.”

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