ADMINISTRATIVE LAW — MAJOR QUESTIONS DOCTRINE — ELEVENTH CIRCUIT APPLIES THE MAJOR QUESTIONS DOCTRINE TO A DELEGATION TO THE PRESIDENT. — *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022).

The Supreme Court's decision in *West Virginia v. EPA*,[1] which formally established the major questions doctrine, left scholars with several questions: What constitutes "major"? What does it mean for Congress to delegate "clearly"? But one question has not received attention in the literature: does the major questions doctrine apply to delegations to the President? Recently, in *Georgia v. President of the United States*,[2] the Eleventh Circuit struck down President Biden's federal-contractor vaccine mandate, extending the major questions doctrine to delegations to the President.[3] In so doing, the Eleventh Circuit applied the doctrine in a way that is unjustified by the Supreme Court's stated rationales for it.

On September 9, 2021, President Biden issued Executive Order 14,042 (the Order) to "promote[] economy and efficiency in Federal procurement" by ensuring that federal contractors "provide adequate COVID-19 safeguards."[4] President Biden issued the Order pursuant to his authority under the Federal Property and Administrative Services Act of 1949[5] (Procurement Act). The Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the Act, so long as those policies are "consistent with" the Act.[6] The Order directed agencies to require contractors to "comply with all guidance . . . published by the Safer Federal Workforce Task Force" provided that the Director of the Office of Management and Budget (OMB) approves the guidance and determines that it "will promote economy and efficiency."[7] The Order also required the Federal Acquisition Regulatory (FAR) Council to "amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts" a clause requiring compliance with the guidance.[8] On September 24, the Task Force issued guidance requiring all covered contractors to be vaccinated against COVID-19 unless

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[1] 142 S. Ct. 2587 (2022).

[2] 46 F.4th 1283 (11th Cir. 2022).

[3] Both the Fifth and Sixth Circuits have reached the same conclusion as the Eleventh Circuit. *See* Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Kentucky v. Biden, 57 F.4th 545 (6th Cir. 2023).

[4] Exec. Order No. 14,042, 86 Fed. Reg. 50,985, 50,985 (Sept. 9, 2021).

[5] Pub. L. No. 81-152, ch. 288, 63 Stat. 377, 378 (codified as amended in scattered sections of the U.S. Code).

[6] 40 U.S.C. § 121(a). The Procurement Act's purpose is to "provide the Federal Government with an economical and efficient" public procurement system. *Id.* § 101.

[7] Exec. Order No. 14,042, 86 Fed. Reg. at 50,985.

[8] *Id.* at 50,986.

"legally entitled to an accommodation."[9] The OMB Director found that the guidance's policies would "improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors."[10] Then the FAR Council issued a memorandum beginning to implement the guidance.[11]

On October 29, 2021, several states filed suit in the U.S. District Court for the Southern District of Georgia seeking a preliminary injunction against the Order.[12] To determine likelihood of success on the merits, the district court examined whether the Procurement Act authorized the Order.[13] The court cited Supreme Court precedent requiring Congress to "'speak clearly' when authorizing the exercise of powers of 'vast economic and political significance.'"[14] The court found that the Order's mandate had "vast economic and political significance" due to its "extreme economic burden" on the plaintiffs[15] and "major impact on the economy."[16] The court also found that Congress "did not clearly authorize the President to issue the kind of mandate contained in EO 14042," which it termed a "regulation of public health . . . not clearly authorized under the Procurement Act."[17] Irrespective of the clear statement rule, the court concluded that the plaintiffs would likely succeed by showing that the Order "does not have a sufficient nexus to the purposes of the Procurement Act."[18] It found in the plaintiffs' favor on every other preliminary injunction prong[19] and enjoined enforcement of the vaccine mandate nationwide.[20]

The Eleventh Circuit affirmed in part and vacated in part. It agreed with the district court "that the plaintiffs' challenge to the mandate will likely succeed and that they are entitled to preliminary relief," but it vacated in part "because the injunction's nationwide scope is too broad."[21] Writing for the panel, Judge Grant[22] first asked "whether the

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[9] SAFER FED. WORKFORCE TASK FORCE, COVID-19 WORKPLACE SAFETY: GUIDANCE FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS 5 (2021), https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf [https://perma.cc/H4TB-LGER].

[10] Notice of Determination, 86 Fed. Reg. 53,692 (Sept. 24, 2021).

[11] Memorandum from Lesley A. Field, Acting Adm'r for Fed. Procurement Pol'y, Off. of Mgmt. & Budget et al. to Chief Acquisition Officers et al. (Sept. 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf [https://perma.cc/MS75-JW6J].

[12] *See* Georgia v. Biden, 574 F. Supp. 3d 1337, 1346 (S.D. Ga. 2021).

[13] *Id.* at 1352–55.

[14] *Id.* at 1352 (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

[15] *Id.*

[16] *Id.* at 1353.

[17] *Id.*

[18] *Id.* at 1354.

[19] *Id.* at 1355–57.

[20] *See id.* at 1357.

[21] *Georgia*, 46 F.4th at 1289.

[22] Judge Grant was joined in part by Judge Edmondson.

Procurement Act authorizes the President to require the employees of federal contractors to be vaccinated."[23] She considered the grant of authority within the Procurement Act[24] to "cabin[] the President's authority."[25] Based on this understanding, she wrote: "The Procurement Act gives the President the authority to direct subordinate executive actors as they carry out its specific provisions; directing them to go beyond the statute's boundaries would neither 'carry out' the Act nor be 'consistent with' it."[26]

Judge Grant then asked whether the Order directed subordinates to exceed the Procurement Act's bounds.[27] She found that "[n]othing in the Act contemplates that every executive agency can base every procurement decision on the health of the contracting workforce. Instead, . . . agencies can articulate specific, output-related standards."[28] But Judge Grant did not rely solely on textual interpretation. She turned, without invoking it by name, to the major questions doctrine. Her analysis was "informed by a well-established principle of statutory interpretation: we 'expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'"[29] She reasoned that "requiring widespread Covid-19 vaccination is 'no everyday exercise of federal power'" and, therefore, "including a Covid-19 vaccination requirement in every contract and solicitation, across broad procurement categories, requires 'clear congressional authorization.'"[30]

Judge Grant concluded that the presidential power asserted lies "beyond what Congress could reasonably be understood to have granted."[31] She looked to "the general grant of procurement power to executive agencies," which "states that agencies 'shall make purchases and contracts for property and services in accordance with this division.'"[32] After examining the Procurement Act's provisions, she found that "[a]n all-encompassing vaccine requirement is different in nature than the sort of project-specific restrictions contemplated by the Act" and that "this

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[23] *Georgia*, 46 F.4th at 1292.

[24] The Act provides that the "President may prescribe policies and directives that the President considers necessary to carry out this subtitle" but specifies that "[t]he policies must be consistent with this subtitle." 40 U.S.C. § 121(a).

[25] *Georgia*, 46 F.4th at 1294.

[26] *Id.* at 1295 (quoting 40 U.S.C. § 121(a)). Judge Grant read Supreme Court precedent "suggest[ing] that the President's authority should be based on a 'specific reference' within the Act" to support this interpretation. *Id.* at 1294 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 304 n.34 (1979)).

[27] *Id.* at 1295.

[28] *Id.*

[29] *Id.* (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

[30] *Id.* at 1296 (quoting Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam); West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022)).

[31] *Id.* (quoting *West Virginia*, 142 S. Ct. at 2609).

[32] *Id.* (quoting 41 U.S.C. § 3101(a)).

statute is not an 'open book' to which contracting agencies may 'add pages and change the plot line.'"[33] Judge Grant rejected the government's argument that the purpose provision of the Procurement Act "should be read together with the grant of authority to the President in § 121(a)" such that it "authorizes the President to 'prescribe policies and directives' to ensure 'an economical and efficient system' for federal contracting"; instead she limited the President's authority to the specific grants in the operative portions of the Act.[34] She also declined to use the nexus-based approach to Procurement Act determinations established by the D.C. Circuit in *AFL-CIO v. Kahn*,[35] reasoning that "treating economy and efficiency as the only content defining the President's procurement power works the same result as embedding the purpose statement of § 101 into the operative delegation of § 121(a) — an untenable approach."[36] Accordingly, the panel held that the President "likely exceeded his authority under the Procurement Act."[37] Affirming in part, the panel found that "[t]he plaintiffs have also met the remaining requirements for a preliminary injunction."[38] However, the panel vacated the preliminary injunction "to the extent that it bars enforcement of the mandate against nonparty contractors"[39] because the court could "offer complete relief to the plaintiffs . . . without issuing a nationwide injunction."[40]

Judge Anderson concurred in part and dissented in part.[41] He agreed with the majority's narrowing of the injunction but disagreed "that Appellees have shown a substantial likelihood of success on the merits."[42] Judge Anderson argued that "§ 121 provides clear authority for the President to 'prescribe policies and directives that the President considers necessary to carry out' the Procurement Act."[43] Under this reading, the President has authority to "prescribe policies and directives that 'provide the Federal Government with an economical and efficient system for' procurement."[44] Unlike the majority, Judge Anderson would have applied the nexus test and found that the Order "has a sufficiently close nexus" to promoting economy and efficiency in procurement.[45]

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[33] *Id.* (quoting *West Virginia*, 142 S. Ct. at 2609).
[34] *Id.* at 1298 (quoting 40 U.S.C §§ 101, 121(a)).
[35] 618 F.2d 784 (D.C. Cir. 1979) (en banc).
[36] *Georgia*, 46 F.4th at 1299.
[37] *Id.* at 1297.
[38] *Id.* at 1301.
[39] *Id.* at 1307.
[40] *Id.* at 1308.
[41] *Id.* (Anderson, J., concurring in part and dissenting in part).
[42] *Id.*
[43] *Id.* at 1309 (quoting 40 U.S.C. § 121). Judge Anderson noted that his "understanding of the Procurement Act is in accord with the many court decisions upholding Presidential Executive Orders issued pursuant to § 121." *Id.* (citing, inter alia, AFL-CIO v. Kahn, 618 F.2d 784, 785 (D.C. Cir. 1979) (en banc)).
[44] *Id.* (quoting 40 U.S.C. § 101).
[45] *Id.* at 1313.

Turning to the major questions doctrine, he observed that the "doctrine has never been applied to an exercise of proprietary authority" or to "the exercise of power by the President," but he "assume[d] that the doctrine does apply."[46] Judge Anderson thought that "this is a question of major economic and political significance," though he noted that the court was "not dealing with delegation to an agency" but "to the President[,] who does not suffer from the same lack of political accountability that agencies may."[47] After considering the Act's text, the history of presidential action under the Act, and the proprietary nature of the President's authority,[48] Judge Anderson concluded that the "President's exercise of authority here was clearly authorized."[49]

The Eleventh Circuit's decision to apply the major questions doctrine to a delegation to the President was unjustified under the doctrine as crystallized last Term in *West Virginia v. EPA*. The Supreme Court's rationale for the major questions doctrine is rooted in "a practical understanding of legislative intent" and "separation of powers principles."[50] But these considerations apply differently to the President than to agencies. Congress's choice to delegate to the President counsels a different "practical understanding" of legislative intent. And the Supreme Court has an established separation of powers doctrine for determining the limits of presidential power: the *Youngstown*[51] framework. This framework directly conflicts with *West Virginia*'s clear statement rule. Accordingly, the major questions doctrine should not apply to delegations to the President.[52]

The Supreme Court has justified the major questions doctrine by appealing to the idea that Congress would not lightly delegate "major" power to an agency. In *FDA v. Brown & Williamson Tobacco Corp.*,[53] the Court reasoned that Congress would not delegate matters

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46 *Id.* at 1314.

47 *Id.* at 1313 (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010)).

48 Id. at 1316–17.

49 *Id.* at 1316.

50 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022). Notably, this modern formulation of the major questions doctrine does not rely, at least facially, on traditional nondelegation principles. *See* Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 297–300 (2022); *id.* at 291 ("[I]t is essentially incorrect to regard the new major questions doctrine as merely a familiar sort of constitutional avoidance or constitutionally tethered clear statement rule.").

51 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

52 Please note that this comment's analysis applies to the major questions doctrine but not the nondelegation doctrine. While the legislative-intent analysis and *Youngstown* framework counsel against applying a clear statement rule to delegations to the President, these arguments do not speak directly to nondelegation. Although the nondelegation doctrine has been used to invalidate a statutory delegation in only two cases, the delegations at issue in both cases were to the President. *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 406 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–22 (1935).

53 529 U.S. 120 (2000).

of "economic and political significance" to agencies in a "cryptic" fashion.[54] This idea developed into a quasi–clear statement rule in *Utility Air Regulatory Group v. EPA*.[55] There, the Court declared that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[56] The Court embraced this doctrinal development in *West Virginia* and stated that the major questions doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: *agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[57] Notably, these cases did not involve delegations to the President. And, although the Court has not addressed whether the President should be treated as an agency in this context, it has not treated the President as an agency in other contexts.[58]

The Supreme Court's theory of legislative intent in these "major questions" cases does not apply to delegations to the President. As then-Professor Elena Kagan once noted, when Congress delegates directly to the President, it "expresses a preference, though not a command, that the President take some part in exercising the delegated authority; otherwise stated, a delegation to the President gives notice that Congress will hold him specially accountable for decisions made within its scope."[59] Likewise, Professor Kevin Stack has provided a detailed account demonstrating that Congress acts deliberately when it chooses to whom it delegates.[60] One consideration that might lead Congress to delegate to the President specifically is the President's heightened political accountability compared to that of agencies. When Congress delegates to the President specifically, "basic political values of accountability and coordination counsel in favor of applying (or presuming a congressional intent to apply) *Chevron* deference."[61] Similarly, the President's political accountability, and Congress's knowledge of that accountability, counsel against applying the major questions doctrine to delegations to the President. The Court's recent jurisprudence on

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[54] *Id.* at 160. The Court's reasoning is repeated in similar formulations across other major questions doctrine cases. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act's] registration provision is not sustainable.").

[55] 573 U.S. 302 (2014).

[56] *Id.* at 324 (quoting *Brown & Williamson*, 529 U.S. at 160). At that point, the clear-statement-rule version of the major questions doctrine had not yet been established as the exclusive version of the rule. *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 483 (2021); Sohoni, *supra* note 50, at 272–73.

[57] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (emphasis added).

[58] *See, e.g.*, Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding that "the President is not an agency within the meaning" of the Administrative Procedure Act).

[59] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2329 (2001).

[60] *See generally* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

[61] *Id.* at 308–09 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

presidential removal powers demonstrates that the Court also recognizes this difference in accountability between agencies and the President.[62] In *Seila Law LLC v. CFPB*,[63] the Court recognized that "the Framers made the President the most democratic and politically accountable official in Government."[64] Applying the major questions doctrine to the President as if the President were an agency ignores the President's heightened political accountability and Congress's intent to delegate to the President in light of that accountability.

The President should likewise be treated differently than agencies under separation of powers doctrine. The Supreme Court's longstanding *Youngstown* framework for determining the scope of presidential power conflicts with the major questions doctrine's clear statement rule.[65] In zone one of the *Youngstown* framework, "[w]hen the President acts pursuant to an express *or implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[66] And in zone two of the framework, when the President acts in the face of congressional silence, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain" and "congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility."[67] Therefore, the "test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[68] In other words, the powers exercised by the President and Congress can evolve to meet changing circumstances.[69]

The *Youngstown* framework stands in stark contrast to a clear statement rule for congressional delegations to the President. Because the framework recognizes implied congressional delegations alongside express ones, courts cannot simply require a clear statement; they must

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[62] *See generally* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371 (2022).

[63] 140 S. Ct. 2183 (2020).

[64] *Id.* at 2203.

[65] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). The Court continues to use the *Youngstown* framework for questions of presidential power. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*.").

[66] *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (emphasis added).

[67] *Id.* at 637.

[68] *Id.*

[69] Justice Jackson recognized the fluidity of presidential power:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

Id. at 635.

instead analyze the statute under zone one to determine whether Congress has made a permissible delegation *implicitly*. And, even if a court determines that Congress has not delegated the President power under zone one, it must still engage in a zone-two analysis to determine whether the President may permissibly exercise the power at issue in light of congressional silence and contemporary circumstances. Applying a clear statement rule bypasses the *Youngstown* analysis and threatens to unnecessarily curtail presidential power.

Though there are arguments that the major questions doctrine should apply to delegations to the President, they fail to pass muster. One may argue that the President's control over agencies as Chief Executive makes it as if all delegations to agencies — or at least all delegations to executive agencies — are delegations to the President.[70] But this argument fails to account for Congress's intentional choice to delegate directly to the President and ignores the Court's focus on legislative intent in its major questions doctrine analysis. Others may argue that, because the President is not subject to the same procedural limitations as agencies,[71] there is more reason for stringent judicial review of delegations to the President.[72] But Presidents are still subject to some procedural safeguards that prevent them from acting without restriction.[73] Further, the President's political accountability operates as a unique safeguard on presidential actions, counseling against overreaching judicial intervention.

By applying the major questions doctrine to a delegation to the President, the Eleventh Circuit demonstrated the potential of lower courts to expand the doctrine beyond its formulation in *West Virginia*. The Supreme Court's stated rationales for the doctrine — a practical understanding of legislative intent and separation of powers principles — militate against extending the doctrine to the President. Additionally, applying the doctrine to the President would further undermine the politically accountable branches and increase the judiciary's power.[74] In light of these considerations, the major questions doctrine should not apply to delegations to the President.

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[70] *See generally* Kagan, *supra* note 59.

[71] *See* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).

[72] *Cf.* Kathryn E. Kovacs, Response, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 107–13 (2021) (arguing that "presidential administration has led the United States' democracy down the path toward authoritarianism," *id.* at 107).

[73] *See* Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1275 (2021) (arguing that, pursuant to "Supreme Court case law on presidential power . . . [,] the President must engage in deliberation before exercising power").

[74] Many scholars contend that the major questions doctrine undermines the politically accountable branches. *See, e.g.*, Sohoni, *supra* note 50, at 314 ("[T]he major questions doctrine . . . will cause both an actual and an *in terrorem* curtailment of regulation."); Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 772 (2022) (arguing that "reliance on the major questions doctrine is not legal interpretation at all, but rather an exercise of raw political power").