



Going to Work with COVID-19:

National Security, Economic Security and Public Health Authority

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“Economic security is national security.”¹

U.S. Commerce Department, June 2021

Introduction

COVID-19 is a multitrack problem within the global and American societies. It is simultaneously a national security problem and a public health concern that has impacted the American economy in a hugely negative and unexpected manner. The terrible irony of 2020 and 2021 is that what Usama Bin Laden hoped to achieve from the September 11, 2001, attacks is exactly what Covid-19 accomplished through its viral scourge: a shutdown of the American economic engine, and an accumulation of over 600,000 casualties. Thank God Bin Laden never knew the

¹ U.S. Commerce Department. “Strengthen U.S. Economic and National Security.” 2021. [www.commerce.gov](https://www.commerce.gov/about/strategic-plan/strengthen-us-economic-and-national-security). Web. <https://www.commerce.gov/about/strategic-plan/strengthen-us-economic-and-national-security>. 2021.

potential for the devastation of a lethal virus versus aircraft converted into aviation fuel-armed missiles.

American national security rests on our superior economic engine, and that is why Bin Laden targeted the nation's economic engine and more. In the economy, Bin Laden's focus was air transportation and air commerce, banking, finance and government regulators. Covid-19 attacked and undermined the same economic engine components as Bin Laden, and again, so much more. The U.S. economic engine sustains our ability to compete globally, and Covid-19 demonstrated that we have many flaws in our plans, and that our actual execution during this significant national emergency was a precarious roller-coaster ride.

Today, while still tallying a series of Covid-19 failures and victories, the American political right has launched a multi-state attack on the public health professionals who tried to stand in the gap and save us from purposeful and callous inaction while responding to Covid-19's attack at the federal level. One of these potential Covid-19 failures is in America's so called, "red" or Republican-leaning states. Red state legislators and red state governors are stripping their own public health officials of the power they used to defend the nation/community against Covid. New laws neutering public health bureaucrats' ability to direct anti-Covid prophylactic measures are emerging. The rationale behind this wave of legislation is that these state public health officials allegedly exceeded their mandate, acted beyond the actual need Covid created, and that these bureaucrats imposed unnecessary restrictions which drove the economy to record production and transaction lows. (Noble, 2021) In his article, "Comparing the Covid-19 Recession with the Great Depression?" David Wheelock, senior vice president and special policy advisor at the Federal Reserve Bank of St. Louis, concludes, "The 2020 contraction might turn out to be the sharpest, but also the shortest, in modern times and perhaps of

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all time in the United States ... The [Covid-19] virus and the public's response to it will likely make that determination.” (Wheelock, 2020)²

Economic strength is a national security imperative

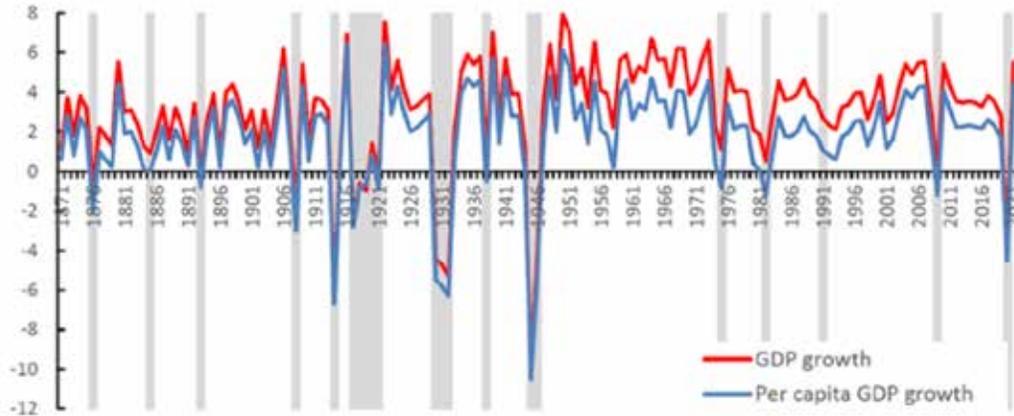
American National Security revolves around the DIME-FIL — diplomacy, information, military, economic, financial, intelligence, law/law enforcement — or what we call the “instruments of national power.” Undergirding all the others is the economic instrument. Covid-19, in both first order and second order ways, attacked American economic power in a manner not seen since the Great Depression and World War II. In the June 2021, Brookings Report publication, “Social and Economic Impact of Covid-19, Brookings Paper #158,” authors Eduardo Levy Yeyati, a nonresident senior fellow in global economy and development at Brookings Institution, and dean of the School of Government at Universidad Torcuato Di Tella; and Federico Filippini, visiting professor at Universidad Torcuato Di Tella, described the pandemic's impact on world gross domestic product (GDP) growth as “massive.” Figure 1 below depicts “Global GDP growth in an historical perspective.” Using the graphics, authors Yeyati and Fillippini note that the Covid-19-induced recession is the “deepest since the end of World War II.” And in Figure 2, virtually all International Monetary Fund (IMF)-covered countries experienced negative GDP growth in 2020. (Brookings Paper #158, 2021) This is a clear illustration of Covid-19 at work on the world economy.

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² Adds Wheelock: “By almost any measure, the 2020 recession began with sharp declines in economic activity, employment and equity prices that rivaled or exceeded the initial declines of the Great Depression. The Great Depression persisted, however, and when it finally reached a trough nearly four years later, economic activity, employment and consumer and equity prices were all far below their initial levels. The 2020 contraction might turn out to be the sharpest, but also the shortest, in modern times and perhaps of all time in the United States. The debate among forecasters has recently focused on the likely pace of the recovery and whether the increase in economic activity since May will be sustained or turn out to be merely an uptick before a second dip. The virus and the public's response to it will likely make that determination.”

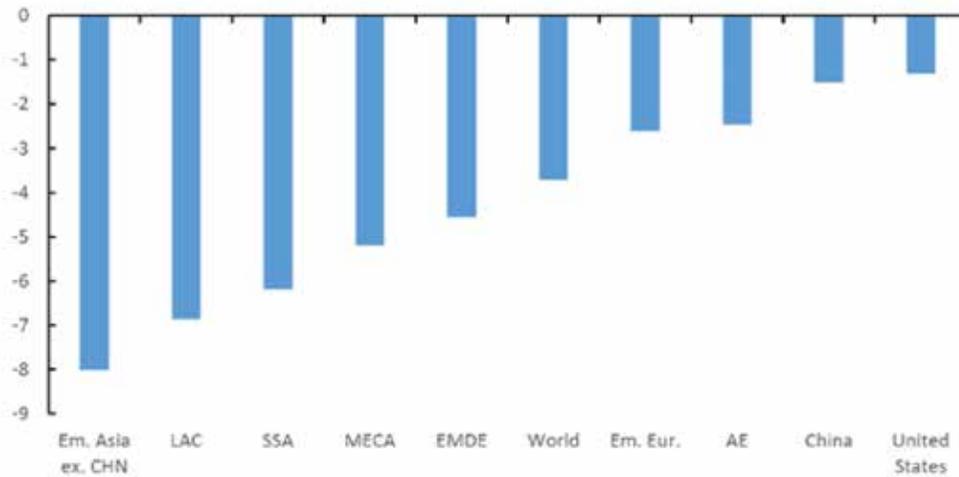
Finally, in the narrative, the authors further predicted the globaleconomic recovery will remain below pre-virus GDP levels through the end of 2021. (Brookings Paper #158, 2021)

FIGURE 1. GLOBAL GDP GROWTH IN A HISTORICAL PERSPECTIVE



Sources: Bolt et al. (2018), Kose, Sugawara, and Terrones (2019, 2020), and IMF-WEO Apr-2021. Shaded areas refer to global recessions.

FIGURE 2. GLOBAL GDP GROWTH 2020



Source: IMF-WEO Apr-2021. Note: AE = Advance economies; Emerging Asia ex. CHN = emerging and developing Asia excluding China; EM. Eur = Emerging and developing Europe; LAC = Latin America and the Caribbean; MECA = Middle East and Central Asia; SSA = sub-Saharan Africa

If economic strength is a key pillar of national security, then the damage identified in Figures 1 and 2 above has potentially broad and long-term effects for some aspects of security.

Traditionally, our initial thoughts about national security have centered on how America's national security infrastructure is under pressure from the usual mil-to-mil* players — Russia, Iran, China and North Korea — and post-9/11 non-state terror organizations, plus the traditional transnational crime networks, the newly emerging non-state cyber actors, the environment, and now, post-January 6 domestic extremists. The current POTUS (the President of the United States) and two of his three most recent predecessors discussed during their terms, and with scientists and medical advisors, the need to prepare for the expansion of national security to meet a potential viral threat. Unfortunately for the nation, the virus arrived on the watch of the one U.S. president not discussing it, the one who was the most ill-prepared and ill-equipped, and the one who was in a state of denial about the catastrophic danger we faced. To successfully address this widening swath of threats, America needs a well-functioning economy. Covid-19 woke America to a new “gray zone”³ (Bothwell, 2021) threat axis — an airborne viral menace — and reminded us that the DIME-FIL is an expansive national security concept, full of potential national security gray zone challenges.

Not your grandpa's national security anymore

In 2021, national security is well beyond DIME-FIL's “M” — the military instrument of power — as the sole national security consideration. Within the non-military threats, or non-conventional threats (Bothwell, 2021), economic

* Mil-to-mil is an under-studied and perhaps over-promoted element of American foreign policy; as in the so-called “mil-to-mil relations.” These are the cultivated ties the U.S. military has with foreign militaries. These mil-to-mil relations consist of military training and liaison exchanges, joint exercises, and senior level consultations. (See E-International Relations, “Mil to Mil,” February 6, 2011. <https://www.e-ir.info/2011/02/06/mil-to-mil/>)

³ Gray zone conflicts/threats are security challenges initiated through purposeful aggression that exceeds the bounds of normal competition but remains below the threshold of conventional warfare. Gray zone conflicts result from adversarial attempts to change the status quo for benefit through gradual belligerence that might be difficult to publicly attribute to the aggressor. Adversaries that initiate gray zone conflicts avoid the costs associated with conventional warfare while miring their opponents in questions involving international law, policy, and trade, thereby effectively preventing decisive responses. Although gray zone conflicts are typically initiated by weaker powers, China and Russia are also proponents, which raises the stakes for U.S. national security strategy. Gray zone conflicts as defined and discussed per the Bothwell article and Chairman of the Joint Chiefs of Staff, Joint Publication (JP) 3-0, Joint Operations (Washington, DC: The Joint Staff, January 17, 2017, Incorporating Change 1, October 22, 2018), as part of Chapter V and campaign planning. The JP and the Bothwell article articles are referring to Phase 0 operations under JP 5-0, Joint Operation Planning (Washington, DC: The Joint Staff, August 11, 2011).



security is rapidly becoming a conventional national security threat (Fatić, 2002). Covid-19 opened our eyes to this just as our eyes have now opened to our other non-conventional/gray zone national security vulnerabilities — white supremacy, energy supply, food and water access, the melting Arctic, etc. (Obama NSS, 2015). We now recognize these and the economy as viable threats which can no longer be ignored; proactive engagement is required to address these matters.

Recognition of Covid-19-related economic national security factors has risen such that the Council on Foreign Relations (CFR) hosted webinar discussion events, including “Concurrent Session: Pandemics

and the New Way of Working.” In this video, David Martinez interviewed Emerita Torres, vice president of policy, research, and advocacy at the Community Service Society of New York (formerly of The Soufan Center), and Nayyera a Haq, chief foreign affairs correspondent and host of the nightly newscast “The World Tonight” on the Black News Channel. The two remarked in their responses to Martinez’s questions that the pandemic exacerbated pre-existing work dynamics, created gaps and seams in technology, evidenced the disproportionate impact of Covid-19 on people of color and cast a spotlight on future U.S. demographic and work-force change. This latter consideration includes a U.S. working-age population in which people of color will be the majority by 2040, and in which the majority of U.S. workers will be without a college degree by 2030; this is significant. (CFR, 2021)

Of particular note here are the gaps and seams in cyber domain technologies and labor shifts. While an in-depth treatment of these is not possible here, I would be remiss not to reinforce the expansive nature of threats to national security in the cyber domain, a major gray zone consideration, and fluctuations in the domestic labor market. First, cyber-attacks like SolarWinds (Jibilian and Canales, 2021) and ransomware attacks (CISA, undated, and NPR, 2021) executed by overseas non-state entities are a formidable concern. (Update: One such recent example is the Associated Press report on NPR on July 3, 2021, that:

“A ransomware attack paralyzed the networks of at least 200 U.S. companies on [July 2], according to a cybersecurity researcher whose company was responding to the incident. The REvil gang, a major Russian-speaking ransomware syndicate, appears to be behind the attack, said John Hammond of the security firm Huntress Labs. He said the criminals targeted a software supplier called Kaseya, using its network-management package as a conduit to spread the ransomware through cloud-service providers” (NPR, July 3, 2021).

And, as we emerge from the Covid-19 lockdowns and restart and restructure the economy, businesses will need to adjust and establish new norms for survival and the re-establishment of economic security, i.e., our collective and individual responses need to recognize — if not outright support — the U.S. Commerce Department’s observations⁴ and the U.S. Labor Department’s statistics. Specifically, the Labor Department’s research showed that “in April 2021, the share of U.S. workers leaving jobs was 2.7% ... a jump from 1.6% a year earlier to the highest level since at least 2000.” The jump is the result of a desire not to return to the office, and the search to find a new work-life balance and work style after pandemic workloads, stress burnouts, and the emergence of new workplace tech that will keep workers at home. (Weber, 2021) Moreover, at the same time, InsuranceJournal.com is warning us with a headline: “Workers Refusing Covid-19 Vaccine Could Lose Their Jobs.” (Kopit, 2021)

These challenges swing like a playground see-saw, and are potentially a very hard ride if your riding partner leads by establishing a rider imbalance to your detriment. A disruption in the economy with the breadth and depth of Covid-19 undermines economic stability and worker confidence, and can potentially see-saw us into a generation-impacting imbalance. We must find the means to adjust to a new normal, and we should grasp an operational reality: immediate future economic security is in flux, and this impacts national security. Covid-19 is the

⁴ National security is beyond the “M” or the military instrument of power. Covid opened our eyes to this just as our eyes were being opened to our national security vulnerabilities in the cyber domain. It occurred first through state sponsored attacks like SolarWinds, then through “Ransomware” attacks from non-state actors located in states that are our largest near-peer competitors and those sponsoring the former.

principal reason why, and finding a novel way to apply the defeat mechanisms⁵ to Covid-19 and its gray zone successors is the reality of the task at hand.

A Covid-19 economic case example: Houston Methodist federal court case and the EEOC

Ironically, one of the first significant examples of new Covid-19 economic disruptions in business is in the public health/medical arena. On April 1, 2021, Houston Methodist Hospital in Houston, Texas, announced a policy requiring employee vaccinations against Covid-19 by June 7, 2021. In response, 117 employees filed a federal lawsuit to block the mandatory vaccinations and the consequential potential terminations for non-compliance with the new policy. On June 7, 2021, Houston Methodist followed through on its new policy and became the first U.S. hospital to require all employees to receive mandatory Covid-19 vaccinations as a condition of their continued “employment at will” status.⁶ Employees who failed to comply and failed to provide proof of vaccination by “Monday, June 7th were suspended without pay for 2 weeks. After that, they would be subject to termination.” (Brown, 2021) On June 12, 2021, the U.S. District Court for the Southern District of Texas dismissed the employees’ lawsuit.⁷ Among other things, the Texas Federal District Court considered as “advice” the May 28, 2021, United States Equal Employment Opportunity Commission’s (EEOC) operating instructions to American businesses. The EEOC told American businesses they were allowed to *require* employees to have vaccinations against Covid-19 as a condition of returning to their redesigned workplaces.

⁵ “Defeat Mechanisms 2-11. A defeat mechanism is a method through which friendly forces accomplish their mission against enemy opposition (ADP 3-0). Tactical forces at all echelons use combinations of the four defeat mechanisms: destroy, dislocate, disintegrate, and isolate.” Department of the Army, “ADP 3-90 Offense and Defense. *Army Doctrine Publication*.” July 31, 2019. [www.fas.org. Web. https://fas.org/irp/doddir/army/adp3_90.pdf](https://fas.org/irp/doddir/army/adp3_90.pdf).

⁶ Texas employment law. “Pay and Policies.” https://www.twc.texas.gov/news/efte/pay_and_policies_general.html#:~:text=The%20basic%20rule%20of%20Texas%20employment%20law%20is,reason%20at%20all%2C%20with%20or%20without%20advance%20notice. “The basic rule of Texas employment law is employment at will, which applies to all phases of the employment relationship – it means that absent a statute or an express agreement (such as an employment contract) to the contrary, either party in an employment relationship may modify any of the terms or conditions of employment, or terminate the relationship altogether, for any reason, or no particular reason at all, with or without advance notice.”

⁷ The District Court dismissal was appealed; no decision has been announced.

In its summary press release, the EEOC said,

- “Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for Covid-19, *so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations.*[italics are author’s] Other laws, not in EEOC’s jurisdiction, may place additional restrictions on employers. From an EEO perspective, employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a Covid-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.
- “Federal EEO laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (not the employer) in the community, such as a pharmacy, personal health care provider, or public clinic. If employers choose to obtain vaccination information from their employees, employers must keep vaccination information confidential pursuant to the ADA.
- “Employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, as long as the incentives are not coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information.
- “Employers may provide employees and their family members with information to educate them about Covid-19 vaccines and raise awareness about the benefits of vaccination.” (EEOC, 2021)

Covid-19 helped reset lifestyle imperatives: A Gallup survey

Recognizing the impact of the economic instrument of power has significant implications for supporting our national security policy and our reality in the workspace, post-pandemic and beyond. In fact, there is not only a concern about this as a workplace issue, but it is also a lifestyle imperative. Covid-19 public health requirements cover freedom of association, group dynamics and social engagement. A Gallup Company survey from May 2021 found 57 percent of respondents support requiring Covid-19 vaccination proof to travel by airplane, while 55 percent of respondents support vaccination substantiation to attend

large-crowd events. Some of these concerns fall along political lines: “Democrats largely support proof for all activities.” (Brenan, 2021) Figure 3, Figure 4 and Figure 5 provide details of the Gallup survey.

FIGURE 3.



FIGURE 4.

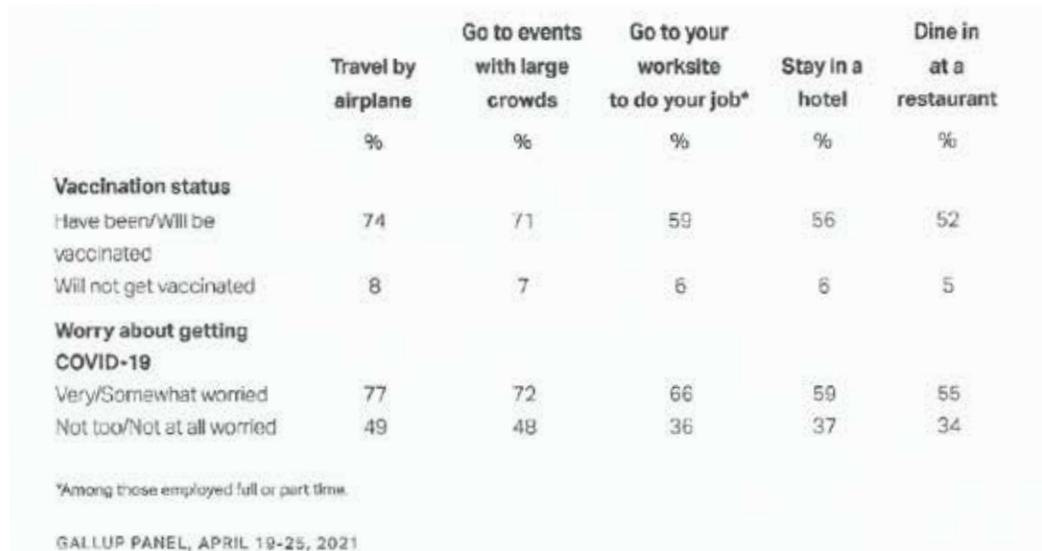
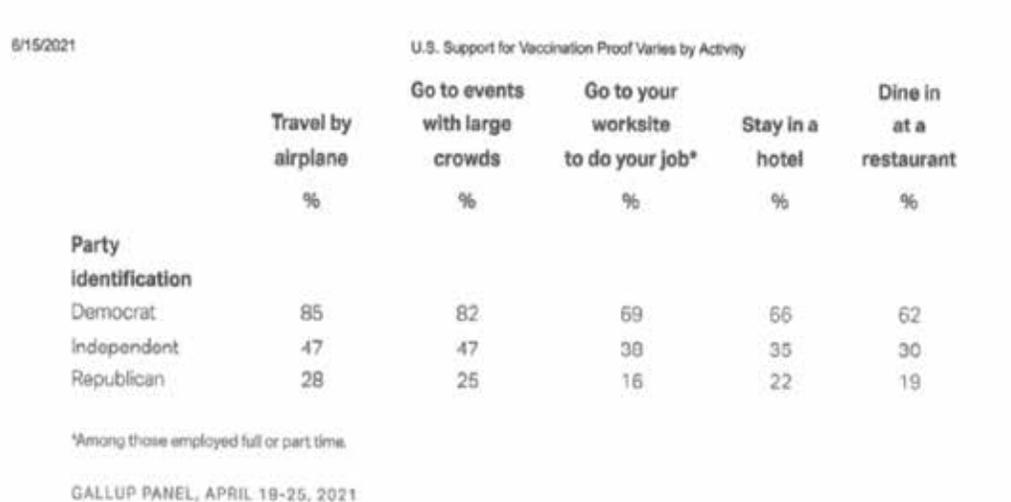


FIGURE 5.



National security case law, the U.S. Constitution and Covid’s political stamp

Domestic law, economic power and national security are interwoven in the bedrock federal cases of *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952),⁸ and

⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The supporting national security concerns of *Youngstown* are now largely curried by the Defense Production Act (DPA), 50 U.S.C. § 4501-4568, which FEMA describes as “the primary source of presidential authorities to expedite and expand the supply of materials and services from the U.S. industrial base needed to promote the national defense.” Former POTUS Donald Trump did not read *Youngstown Steel*, and found out the limits of his own executive powers the hard way when he unsuccessfully dictated that he had authority to open and close states and to dictate the opening and closing of businesses, when in fact he did not. Trump said, “The president of the United States calls the shots” and “They can’t do anything without the approval of the president of the United States” and, finally, “When somebody’s the president of the United States, the authority is total...” Trump also said there were “numerous provisions” in the Constitution that gave him that power, but he didn’t name any on that day or any day; and, “Trump claims he, not governors, has authority on opening state economies ... while Trump has the clear authority to rescind or change federal health guidelines, state and local officials do not need to follow the federal government’s orders, legal experts say.” (Morgan Chalfant, “Trump claims he, not governors, has authority on opening state economies,” <https://thehill.com/homenews/administration/492503-trump-claims-he-not-governors-has-authority-on-opening-state>). Further, “while Trump can issue federal regulations to prevent the spread of diseases, he does not have the authority to reverse a public health restriction put in place at the state or local level.” (Martha Kinsella, et al. 2021. “Trump Administration Abuses Thwart US Pandemic Response.” January 21, 2021. The Brennan Center. www.brennancenter.org. Web. <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response>.) Trump was wrong across the board because the Tenth Amendment of the U.S. Constitution reserves these police powers to the states, the states’ respective governors and legislators/legislatures. The president only has persuasion and possibly coercion as political carrot-and-stick options. Former President Trump ultimately invoked the Defense Production Act and redirected private industry to produce personal protective gear (PPE), ventilators and the like to fight the pandemic. The presidential power regulation discussed here is instructive to have in our background as we look at the idea that “Economic security is national security,” which is discussed throughout this article.

Jacobson v. Massachusetts, 197 U.S. 11 (1905); and also, the First, Fourth and Tenth Amendments to the U.S. Constitution.

In *Youngstown*, the U.S. Supreme Court issued a milestone decision that limited the power of the U.S. president to invoke national security in an exercise of executive power to seize private property. In this 1952 case, it was American steel mills alleging a violation of Fourth Amendment rights by being forced to support U.S. Korean War efforts. The case demonstrated the Supreme Court’s willingness to take on the political questions and complexities of governmental actions for and against a portion of the military-industrial complex.⁹ It also laid bare the gaps and seams of federal control over domestic businesses in a potential violation of the Fourth Amendment to the U.S. Constitution, even in the face of a national security concern. In the aftermath of *Youngstown*, firing off “national security” as a magic bullet to impose federal will and override the Constitution does not always hit the intended target.

The *Jacobson* case in 1905 pitted a First Amendment challenge to a state’s public health authority under the Tenth Amendment against an individual’s rights and freedom of action. In *Jacobson*, the Supreme Court upheld the Commonwealth of Massachusetts’ mandate that students attending public school in the state receive a compulsory smallpox vaccination over a 1904 due process challenge by Pastor Henning Jacobson. The court’s decision articulated that individual liberty is not absolute and is subject to the state’s police power that emanates from the U.S. Constitution’s Tenth Amendment and is found in many state constitutions.



Image credit: Maxime / Unsplash

⁹ “Military-industrial complex” is a phrase introduced by outgoing President Dwight Eisenhower in 1961 as he warned of the challenges intrinsic to the close relationship between the U.S. federal government and the U.S. federal defense industry. The unofficial phrase highlights the actual or potential “comfortable” relationship that can develop between government entities (namely the Department of Defense) and privately held defense-minded manufacturers/organizations. This union can produce obvious benefits for both sides – defense/war planners receiving the tools necessary for waging war (while also furthering political interests abroad), while defense companies become the recipients of lucrative multi-million or multi-billion-dollar deals. See <https://www.militaryindustrialcomplex.com/what-is-the-military-industrial-complex.php>.

Under the 1791 Tenth Amendment, “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, 1791). The Tenth Amendment demonstrated the understanding that the Constitution granted explicit or implied powers to the United States government in the Constitution, and where these exclusively federal carve-outs are not present, the law and legislation fall to the states and state government. For example, think about the first three articles of the U.S. Constitution — articles that established the legislative, executive and judicial branches of the government — as examples of explicit federal power excluded from the states and reserved to the federal government. These articles cannot be lawfully executed, modified or attacked by duly elected or appointed state-level officers. (U.S. Constitution, 1791).

Pastor Jacobson objected to his son’s mandatory vaccination in order to attend public school in Cambridge, Massachusetts. The pastor brought his objections under the U.S. Constitution’s First Amendment on religious liberty and other grounds. He asserted rights under the Free Exercise Clause of the First Amendment to avoid the mandatory smallpox vaccination required to attend public school during a smallpox outbreak.¹⁰ The law dictating vaccination in order to attend a public school in the commonwealth was enacted in 1855¹¹ in compliance with Massachusetts’s exercise of federal and state constitutional authority. In a testament to the correctness of the court and Massachusetts state actions, the vaccination versus non-vaccination death rates for vaccinated Cambridge

¹⁰ Michael R. Albert et al. “The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901–1903.” *N Engl J Med*, p 344:375–379 (2001). “In May 1901, an outbreak of smallpox, initially unrecognized, was followed by a series of outbreaks in various neighborhoods of Boston. From 1901 to 1903, there were 1,596 cases of smallpox with 270 deaths, in a city with a population of approximately 560,900. The attack rate was 3 cases per 1,000 persons, with a case fatality rate of 17 percent. Of 243 consecutive patients with smallpox who were admitted to the smallpox hospital on Southamptton Street, 18 (7 percent) were Black, although Blacks made up only 2 percent of Boston’s population in 1900. Of the 238 patients whose birthplace was identified, 49 percent were immigrants, whereas only 35 percent of the city’s residents were foreign-born; Canadian-born residents, accounting for 21 percent of the patients, made up 9 percent of Boston’s population at the time. During the epidemic, 60 percent of cases occurred in males who were among 754 patients with smallpox who had evidence of vaccination (there were 82 deaths and a case fatality rate of 11 percent), whereas among 842 unvaccinated patients, there were 188 deaths (a case fatality rate of 22 percent). The law requiring that children be vaccinated in order to attend public school, which had been enacted by the state in 1855, appeared to be effective in providing protection against the epidemic. A review of 700 cases showed that 130 (19 percent) occurred in children 1 to 5 years old, but only 21 (3 percent) occurred in children 6 to 10 years old; the number of children in each age group was similar.”

¹¹ *Ibid.*

students were significant. The vaccinated were spared and the death rate of the unvaccinated was twice that of the vaccinated. History has recorded the smallpox vaccinations provided effective protection during this epidemic — a highly visible templet for today.¹²

In *Jacobson*, Justice Harlan stated the question before the court, “Is this statute . . . inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State?” (*Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905)). Harlan confirmed that the Constitution protects individual liberty, *and* that this liberty is not “an absolute right in each person to be, in all times and all circumstances, wholly free from restraint.”

“There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution. But it is equally true, that in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.”

Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)

Thus, Massachusetts had the authority to enforce compulsory vaccination laws for public school students under the state’s constitutional police powers, and the federal police power established in the Tenth Amendment. Requiring a smallpox vaccine does not violate the First Amendment, *According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.* [italics are author’s] (*Jacobson and Wright v. DeWitt School Dist. No. 1 of Arkansas County*, 385 S.W.2d 644 (1965)).

¹² Michael R. Albert, M.D., Kristen G. Ostheimer, M.A., Joel G. Breman, M.D., D.T.P.H. “The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901–1903.” *N Engl J Med*, p 344:375–379 (2001).

For the ‘common good’: Jacobson case controls the Methodist Hospital workers’ lawsuit

Fast forward to the Texas federal lawsuit, and we can apply the *Jacobson* rationale; the U.S. District Court did precisely that in dismissing the Methodist Hospital employees’ claims.

The court dismissed the lead plaintiff’s and co-plaintiffs claims alleging the “vaccines are experimental and dangerous,” and that using the vaccinations would somehow cause them to commit an illegal act. The plaintiffs also argued that the injection requirement violated public policy. The court considered these claims to be “false” and “irrelevant” and that the vaccine injection requirement was consistent with public policy. The Texas Federal District Court, citing the U.S. Supreme Court, took notice of the facts that an involuntary quarantine for

contagious diseases and a state-imposed requirement of mandatory vaccinations do not violate due process. Finally, the district court cited the EEOC’s May 28, 2021, directions as “not binding, but it is advising” in dismissing the case and acknowledging the hospital’s right to terminate those vaccine refusers as valid. (*Bridges v. Houston Methodist Hospital*, 2021). The district court cited the plaintiff’s misunderstanding of Texas employment laws and the role and powers of the U.S. Secretary of Health and Human Services. Additionally, it called to attention the federal court’s

public policy pronouncements as an important reason for dismissal. The policy pronouncements emphasis aligns with what became the *Jacobson* rules, and is also reflective of *Compagnie’ Francoise De Navigation a Vapeur v. Bd of Health of State of Louisiana*, 186 U.S. 380 (1902), which found a law requiring involuntary quarantine during a yellow fever outbreak was a reasonable exercise of state police powers. The plaintiffs’ claims all failed as a matter of law in the “common good” litmus test — the common good of the larger body over the rights asserted by an individual.

How we regulate the economy and the nation’s working environments has always had a political dimension, but Covid-19 exploded the political divide on the home front.

The 'common good' and the constitutional component

The *Jacobson* court said an individual's constitutional right must give way to the "common good." Specifically, "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." Actions for the larger good — "the common good" in this case — overcome the individual good when the emergency is manifest for official government action; the *Methodist Hospital* case followed this line.

During the pandemic, the Tenth Amendment of the U.S. Constitution rose from the shadows to assert its dominion through the long-held interpretation of the *Jacobson* case, assuming new importance. The amendment dictates that state and U.S. territorial governors, legislators, public safety, and public health officials control the opening and the closing of the U.S. economy on a state-by-state basis during a state of emergency like Covid-19. And, in some ways, collaterally empowered private sector business executives in a similar manner. Each state gets to control the menu of options and how they are consumed, exercised or rejected. The same is true of business, as their actions affect our national security, based on their increase or decrease in economic power, business activities and economic security.

How we regulate the economy and the nation's working environments has always had a political dimension, but Covid-19 exploded the political divide on the home front! From controversial (for some) mask-wearing mandates to violence on airplanes, and from vaccination policies to violence in grocery stores and physical arguments over business capacity limits, the pandemic has put us on a new and different path. Pre-pandemic, most aspects of *Jacobson* had been considered settled law. But new challenges — from the feeble and baseless to those fabricated for political self-preservation, as well as others posing a legitimate challenge to the regulation of church activities by federal, state, regional and local-level government leaders — are afoot. In the end, across the country, the results of the

baseless, the feeble, the fabricated and the legitimate all seek to uproot and usurp the standards, rule, holding and “common good” rationale of *Jacobson*.¹³

Covid's political stamp is a red backlash

Little discussed, but fundamental post-Covid-19 change is impacting the authority of public health officials to act in the “common good.” Multiple states have enacted measures limiting public health officials’ scope of authority in the wake of the coronavirus pandemic. The advice or direct action by public health officials helped to shutter business and close the national economy in prophylactic shutdown actions to stop or slow the mass spread of the virus.

On the National Academy for State Health Policy website, observers can watch in real time the changes in state emergency orders, mask mandates and travel advisories (NASHP, 2021). Elected officials reacting to the politicization of public health actions made in the common good by public health officers are stripping power from these state-level public health officers. Observers can track this assault on the power of public health officials to act in the common good state by state in articles like “These 8 States Passed Legislation to Limit Public Health Officials’ Authority.” (Route-Fifty, 2021) In a report highlighted in the article, “Proposed Limits on Public Health Authority: Dangerous for Public Health Report,” (National Association of County and City Health Officials, 2021) which includes a “50-State Survey of Legal Protections for Public Health Officials” made necessary because acting in the common good has jeopardized their personal safety. (Network for Public Health Law, 2020) Additional material on the topic is available from the Association of State and Territorial Health Officials (ASTHO) ¹⁴“Emergency Declarations and Authorities Fact Sheet.” (ASTHO, undated)

¹³ The combination of Covid-19 and the defeat of former POTUS Trump has led to numerous Republican-led red states changing the authority of state voting officials and state voting laws. (See, Brennan Center, “Voting Laws Roundup: May 2021.” <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>. May 2021.) “As of June 21, 17 states enacted 28 new laws that restrict access to the vote. With some state legislatures still in session, more laws will certainly follow, which we will track in the next roundup later this year.” (See also, Marie Feyche, “US states have enacted 22 restrictive voting laws so far this year: report.” *Jurist*, May 31, 2021. <https://www.jurist.org/news/2021/05/us-states-have-enacted-22-restrictive-voting-laws-so-far-this-year-report/>.)

¹⁴ Chief health officers and officials in each U.S. state, federal territory and jurisdiction are the members of the Association of State and Territorial Health Officials. <https://www.astho.org/>.

These various documents demonstrate some of the “backlash” over public health officials’ actions during the pandemic.

The ASTHO report provides examples of laws that would:

- Prohibit requiring masks in any situation, including cases of active tuberculosis. In North Dakota, a new law would remove the authority of the state health office to require face masks or covering.
- Block the closure of businesses necessary to prevent the spread of disease, allowing for super-spreader venues. In Kansas, a new law removes the governor’s ability to close businesses during a public health emergency.
- Ban the use of quarantine. In Montana, a new law prohibits local board of health emergency orders from separating those individuals who are not yet ill, but reasonably believed to be infected or exposed. Prohibition of quarantine orders undermines the basis of infection control and would make it impossible to stop outbreaks of deadly diseases spread by individuals who are not yet symptomatic.
- Block state hospitals and universities from requiring vaccinations for employees and students in dormitories to protect state residents. In Arizona, a new law prohibits requirements that a person receive a vaccination, except in K-12 school settings, and creates criminal penalties for violating the ban.
- Strip local governments, including local health agencies, of the ability to respond to local conditions in an emergency. In Texas, a proposed bill would preempt local emergency action to the extent that it is inconsistent with orders of the governor or state health department.
- Set arbitrary time limits for emergency orders. In Florida, a new law provides for automatic expiration of local orders after seven days (a majority vote of the local governing body is required for an extension of such emergency orders), limits the total duration of local orders to 42 days and prevents the issuance of a substantially similar order for the same emergency if a previous order has expired.
- Give unilateral power to legislatures to stop public health actions. In Ohio, a new law will allow the legislature alone to rescind any order or action by the state health department or director of health to control the spread of contagious or infectious disease. The governor, who vetoed the law, issued a statement saying that the law “strikes at the heart of local health departments’ ability to move quickly to protect the public from the most serious emergencies Ohio could face.” The Governor’s veto was overridden by the legislature and the law [took] effect June 23, 2021.”

The report reaches four conclusions:

1. Legislation to block reasonable public health measures like mask wearing, social distancing, and quarantining poses an immediate threat to life and health.
2. Legislation to stop expert public health agencies from leading the response to health emergencies creates unforeseen, serious risks to life and health.
3. Legislation that strips authority from public health agencies and the executive branch infringes on the constitutional separation of powers and undermines effective government response.
4. These laws could make it harder to advance health equity during a pandemic that has disproportionately sickened and killed Black, Hispanic and Latino, and Indigenous Americans. (Dangerous for Public Health, 2021)

Conclusion

“Economic security is national security,” and public health actions are national security. “Anger over responses to the pandemic led some legislators to limit health officials’ role in public health emergency mandates ... [and] raised the profile of once-obscure local public health officials, as their decisions about lockdowns or mask orders became political fodder. Emotional burnout became common, and some pandemic front liners faced threats of violence, leading to a wave of resignations, retirements or firings among public health leaders during the last year.” (Route Fifty, 2021). Public officials are under attack as Covid-19 progresses.

Covid-19 clearly laid the economy low, but to blame and neuter public health officials who are acting to save lives is a mistake. These actions are not supported by the Gallup Survey results, nor will they correct the problems identified in the Brookings Report.

The American safety net that provided essential national security, economic security, and health protection in the past through the legislative process and our courts of law is vanishing under siege. It is vanishing via federal legislative inaction, red state legislatures and red state governors’ political actions that ignore ‘the common good’ in favor of individual rights and corporate interests. The safety net is under challenge in the courts. Both state and federal legislators

are more focused on this mode of attack than recognizing the role social justice and the social determinants of health (Artiga and Hinton, 2018)¹⁵ play in public health; or the pressing need to address them. (The Conversation, 2020) The ASTHO Report is but one example. Further, the Brennan Center proposes solutions to some of these dilemmas in reports generated by its National Task Force on the Role of Law and Democracy. Task force solutions include “legislation to protect government science from political interference, strengthen[ing] federal ethics laws, and curb[ing] the practice of placing acting officials in key government positions” in addition to new restraints on executive branch actions. (Kinsella, 2021, and Morgan, 2020)

We have entered an arena where the “common good” is less common, and partisanship is the emerged norm. We have entered an arena where public health guardians executing emergency mandates are villainized and require police protection to ensure their safety. When the upheaval from Covid-19 settles, harking back to the integration of economic security with national security mentioned by David Wheelock, will national security, economic security and public health officials retain the power and authority to protect the U.S. citizenry? The Supreme Court’s uneven, sometimes waning support¹⁶ for *Jacobson* during this pandemic leaves many questions unanswered (Don Jacobson, 2021 and Williams, 2021). Will the nation’s security be improved or weakened in the end? “The virus and the public’s response to it will likely make that determination ...” (Wheelock, 2020). More than 600,000 casualties represents the cost of the last such determination, our real-time gray zone conflict; will we remember?

When it is all said and done, if we don’t believe that championing public health promotes the 52-word paragraph we know as the Preamble to the U.S. Constitution¹⁷ — protecting the health of our people, our communities and the places where

¹⁵ “The social determinants of health are the conditions in which people are born, grow, live, work and age as well as the complex, interrelated social structures and economic systems that shape these conditions.”

¹⁶ “Uneven to waning support,” refers to SCOTUS rulings on religious challenges to Covid restrictions in California and New York discussed earlier.

¹⁷ U.S. Constitution., Preamble. “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

we live, learn, work and play — then we may not fully understand the 52-word national security directions the framers of the Constitution were giving us.

About the author

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Dr. Sanders was previously a U.S. Naval War College Military Law and Operations professor (2014–2019); director of the Defense Institute of International Legal Studies, U.S. Department of Defense (2011–2014); commanding officer of the U.S. Naval Legal Service Office, North Central (2007 and 2009–2011); a deputy assistant judge advocate general (2007–2009); and the in-country legal mentor for the Afghan National Army's 1st Judge Advocate General and the Afghan Ministry of Defense's 1st General Counsel equivalent (2004–2005). His work included rule of law instruction to military, civilian, NGO and regional organizations in the U.S., Liberia, Sierra Leone, Democratic Republic of the Congo, Chad, Afghanistan, Colombia, Australia, Djibouti, Yemen, Myanmar, and the Philippines. (2004–2014).

He earned his LP.D. in law and policy and Bachelor of Electrical Engineering from Northeastern University, his LLM from the U.S. Army JAG School, and his Juris Doctorate from Catholic University's Columbus School of Law; along with several other master's degrees. Dr. Sanders has served on several boards of directors, including the Rhode Island Black Heritage Society Board, the U.S. Secretary of Defense's Recovering, Wounded, Ill and Injured Members of the Armed Forces Task

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