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COVID In The Courts

The pressure on American courts to work out social problems continues unabated. The courts have addressed the issue of whether a Black man is a “person” under the Constitution or “property” in pre-Civil War times. In 1905, the United States Supreme Court found that Massachusetts could fine a man for refusing a smallpox vaccine. The courts have weighed in on issues from child labor to gay marriage and abortion.

Therefore, it is no shock or surprise that the courts are now asked to determine how far the legislature or the executive may go in developing rules with respect to fighting the COVID pandemic. Not surprisingly, most executives have relied upon their own emergency powers, rather than new legislation, to impose vaccine, mask and other mandates.

The courts have almost uniformly been wary of using existing legislation to permit a broad exercise of executive power. That was not always the case. The courts, since the Roosevelt era, have endorsed reposing considerable power in the part of the fourth branch of government, the Administrative Branch. Most Americans face mandates and determinations as a result of administrative rulemaking which are oftentimes arbitrary and capricious process.

In *Corman v. Acting Secy. Of the Pa. Dep’t of Health*, 2021 Pa. LEXIS 4348 (December 10, 2021) (Wecht, J.), one of the most erudite and thoughtful justices in the Pennsylvania Supreme Court wrote that the acting Secretary of Health simply went too far with respect to the imposition of vaccine mandates under existing law and Department of Health regulations.

The Court granted expedited review of the direct appeal to decide whether the Commonwealth Court erred in concluding that Acting Secretary of Health Alison Beam ("the Secretary") lacked the power under existing law and Department of Health regulations to require individuals to wear facial coverings while inside Pennsylvania's schools as a means of controlling the spread of COVID-19. Having determined that the Secretary exceeded her authority in issuing that directive, by *per curiam* order on December 10, 2021, the Supreme Court affirmed the lower court's decision nullifying the mandate.

Exercising King's Bench authority, the Pennsylvania Supreme Court upheld the Governor's business-closure order as a permissible exercise of the Commonwealth's general police power under the Emergency Code. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 890-92 (Pa. 2020) ("The protection of the lives and health of millions of Pennsylvania residents is the *sine qua non* of a proper exercise of police power.").

For businesses that were permitted to maintain in-person operations, Secretary Levine directed the implementation of stringent COVID-19 mitigation protocols,

including a requirement that employees and patrons alike wear face coverings while on business premises. This mandate later was expanded to require all individuals to wear masks while "outdoors and unable to consistently maintain a distance of six feet from individuals who are not members of their household"; "in any indoor location where members of the public are generally permitted"; when utilizing public transportation; when "obtaining services from the healthcare sector in" various settings and facilities; and generally while engaged in work, whether at the workplace or performing work off-site, when interacting in-person with any member of the public, working in any space visited by members of the public, working in any space where food is prepared or packaged for sale or distribution to others, working in or walking through common areas, or in any room or enclosed area where other people, except for members of the person's own household or residence, are present when unable to physically distance.

While objectors acknowledged that the Department had authority to isolate, segregate, quarantine, and surveil persons or animals with communicable diseases and those persons or animals who come into contact with the infected, they contended that there is no existing rule that vests the Department with the authority to issue a mask order. *Id.* at 17. The Administrative Code and Department of Health Act provide "general policy statement[s] regarding the general duties of the Department," but they do not authorize the Order absent a rule or regulation to that effect. *Id.* at 16. As the DOH failed to comply with Pennsylvania's formal rule-making procedures in promulgating the Order, it is void *ab initio. Id.* at 19-25; *see id.* at 22-24 (likening the Mask Mandate to the CDC's extension of the nationwide eviction moratorium, which the Supreme Court struck down in *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 2489, 210 L. Ed. 2d 856 (2021) (*per curiam*) (explaining that "the Government's read of § 361(a) [of the Public Health Service Act for authority to promulgate and extend the eviction moratorium] would give the CDC a breathtaking amount of authority")).

Where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute, such as the Department of Health's power and duty to "determine and employ the most efficient and practical means for the prevention and suppression of disease." 71 P.S. § 532.

Absent a gubernatorial disaster emergency declaration suspending the framework of laws governing agency rulemaking in Pennsylvania, the Department was obligated to follow the procedures set forth in the Regulatory Review Act, the Commonwealth Documents Law, and the Commonwealth Attorneys Act before promulgating a new disease control measure with the force of law. Because the Secretary circumvented that process, her Order was void *ab initio*.

The United States Supreme Court has now weighed in on vaccine mandates, with differing results, indicating the continuing question as to how far administrative agencies will be permitted to go in controlling the behavior of American citizens.

In *National Federation of Independent Businesses v. Department of Labor*, 2022 .S. LEXIS 496 (January 13, 2022), the *per curiam* opinion concerning the application for stays held that although Congress "has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA [Occupational Safety Health Administration] has promulgated here." The Court found that the administrative agency went too far, absent the authority so to do. The OSHA legislation contains an exception to ordinary notice-and-comment procedures for emergency temporary standards. However, when an emergency is asserted, the Secretary must show that employees are exposed to a grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards **and** that the emergency standard is necessary to protect employees from such danger.

The Supreme Court of the United States found that applicants are likely to succeed on the merits of their claim that the Secretary lacked the authority to impose the mandate. As a restriction on the octopus-like behavior of administrative agencies, the Court reminded us that administrative agencies are creatures of statute. They only possess authority that Congress has provided. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." In other words, the Secretary did not have the authority, absent typical rulemaking, or legislation from Congress, to impose a standard on 84-million Americans.

Contrast that to *Biden v. Missouri*, 2022 U.S. LEXIS 495 (January 13, 2022), where the Supreme Court of the United States, on the same day, held that the Secretary of Health and Human Services, which administers the Medicare and Medicaid programs, can order those receiving Medicare and Medicaid funding to ensure that their staffs are vaccinated unless exempt for medical or religious reasons. Two federal District Courts had enjoined in enforcement of the rule, and the Government asked the United States Supreme Court to stay those injunctions. The Court agreed and stayed the injunctions. What was the difference between *National Federation of Independent Businesses v. Department of Labor* and *Biden v. Missouri*? The difference is that, in the latter case, although the Secretary issued the rule as an interim final rule, rather than through the typical notice-and-comment procedures, the legislation was found to have permitted the authority to require vaccines.

In *Biden*, the Court wrote that, while the challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it, "unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."

Restated: There must be either proper rulemaking procedures or, if there is an emergency, the statute must give the administrative agency the right to act in a dramatic and broad-sweeping manner.

The Pennsylvania Supreme Court decision and the two decisions from the United States Supreme Court reinforce the notion that Americans should not be ruled by the tyranny of administrative agencies.

The rule that unelected bureaucrats should not have totalitarian power, should be a comfort to those who believe that there should be limits to how fundamentally the unelected may control our lives. It is of some curiosity that judges characterized as "liberal" are more willing to accept the authority of administrators who are bureaucratic and, on occasion, arbitrary, rather than demanding that the legislature pass laws that are constitutionally acceptable or proceed through rulemaking procedures which may result in a more reasoned determination by the administrative agency.

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