Shots Fired, Shots Refused: Scientific, Ethical & Legal Challenges Surrounding the U.S. Military's COVID-19 Vaccine Mandate

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ARTICLE

SHOTS FIRED, SHOTS REFUSED: SCIENTIFIC, ETHICAL, & LEGAL CHALLENGES SURROUNDING THE U.S. MILITARY’S COVID-19 VACCINE MANDATE

SHAWN D. MCKELVY, L. WILLIAM UHL, AND ARMAND BALBONI

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ABSTRACT

The COVID-19 pandemic provided uncertain and challenging circumstances under which to lead a nation and the military that protects it. Those in charge and in command faced unique challenges—scientific, ethical, and legal—at our various levels of government to both keep people safe while keeping government and society functioning. While there were many successes to celebrate, there are also many criticisms for how this “whole-of-government approach” may have degraded some of our most cherished liberties along the way. The authors focus on the U.S. military’s vaccine mandate and propose military leaders may have failed to fully consider the evolving science, weigh the prevailing ethics,
and appropriately apply the relevant law regarding exemptions, and instead adopted a more uniform approach that aligned with other federal agencies and not to the military’s unique population. And along the way, military leaders lost some of the trust and the faith of those they were seeking to protect, prompting the other two branches of government, the Judiciary and Congress, to intervene. Drawing from our diverse experiences as both practitioners and academics, this Article not only seeks to document the past but also provides some suggestions for the future should we face another such pandemic.
I. INTRODUCTION

May 11, 2023, marked the end of the Federal COVID-19 Public Health Emergency (PHE) with the Biden-Harris Administration claiming its “whole-of-government approach to combating COVID-19” places the nation in a position to “transition out of the emergency phase and end the COVID-19 PHE.”1 COVID-19 has not disappeared and likely never will, but the emergency certainly has run its course. These three-plus years of “COVID times” presented unique challenges—scientific, ethical, and legal—for our various levels of government to both keep its people safe while keeping government and society functioning. And while there were many successes to celebrate and of which to be proud,2 there are also many criticisms for how this “whole-of-government approach” degraded some of our most cherished liberties along the way.

A week after the official end of the COVID-19 PHE, on May 18, 2023, the United States Supreme Court issued an opinion dealing with the expiration of Title 42, the emergency decree severely restricting immigration to prevent the spread of COVID-19.3 In a decision that took the majority one sentence to dispose of the issue before the Court, Justice Neil Gorsuch attached a statement filling eight pages and issuing a powerful rebuke of the “breathtaking scale”4 of emergency powers taken by executive officials across the country since the start of the COVID-19 pandemic.

In his statement, Justice Gorsuch writes in part:

Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license

4. Id. at 1314 (Gorsuch, J., dissenting).
plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent.5

Federal executive officials entered the act too. Not just with emergency immigration decrees. They deployed a public-health agency to regulate landlord-tenant relations nationwide. They used a workplace-safety agency to issue a vaccination mandate for most working Americans. They threatened to fire noncompliant employees, and warned that service members who refused to vaccinate might face dishonorable discharge and confinement.

. . .

Doubtless, many lessons can be learned from this chapter in our history, and hopefully serious efforts will be made to study it. One lesson might be this: Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat. A leader or an expert who claims he can fix everything, if only we do exactly as he says, can prove an irresistible force. We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties—the right to worship freely, to debate public policy without censorship, to gather with friends and family, or simply to leave our homes. We may even cheer on those who ask us to disregard our normal lawmaking processes and forfeit our personal freedoms.6

. . .

Make no mistake—decisive executive action is sometimes necessary and appropriate. But if emergency decrees promise to solve some problems, they threaten to generate others. And rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow.7

This Article attempts to begin answering Justice Gorsuch’s call to take “serious efforts . . . to study”8 our nation’s COVID-19 response by looking at the Department of Defense’s, and more specifically, the Department of the Air Force’s COVID-19 vaccine mandate in hopes of learning lessons.

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5. Id. at 1314–15 (citations omitted).
6. Id. at 1315 (emphasis added).
7. Id. at 1316 (emphasis added).
8. Id. at 1315.
from this chapter in our history. We will do so by examining the science, ethics, and law surrounding the military’s COVID-19 vaccine mandate.

A. The Fog of COVID-19

The Fog of War is a term used in the military to describe the complexities of conflict where there are often layers of uncertainty. The War on COVID-19 resembles this adage in almost every way. And while reasonable minds may differ on the prudence of the various policies undertaken throughout this global pandemic, “decisive executive action” was both “necessary and appropriate” during the initial Fog of COVID-19. The world faced a true emergency, and leaders across government, including our military leadership, were doing their best with the information available. However, as the fog began to lift and more reliable data emerged, an argument can be made that military leaders were both slow to change course and unwilling to faithfully consider religious exemptions when the scientific data suggested that there was no longer a military necessity for full vaccination of the Total Force.

It is true that hindsight is twenty-twenty. And it is equally true that COVID-19 provided some of the most uncertain and challenging circumstances under which to lead. However, the authors propose military leaders may have failed to fully consider the evolving science, weigh the prevailing ethics, and appropriately apply the relevant law regarding exemptions, and instead adopted a more uniform approach that aligned with other federal agencies and not the military’s unique population. And along the way, military leaders lost some of the trust and the faith of those they were seeking to protect, prompting the other two branches of government, the Judiciary and Congress, to intervene.

9. See Fog of War, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095820962 [https://perma.cc/W26U-T9N4] (“A phrase now much used to describe the complexity of military conflicts . . . . Fog of war is often attributed to Clausewitz, but is in fact a paraphrase of what he said: ‘War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty.’”).

10. Mayorkas, 143 S. Ct. at 1316 (Gorsuch, J., dissenting).

11. See OFF. OF GEN. Couns., DEPT OF DEF., LAW OF WAR MANUAL § 2.2, at 52 (rev. ed. Dec. 2016) (defining military necessity “as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war”). In this case, while COVID-19 was the enemy, the authors argue any military necessity that existed at the outset of the pandemic likely ended prior to the vaccine mandate.
B. Enter the COVID-19 Military Vaccine Mandate

On August 23, 2021, the United States Food and Drug Administration (FDA) approved the first COVID-19 Vaccine. The following day, invoking notions of military necessity, Secretary of Defense Lloyd Austin issued a mandate requiring full vaccination of all members of the Armed Forces. The memorandum began by stating:

To defend this Nation, we need a healthy and ready force. After careful consultation with medical experts and military leadership, and with the support of the President, I have determined that mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people.

Secretary Austin then ordered the Secretaries of the Military Departments to “immediately begin full vaccination” and to “impose ambitious timelines for implementation.” However, while moving with all haste towards the goal of full vaccination, recognizing some members would have medical contraindications or other objections to the vaccine, the mandate left room for medical and “administrative or other exemptions established in Military Department policy,” allowing each Military Department to promulgate guidance to carry out the established requirements. The memorandum closed with an expression of gratitude stating, “Our vaccination of the Force will save lives. Thank you for your focus on this critical mission.”

On the heels of Secretary Austin’s mandate, on September 3, 2021, Secretary of the Air Force, Frank Kendall III, released an implementation plan directing Air Force and Space Force commanders to “take action systemically and as expeditiously as possible to ensure prompt and full
vaccination of Service members.” Unless exempted, active duty Airmen and Guardians were required to be fully vaccinated by November 2, 2021, and those in the Air Force Reserve and National Guard were to be fully vaccinated by December 2, 2021.

A press release from the Secretary of the Air Force Public Affairs office accompanying this memo stated, “Vaccinations will help ensure service members’ health and safety while preserving the department’s readiness and ability to execute worldwide air and space forces missions . . . .” Secretary of the Air Force Gina Ortiz Jones was quoted saying, “We are taking an aggressive approach to protect our service members, their families and their communities from COVID-19 and the highly transmissible Delta variant.” Secretary Ortiz’s inclusion of “their communities” may have subtly signaled that this vaccination campaign was not based solely on the unique needs of the military, but rather was part of the national response.

By mid-October, Secretary Kendall thanked the hundreds of thousands of Total Force Airmen and Guardians who were on track to meet the vaccination timelines, but issued a stern warning to the unvaccinated stating, “To those yet to get vaccinated, the order is clear: You have a responsibility to take action now, protect our nation and those we love, or be held accountable for failing to do so.” By the November 2nd deadline, nearly 97% of those on active duty “received at least one dose of the COVID-19 vaccine,” and by the December 2nd deadline, 91% of those in the National

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19. Id.


21. Id.


Guard and Reserve had willingly\textsuperscript{24} received at least one dose of the COVID-19 vaccine.\textsuperscript{25}

On December 7, 2021, Secretary Kendall provided supplemental guidance regarding administrative and disciplinary action for service members who refused to obey a lawful order to receive the COVID-19 vaccine and who did not have a pending separation or retirement, nor a medical, religious, or administrative exemption.\textsuperscript{26} Those pending separation or retirement who submitted a request for exemption prior to the November 2, 2021, deadline were granted an administrative exemption so long as they would be separated or retired by April 1, 2022.\textsuperscript{27} The policy provided temporary exemptions from the COVID-19 vaccination requirement while requests were being processed and established a timeline to begin the COVID-19 vaccination regimen (five days) in the event exemptions, appeals, or both were denied.\textsuperscript{28} It also allowed for service members to request to separate or retire on or before April 1, 2022, or no later than the first day of the fifth month following initial or final appeal denial.\textsuperscript{29}

Of note, on August 30, 2021, prior to the issuance of Secretary Kendall’s mandate, 71% of the active-duty Airman and Guardians were already partially or fully vaccinated, as were 65% of the National Guard and

\textsuperscript{24} While the authors use the term “willingly,” it is appropriate to place that term in context. Many service members who were early adopters of the COVID-19 vaccine may have truly desired it for its promise of limiting severe illness; however, it is also likely true that many service members who received the COVID-19 vaccine prior to the mandate did so for other reasons, including appeals to patriotism, pressure from superiors, and incentives like being able to return to the workplace or as a prerequisite to be able to travel TDY (temporary duty) for work, etc. In an environment where service members adhere to Core Values, are trained to respect their leaders, and certainly to follow their orders, it is unknown how many early adopters did so because of the above influences. Further, once the writing was on the wall that a mandate was imminent, many service members likely received the shot to only avoid adverse consequences.


\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id. at 1–2.}

\textsuperscript{28} \textit{Id. at 2.}
While a strong start, a sizeable number of unvaccinated service members remained hesitant to receive the vaccine. Not unlike in the general United States population where vaccine hesitancy had increased over the years, many in the military expressed concerns about the speed in which this vaccine was developed and the possibility of yet unknown, long-term side-effects. Other service members cited conspiracy theories and other “misinformation and disinformation” found on the internet. Researchers and practitioners have begun to explore this hesitancy among military members, with some promising educational and informational interventions delivered by trusted leaders as a possible way of decreasing the hesitancy moving forward. Still, others raised new forms of religious objections and did so in significant numbers.

With more than two-thirds of all Airmen and Guardians already vaccinated prior to the mandate, coupled with what “the science” was beginning to show by the fall of 2021, questions were raised whether a


31. See Meeting COVID-19 Misinformation and Disinformation Head-On, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH, https://publichealth.jhu.edu/meeting-covid-19-misinformation-and-disinformation-head-on [https://perma.cc/ES9X-8W29] (“Misinformation is a broader classification of false or inaccurate claims shared largely unwittingly and without the intention to deceive. Disinformation is a specific subset of misinformation created with deliberate intentions to deceive. Both have caused significant and real harm throughout the COVID-19 pandemic.”).

32. See Seth Moulton & Tammy S. Schultz, One-Third of U.S. Troops Opted Out of the COVID-19 Vaccine. Here’s Why That Is Dangerous for National Security, TIME (Apr. 5, 2021), https://time.com/5952558/military-covid-19-vaccine-misinformation/ [https://perma.cc/2AHV-Y8UN] (explaining how conspiracy theories may have influenced service members to refuse taking the vaccine). However, as time would tell, many things that were originally labeled as “misinformation or disinformation” or “conspiracy theories” ended up being either true (e.g. the vaccine does not prevent one from getting COVID-19 despite early claims that it did) or have since been admitted as plausible (e.g. the hypothesis that the COVID-19 virus originated from a Chinese lab leak despite previous claims that it was of natural origin). See Wenstrup Releases Statement Following Dr. Fauci’s Two-Day Testimony, COMM. ON OVERSIGHT & ACCOUNTABILITY (Jan. 10, 2024), https://oversight.house.gov/release/wenstrup-releases-statement-following-dr-faucis-two-day-testimony/ [https://perma.cc/YA4K-8XXS] (identifying Dr. Anthony Fauci appeared before the Republican-led House Select Committee on the Coronavirus Pandemic and acknowledged that the lab leak hypothesis was not a conspiracy theory—contrary to nearly four years of claiming otherwise. So, while some of the “conspiracy theories” believed by military members were just that, other contrary thinking has in time turned out to be not so contrary after all).

33. See Carolyn M. Batie et al., COVID-19 Vaccination in a Military Population: Evaluation of a Quality Improvement Initiative to Increase Vaccine Confidence and Reduce Hesitancy, 188 MIL. MED. e2885, e2886 (2023) (describing the goal of the COVID-19 Educational Presentation as increasing confidence in receiving the vaccine).
vaccine mandate was necessary or even appropriate. At this stage, there was clear evidence the military population was at an extremely low risk of severe outcomes. Additionally, a growing body of evidence emerged identifying that while the vaccine prevented severe illness, it did not fully prevent one from contracting COVID-19, nor did it necessarily prevent an infected person from spreading the virus.

Drawing from diverse experiences as both practitioners and academics in the areas of science, ethics, and law, this Article seeks not only to document the past but also to provide some suggestions for the future should our nation face another such pandemic. As a preview, the authors will argue that military leaders may have failed to fully consider the evolving science, weigh the prevailing ethics, and appropriately apply the relevant law regarding exemptions—instead of adopting a more uniform approach that aligned with other federal agencies and not the military’s unique population.

II. THE SCIENCE

We first turn to the military’s longstanding use of vaccine and inoculation mandates as a prelude to our recommendation on how the military might handle such mandates in the future. The long history of military vaccine mandates begins near the founding of our nation with the smallpox inoculation (also termed variolation) campaign initiated by General George Washington in 1777, followed by the influenza vaccine introduced at the end of WWII, up through the anthrax vaccines mandated during the Gulf War and beyond. Today, the DoD vaccination requirements fall into one of three categories: (1) vaccinations during initial entry or basic training (IET); (2) routine adult vaccinations; and (3) special risk-based or occupation-specific vaccinations (Table 1).

34. See Pete Riley et al., COVID-19: On the Disparity in Outcomes Between Military and Civilian Populations, 188 MIL. MED. 311, 311 (2023) (finding ICU burdens and deaths for active duty service members substantially lower compared to civilian populations).
35. See Vaccines FAQ, JOHNS HOPKINS CORONAVIRUS RES. CTR., https://coronavirus.jhu.edu/vaccines/vaccines-faq [https://perma.cc/F28A-K77W] (“[M]ost vaccines do not completely prevent infection but do prevent the infection from spreading within the body and from causing disease.”).
38. See H.R. REP. NO. 106-556, at 1–2 (assessing the DoD’s anthrax vaccine mandate).
Even when mandated by the DoD, a service member may request an exemption, medical or administrative, and if granted, can either be temporary or permanent. For the medical exemptions, after a review of the request and the underlying medical facts, a local military health care provider may authorize a medical exemption. These are subjective measures of health and risk and require a service member to demonstrate a documented underlying health condition or a known adverse reaction associated with a specific vaccine or vaccine component. Under the administrative exemption pathway, commanders may authorize exemptions for a service member within one hundred eighty days from separating or retiring from the military. Requests for religious accommodation, which fall under administrative exemptions, are handled entirely by a separate process. A detailed discussion and analysis of the exemption processes for COVID-19 vaccines awaits in Part IV: The Law.

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<th>Vaccine Name</th>
<th>Army</th>
<th>Navy</th>
<th>Air Force</th>
<th>Space Force</th>
<th>Marines</th>
<th>Coast Guard</th>
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39. See U.S. DEPT OF ARMY, REG. 40-562, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR THE PREVENTION OF INFECTIOUS DISEASES 6 (Oct. 7, 2013), https://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-110/afi48-110.pdf [https://perma.cc/DEV7-KYCV] (describing the process for medical and administrative exemptions). Section 2–6. Exemptions lays out two types of exemptions from immunization—medical and administrative—and states that granting medical exemptions is a medical function, while granting administrative exemptions is a non-medical function. Id. Section 2–6.a. states, “[h]ealth care providers will determine a medical exemption based on the health of the vaccine candidate and the nature of the immunization under consideration. Medical exemptions may be temporary (up to 365 days) or permanent.” Id.

40. See id. (clarifying the role of a military health care provider in authorizing an exemption).

41. See id. (“Within 180 days before separation or retirement, Service personnel may be exempt from deployment . . . .”).

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Table 1: Required Immunizations for Military Personnel (current as of 2023)  

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<tr>
<td>1. Initial entry basic training</td>
<td>2. Acc = accessions</td>
<td>3. Risk = special, risk-based, occupation</td>
<td>4. Rou = adult routine</td>
<td>5. Increased risk in certain geographic regions</td>
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A. History of Military Vaccine & Inoculation Mandates

History shows successful military vaccine mandates are only undertaken when there is an acute military need and are most often based on a demonstrable risk to a specific population within the force. Military leaders succeeded in the past when they effectively demonstrated and communicated not only the threat to the force (either as a whole or to a specific high-risk population) but also that such mandates served a strategic military objective.

1. Smallpox

“Smallpox is caused by infection with variola major, a virus of the family Poxviridae. There are no natural animal carriers nor natural propagation of variola outside the human body.” The illness presents severe flu-like symptoms, including headache, high fever, malaise, and fatigue, and begins approximately twelve days after exposure to the virus. An exanthem rash appears on the infected individual’s mucus membranes and they are highly contagious at this stage; they can also easily transmit the virus to uninfected individuals via a respiratory route. An external rash, the exanthem, with classic pox lesions appears all over the body, with higher concentrations of lesions on the face, arms, and legs. Individuals are less contagious as the
lesions begin to scab over but remain contagious until the lesions completely fall off. In 2–6% of smallpox infections, the lesions are classified as either hemorrhagic, characterized by bleeding sores, or flat, where the lesions are soft and flat. The mortality rates for these types of infections are significantly higher than in those with classic lesions and can approach 95%. Following the pattern of earlier European smallpox epidemics, the North American epidemic of 1775–1782 was a significant event within the military and the civilian population of the American Colonies. The pandemic, introduced by movement between Europe and the American Colonies, presented a series of waxing and waning outbreaks. These outbreaks would eventually claim more than 130,000 lives across North America.

In 1776, disease non-battle injuries (DNBIs) caused approximately 90% of all deaths in General George Washington’s Continental Army. Infectious diseases such as malaria, diphtheria, scarlet fever, and the most devastating to the Continental Army, the major variant of smallpox, primarily caused these DNBIs. Lewis Beebe, a physician in the Connecticut Regiment of Arnold’s Northern Army, noted in his journal that smallpox wiped out one-third of General Benedict Arnold’s troops as he faced and extremities, and then spread to the trunk, palms, and soles in a centrifugal pattern of distribution.”.

49. Smallpox, WORLD HEALTH ORG., supra note 46.
51. See id. (discussing how flat and hemorrhagic smallpox are uncommon but fatal).
52. See Smallpox, CDC, supra note 48 (describing the fatality of flat-type (malignant) and hemorrhagic smallpox); Jean Pascal Zanders, Addressing the Concerns About Smallpox, 8 INT’L. J. INFECTIOUS DISEASES S9, S9 (2004) (identifying the mortality rates for flat-type and hemorrhagic smallpox as “95–100 percent and 94 percent, respectively”).
marched toward Quebec. Smallpox was not only affecting existing forces but was having considerable impacts on recruiting new troops. With heavy losses to the Continental forces besieging Quebec in 1776 and the subsequent weakly enforced quarantine, Washington concluded the Army’s smallpox identification and containment policy was not effective.

The call for a mandatory smallpox inoculation of all General Washington’s soldiers entering training (the equivalent to accession and initial entry training (IET) in the modern military) balanced the risk of morbidity and mortality of the treatment for an individual against the needs of the Continental Army regarding operational readiness. Importantly, Washington considered evidence of the deliberate introduction of smallpox infected individuals by the British to areas under the control of the Continental Army—caused by a largely failed quarantine policy by Washington’s Army and a negative political and social environment—prior to eventually mandating treatment of all newly enlisted troops as necessary to halt the spread of smallpox and conserve the fighting strength of the Continental Army.

Washington informed Congress on February 5, 1777, of his plans for mass inoculation of newly enlisted and accessioned troops. The general’s plans contraindicated ongoing social protests by the citizens and clergy in Boston and the subsequent 1776 proclamation by the Continental Congress prohibiting inoculations. A February 6th letter to Dr. William Shippen from Washington stated:

59. See FENN, supra note 53, at 63–64, 99–100 (characterizing Washington’s realization on how the Continental Army needed to “change their [inoculation and quarantine] policy”).
60. See Per-Olof Hasselgren, The Smallpox Epidemics in America in the 1700s and the Role of the Surgeons: Lessons to be Learned During the Global Outbreak of COVID-19, 44 WORLD J. SURGERY 2837, 2840 (2020) (detailing Washington’s decision to inoculate the Continental Army soldiers); FENN, supra note 53, at 260 (“Immunization liberated Washington’s army from almost certain infection, especially given the broad circulation of people and microbes that went with the war.”).
61. Aker, supra note 55.
62. See Laurence Farmer, The Smallpox Inoculation Controversy and the Boston Press 1721–2, 34 BULL. N.Y. ACAD. MED. 599, 602 (1958) (describing the citizenry’s and clergy’s divided sentiment concerning inoculations); Aker, supra note 55 (acknowledging how Washington’s inoculation plans contravened the “1776 proclamation by the Continental Congress”).
Finding the Smallpox to be spreading much and fearing that no precaution can prevent it from running through the whole of our Army, I have determined that the troops shall be inoculated. This Expedient may be attended with some inconveniences and some disadvantages, but yet I trust in its consequences will have the most happy effects. Necessity not only authorizes but seems to require the measure, for should the disorder infect the Army in the natural way and rage with its usual virulence we should have more to dread from it than from the Sword of the Enemy.

Notably, General Washington made his determination regarding an inoculation mandate in a highly charged sociopolitical environment with disinformation in the newspapers regarding the origin and spread of smallpox, safety of the inoculation, and religious protests decrying the “unnatural” state of inoculation. We claim that a contemporary COVID-19 vaccine hesitancy study in military members noted strikingly similar forces driving hesitancy amongst service members.

2. Influenza (1918; 1942–1945)

The H1N1 A influenza virus was responsible for the 1918 pandemic that infected one-third of the world’s population in three waves. The first originated in early March 1918, spreading rapidly through the United States, Europe, and Asia. The first influenza wave was mild, with a more lethal disease emerging in August 1918. “Pneumonia often developed quickly, with death usually coming two days after the first indications of the flu.”

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64. See Farmer, supra note 62, at 601–02 (“Inoculation, it was feared by many, could readily contribute to a spread of the contagion and should, therefore, not be practiced.”).


66. Jeffery K. Taubenberger & David M. Morens, 1918 Influenza: The Mother of All Pandemics, 12 EMERGING INFECTIOUS DISEASES 15, 15 (2006) (stating one third of the world’s population was infected by the 1918 influenza).

67. See id. at 17 (“[A] first or spring wave began in March 1918 and spread unevenly through the United States, Europe, and possibly Asia over the next 6 months . . . .”).

68. See id. (describing the lethality of the second wave which “spread globally from September to November 1918”).

With more than 45,000 deaths attributed to influenza in the military training environment, deaths from the virus rival mortality in the largest battles of WWI in Europe.\textsuperscript{70}

The impact of influenza on military operations in WWI and evidence of biological warfare research by Germany and Japan in WWII led the United States Army Surgeon General to support the development of the first inactivated flu vaccine and subsequently a vaccine mandate for military personnel in 1945.\textsuperscript{71} The push for an influenza vaccine for military personnel and the subsequent vaccine mandate was thus rooted in a demonstrable threat to the forces.

3. Human Adenovirus (HAdV)

The DoD requires human adenovirus (HAdV) as an accession mandated vaccine for all service members attending IET.\textsuperscript{72} HAdVs “are non-enveloped, double-stranded DNA viruses in the family Adenoviridae; seven species (A–G) and [more than sixty] genotypes are known to cause human infection.”\textsuperscript{73} Symptoms connected to “HAdV infection include fever, acute respiratory illness, gastroenteritis, and conjunctivitis.”\textsuperscript{74} Among military recruits, reported illness tends to occur sporadically and without identified seasonality.\textsuperscript{75}

All United States military members received a live, oral HAdV-4 and HAdV-7 vaccine from 1971 to 1999.\textsuperscript{76} After depletion of the vaccine in

\textsuperscript{70} Peter C. Wever & Leo van Bergen, *Death from 1918 Pandemic Influenza During the First World War* A Perspective from Personal and Anecdotal Evidence, 8 INFELUENZA & OTHER RESPIRATORY VIRUSES 538, 538 (2014).


\textsuperscript{72} See DEF. HEALTH AGENCY, ADENOVIRUS DISEASE AND ADENOVIRUS VACCINE para. 2(h) (2022) (stating the DoD policy as “Adenovirus vaccines will be administered to military enlisted basic trainees before or at the beginning of collective training, at the same time that other live-virus vaccines are administered.”).


\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} See Nakia S. Clemmons et al., *Acute Respiratory Disease in US Army Trainees 3 Years After Reintroduction of Adenovirus Vaccine*, 23 EMERGING INFECTIOUS DISEASES 95, 95 (2017) (recognizing “[r]outine use of oral adenovirus type 4 and 7 (AdV-4 and -7) vaccine” occurred between 1971 and 1999).
1999, HAdV-4 reemerged as the main cause of febrile respiratory illness among military service members, especially among those in IET.\textsuperscript{77} Subsequent reintroduction of HAdV-4 and HAdV-7 vaccines at all United States IET sites in late 2011 led to declines in overall rates of respiratory illness and incidences of adenovirus infections.\textsuperscript{78}

The military vaccine mandate for HAdV-4 and HAdV-7 is deemed successful, or at least non-controversial, because of the well-demonstrated and widely held scientific data linking the morbidity and mortality of the illness to force readiness and IET training. Importantly, the mandated HAdV vaccine is for a specific population of IET military recruits at highest risk of developing the illness.

4. Anthrax

Anthrax is a serious infectious disease caused by gram-positive, rod-shaped bacteria known as Bacillus anthracis.\textsuperscript{79} It forms spores which are found naturally in soil, commonly affecting domestic and wild animals worldwide.\textsuperscript{80} Although it is rare in the United States, people can get sick with anthrax if they encounter infected animals or contaminated animal products.\textsuperscript{81}

When anthrax spores get inside the body, the bacteria can multiply, spread out in the body, produce toxins (poisons), and cause severe illness or death.\textsuperscript{82} Anthrax can enter the body through the skin (cutaneous), by ingesting contaminated food or water (gastrointestinal), intravenously (rare), or by inhalation, which is the deadliest form of the disease and the one most likely to be used as a biological weapon.\textsuperscript{83} As a potential bioweapon, a more comprehensive approach to reducing the risk to the force includes vaccination for those deemed to be at greatest risk of exposure from an attack by a state actor or a non-state terrorist group. Having adequate stockpiles of antibiotics, such as ciprofloxacin, doxycycline, and amoxicillin,
is also critical for treating the rest of the force should an attack be launched.  

On December 15, 1997, the DoD Anthrax Vaccine Immunization Program (AVIP) was announced. \(^{85}\) “In March 1998, Secretary Cohen was publicly vaccinated, and mandatory mass vaccinations began.” \(^{86}\) At this time, there was insufficient science to support the program as there were “no published studies documenting the safety or efficacy of this vaccine for any route of exposure in humans,” and “military service members began reporting illnesses following vaccination, while others refused the vaccine” altogether. \(^{87}\) Those who refused the vaccine faced severe consequences, including nonjudicial punishment or even court-martial charges. \(^{88}\) One such officer was Captain John Buck, a military physician, who refused to receive and administer the vaccine. \(^{89}\) At the sentencing phase of his court-martial, Captain Buck stated, “I was at the crossroads between the oath of an officer and the oath of a physician. The only way I could have peace about the apparent conflict was to do what I knew to be right as a physician and to stare down the barrel of the gun with the courage of an officer.” \(^{90}\)

The contentious nature of the AVIP spawned thirteen congressional hearings. \(^{91}\) The House Committee on Government Reform recommended suspending the mandatory program and using the vaccine “only pursuant to FDA regulations governing investigational testing for a new indication.” \(^{92}\) In its report, “the subcommittee [found] the AVIP a well-intentioned but overwrought response to the threat of anthrax as a biological weapon.” \(^{93}\) The subcommittee also called the AVIP an unrealistic program, with unstable supply, uncertain safety, and untested efficacy. \(^{94}\) Despite problems

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84. See id. at 29 (explaining anthrax can be cured by prompt antibiotic treatment).
86. Id.
87. Id.
88. See Todd South, Troops Who Refused Anthrax Vaccine Paid a High Price, MIL. TIMES (June 17, 2021), https://www.militarytimes.com/news/pentagon-congress/2021/06/17/troops-who-refused-antibiotic-vaccine-paid-a-high-price/ [https://perma.cc/A7WZ-5WLA] (describing nonjudicial punishment ranges from lost rank and pay, and potential punishment, if taken to a court-martial, can include jail time as well as a punitive discharge).
89. Nass, supra note 85, at 718.
90. Id.
91. See id. at 716 (“[A]n unprecedented 13 congressional hearings explored these [vaccine] issues in depth.”).
93. Id. at 3.
94. See generally id. at 2–4 (summarizing complaints of the AVIP).
with the vaccine and the military mandate, approved products are commercially available and candidate vaccines are still in development to try to address research gaps in the anthrax vaccine field.

5. COVID-19

“The infection fatality ratio (IFR) is the risk of death per infection” and a key epidemiological parameter in understanding the potential impact of COVID-19 on a population. Enormous efforts have been undertaken to estimate the IFR for COVID-19, and the age-related risk and exponential relationship between age and IFR for COVID-19 has continued to be supported by the epidemiological data. Importantly for this Article, the estimated age-specific IFR during the period of the epidemic prior to the DoD mandating the COVID-19 vaccine was “very low for children and younger adults (e.g., 0.002% at age 10 and 0.01% at age 25) but increases progressively to 0.4% at age 55, 1.4% at age 65, 4.6% at age 75, and 15% at age 85.”

The rapid progression and spread of COVID-19 clearly placed a burden on leadership to decide how to best combat the outbreak. However, a more thoughtful review afforded to us as an after-action review of what we knew and when we knew it leading up to the vaccine mandate is supportive of a risk-based mandate rather than the “whole-of-government” and Total Force program that was rolled out. The Centers for Disease Control (CDC), Food and Drug Administration (FDA), and DoD information together with peer reviewed publications, provide an important window on the state of the science around COVID-19 (Table 2). As we note above, the chance of severe illness from COVID-19 increases across age groups, with people in their fifties at higher risk for severe illness than people in their forties, people in their sixties or seventies at higher risk than people in their fifties, and those aged eighty-five or older at the highest risk. On June 25, 2020, the CDC confirmed what was in the literature and specifically noted that the

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98. See id. at 1127 (identifying metaregression predictions concerning IFR and age).
risk of severe illness from COVID-19 was related to age.\textsuperscript{99} It was clear by mid-2020 that the risk for severe illness and death could be stratified by age, and that the government was beginning to understand that the vaccines available under Emergency Use Authority (EUA) were protective for those most vulnerable. Further, the January 20, 2021 Executive Order 13991, known as “the mask mandate,”\textsuperscript{100} likely set in motion calls of governmental overreach that would later cause a small but vocal component of the military service members to resist the DoD’s vaccine mandate.

B. Some Suggestions

Even when broad deference was granted to the military by the courts and the co-equal Legislative Branch of the government, the perception of overreach by the Executive Branch—and by extension the DoD—was driven in-part by the shifting conclusions in the scientific literature as new data and papers were flooding scientific journals and media. In the weeks following the COVID-19 vaccine mandate, a series of communications by the CDC reversed previous suggestions that the COVID-19 vaccine could prevent both severe illness and acquisition of the virus, thus providing “complete immunity.” Just three weeks after the DoD vaccine mandate was announced, a CDC paper concluded that “[e]arly evidence suggests infections in fully vaccinated persons caused by the Delta variant of SARS-CoV-2 may be transmissible to others; however, SARS-CoV-2 transmission between unvaccinated persons is the primary cause of continued spread.”\textsuperscript{101} This finding came on the heels of the earlier, pre-DoD vaccine mandate report in July 2021, showing an increase in breakthrough infections of COVID-19 in Barnstable County, Massachusetts.\textsuperscript{102} This suggests a concern that, unlike with other variants, vaccinated people infected with the Delta variant can transmit the virus to others.\textsuperscript{103} These Morbidity and

\begin{footnotesize}
\begin{enumerate}
\item See id. at 1061 (discussing the efficacy of the COVID-19 vaccines against the transmissibility of the Delta variant).
\end{enumerate}
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Mortality Weekly Reports (MMWR) were bookends to the DoD COVID-19 vaccine mandate, and they became the most widely circulated reports in the agency’s history. The history of vaccine mandates arguably creates a higher bar for the government to point out all available data that could weaken the case for the vaccine.

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<tr>
<td>CDC more specifically defines increased risk for severe COVID-19 illness with increasing age. CDC also includes people experiencing chronic kidney disease, COPD, obesity, serious heart conditions, sickle cell disease, and type 2 diabetes, and those who are immunocompromised from solid organ transplants.</td>
<td>June 25, 2020</td>
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<td>President declares a federal mask mandate—all shall wear masks, maintain physical distance, and adhere to other public health measures, as provided in CDC guidelines.</td>
<td>Jan. 20, 2021</td>
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<td>CDC releases data in MMWR on the emerging and more transmissible COVID-19 B.1.1.7 / “Alpha” variant—CDC recommends universal and increased compliance with mitigation strategies, e.g., social distancing, masking, and higher vaccination coverage to protect the public. A CDC study finds that mRNA COVID-19 vaccines, Pfizer-BioNTech and Moderna, are highly effective at preventing infection with the SARS-CoV-2 virus in real-world conditions among healthcare personnel, first responders, and other essential workers (groups that are more likely than the general population to be exposed to the virus because of their occupations), reducing their risk of infection by 90%.</td>
<td>Jan. 22, 2021</td>
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<td>CDC finds that the Pfizer-BioNTech and Moderna mRNA COVID-19 vaccines reduce the risk of hospitalization with SARS-CoV-2 in people ages 65 years and older by 94%.</td>
<td>Apr. 28, 2021</td>
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<td>CDC finds that the Pfizer-BioNTech and Moderna mRNA COVID-19 vaccines reduce the risk of infection with the SARS-CoV-2 virus by 91% and protect against severe illness and hospitalization if a breakthrough infection does occur. CDC releases data in MMWR showing that while most COVID-19–associated hospitalizations occur in older adults, severe disease requiring hospitalization can occur in all age groups—including adolescents ages 12–17 years. CDC releases data in MMWR showing an increase in breakthrough infections of COVID-19 in Barnstable County, Massachusetts in July of 2021. The early data showing high viral loads in people infected with the Delta variant of COVID-19 suggest a concern that, unlike with other variants, <strong>vaccinated people infected with Delta can transmit the virus to others.</strong> This MMWR became the most widely circulated report in the agency’s history. CDC releases a statement assuring the public that COVID-19 vaccination is safe for pregnant and breastfeeding people. CDC studies have found that an infection with COVID-19 during pregnancy increases the risk of developing severe illness from COVID-19 and that there is no evidence that any vaccines, including the COVID-19 vaccines, cause fertility problems in women or men. FDA fully approves the Pfizer-BioNTech COVID-19 vaccine for all people ages 18 years and older. Full FDA approval further reinforces that the Pfizer-BioNTech COVID-19 vaccine has been shown to meet the agency’s high standards for safety, effectiveness, and consistent quality in manufacturing. DoD Vaccine Mandate: Memorandum for Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members Dept of Air Force Vaccine Mandate: Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members The vaccine efficacy (VE) point estimates declined from 91% before predominance of the SARS-CoV-2 Delta variant to 66% since the SARS-CoV-2 Delta variant became predominant at the HEROES-RECOVER cohort study.</td>
<td>June 7, 2021</td>
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sites—a moderate but meaningful reduction in the ability of the delta variant of the virus to cause infection.

CDC issues an update stating that early evidence suggests infections in fully vaccinated persons caused by the Delta variant of SARS-CoV-2 may be transmissible to others; however, SARS-CoV-2 transmission between unvaccinated persons is the primary cause of continued spread.

CDC issues an urgent health advisory to increase COVID-19 vaccination rates among people who are pregnant, breastfeeding, or who are trying to become pregnant. More than 22,000 pregnant people have been hospitalized with COVID-19 and 161 have died. COVID-19 in pregnant people carries a two-fold risk of admission to intensive care, a 70% increased risk of death, and adverse pregnancy outcomes that can include preterm birth, stillbirth, and the admission of a newborn into the ICU with COVID-19.

The effectiveness of the coronavirus disease 2019 (COVID-19) BNT162b2 vaccine in preventing severe disease and reducing viral loads of breakthrough infections (BTIs) has been decreasing, concomitantly with the rise of the Delta variant of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

DoD Vaccine Mandate: Coronavirus Disease 2019 Vaccination Requirements for Members of the National Guard and Ready Reserve

The rate and magnitude of this post-booster decline in viral-load reduction effectiveness mirror those observed post the second vaccine. These results suggest rapid waning of the booster’s effectiveness in reducing infectiousness, affecting community-level spread of the virus.

FY23 James M. Inhofe National Defense Authorization Act (NDAA)—Section 528 requires DoD rescission of COVID-19 Mandate

DoD: Rescission of August 24, 2021, and November 30, 2021, Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces;

Dept of Air Force: Rescission of September 3, 2021 Mandatory Coronavirus Disease 2019 Vaccination of
III. THE ETHICS

While hundreds of millions of COVID-19 vaccinations have been administered throughout the United States since December 2020, not all military members rolled up a sleeve to receive them. This portion of the Article will address some of the ethical issues surrounding vaccine mandates and the refusal to receive a COVID-19 vaccine based on conscience.

A. Three Primary Objections to the COVID-19 Vaccine

Many military members adhering to various faiths presented religious beliefs as the basis for their refusal to receive COVID-19 vaccines. Most of these requests for exemptions fell under one or more of the following three objections:

- It is morally wrong to receive a vaccine that used fetal cells in the development stage—the most commonly cited religious objection to the vaccines;
- The body is a temple that should not receive foreign or unnatural substances, and God will protect the body from sickness; and
- The immune system was created by God and should not be altered—often based on the misconception that the COVID-19 vaccine alters a recipient’s DNA.104

This Article responds to these objections later using both religious authorities and philosophical arguments that are not religious in nature, but before proceeding, it must be made clear that one does not have to be religious to hold the above beliefs. Believers and nonbelievers alike can (1) oppose abortion, (2) agree that harmful substances should not enter the body, or (3) agree that nothing should compromise the immune system. It is possible, then, to say that one can object to receiving the COVID-19

vaccine as a matter of conscience, not necessarily based only on religious belief.

B. The Role of Conscience

Conscience falls under what the Air Force calls “sincerely held beliefs.” According to Department of the Air Force Instruction (DAFI) 52-201, paragraph 2.2.1., sincerely held beliefs can be a person’s “conscience, moral principles, or religious beliefs.”105 Moral principles and religious beliefs help form one’s conscience. A moral principle does not in itself have to be religious. For example, a person may subscribe to German philosopher Immanuel Kant’s practical imperative: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”106

Religious beliefs can manifest themselves in some “expression [that] can include any religious practice, whether compelled by, or central to, an organized system of religious belief.”107 Examples of religious expression are the Jewish custom of keeping the Sabbath and the Muslim requirement of eating only halal, or ritually fit, food. When deliberating about some action we think we should do or avoid doing, we often receive advice to follow our conscience. It is conscience, then, that should be investigated further—not only its definition but also its formation, its sanctity, and the limits on its freedom.

1. Definition of Conscience

Many people probably define conscience as an inner voice that tells them right from wrong, perhaps while recalling images of an angel and a devil sitting on opposite shoulders of a character in a movie, TV show, or cartoon. While these images often provide comedic effect, they certainly reflect the definition of conscience found in dictionaries or accepted by religious organizations. For instance, the Catechism of the Catholic Church defines conscience as “a judgment of reason whereby the human person recognizes the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed.”108 Commenting on the Vatican II document Gaudium et Spes, Bishop Robert Barron, bishop of

105. DAFI 52-201, supra note 42, at 3.
107. DAFI 52-201, supra note 42, at 3.
Winona-Rochester and founder of Word on Fire Catholic Ministries, says that conscience is “that strangely compelling interior voice that tells us right from wrong, that urges us—with an uncompromising, unconditioned authority—to do what we must do and avoid what we must avoid.”\textsuperscript{109} Regarding health in general, both private and public, we must protect our own health and that of others, while avoiding to threaten the same.

2. Formation of Conscience

To do or to avoid some action based on one’s conscience, one must arrive at a certain conclusion (e.g., receiving [or avoiding] the COVID-19 vaccine is right, or it is wrong). Formation of conscience is the process by which an individual develops a position regarding a certain action to perform or to avoid. “A well-formed conscience is upright and truthful. It formulates its judgments according to reason . . . . The education of conscience is indispensable for human beings who are subjected to negative influences . . . to prefer their own judgment and to reject authoritative teachings.”\textsuperscript{110} The \textit{Catechism of the Catholic Church} makes clear that formation of conscience is neither short nor easy:

The education of the conscience is a lifelong task. From the earliest years, it awakens the child to the knowledge and practice of the interior law recognized by conscience. Prudent education teaches virtue; it prevents or cures fear, selfishness and pride, resentment arising from guilt, and feelings of complacency, born of human weakness and faults. The education of the conscience guarantees freedom and engenders peace of heart.\textsuperscript{111}

To fully form one’s conscience, one must first be informed. During the pandemic, the problem with COVID-19 information was not that there was too little; on the contrary, there was likely too much. This Article does not seek to provide the history of how COVID-19 information, misinformation, or disinformation might have developed and spread, nor does it take

\textsuperscript{110} \textit{Catechism of the Catholic Church}, supra note 108, ¶ 1783.
\textsuperscript{111} \textit{Id.} ¶ 1784. “It is by the judgment of his conscience that man perceives and recognizes the prescriptions of the divine law . . . .” \textit{Id.} ¶ 1778. To provide an understanding of what is meant here by divine law, one can turn to Saint Thomas Aquinas’s \textit{Summa Theologica}, in which he claims that “Divine Wisdom [(God’s wisdom)], as [it] mov[es] all things to their due end, \textit{bears the character of law}. Accordingly, the eternal law is nothing else than the type of Divine Wisdom, as directing all actions and movements.” \textit{Saint Thomas Aquinas, Summa Theologica} 1343 (Fathers of the Eng. Dominican Province trans., Benziger Bros. 1947) (emphasis added).
political sides. It is fair to say, though, that many scientists disagreed about what was most effective in combating and ultimately treating COVID-19 (e.g., the wearing of masks, washing of surfaces, social distancing, and receiving the vaccine). And indeed, as time goes on, we continue to learn more. It is fair to say, as Dr. Anthony Fauci did when reflecting on the pandemic response, that “communication in pandemics is difficult under the best of circumstances.” However, Dr. Fauci also admitted, “What we didn’t do so well in . . . communication and transparency . . . .” Compounding the challenges of gaining reliable and trustworthy information was the fact that COVID-19 information was weaponized during an election year. Finally, internet and social-media influencers had the ability to express their opinions (probably most of which were not grounded in solid science, especially the disciplines of epidemiology or virology) with wide reach. These points are raised merely to demonstrate that informing oneself to form one’s conscience about whether to receive the COVID-19 vaccine was, and continues to be, difficult, to say the least.

Given the difficulty of forming one’s conscience, it is possible to err in judgment. Still, one is bound to follow one’s conscience: “A human being must always obey the certain judgment of his conscience. If he were deliberately to act against it, he would condemn himself. Yet it can happen that moral conscience remains in ignorance and makes erroneous judgments about acts to be performed or already committed.” One can be responsible for erroneous judgments if one “cares but little for truth and goodness.” For example, a person could choose not to read any COVID-19 information such as brochures, listen to the news, or ask a physician about the safety and efficacy of the vaccine.
If—on the contrary—the ignorance is invincible, or the moral subject is not responsible for his erroneous judgment, the evil committed by the person cannot be imputed to him. It remains no less an evil, a privation, a disorder. One must therefore work to correct the errors of moral conscience.\textsuperscript{117}

For example, a person may want to receive the vaccine, but only if he or she is absolutely convinced that the vaccine is safe and effective. If such a person tries to read information about COVID-19 but cannot understand it, receives conflicting messages while watching the news, or cannot comprehend what his or her physician is saying about the vaccine, then the person is not blameworthy for not receiving the vaccine.

3. Ethical Arguments For and Against Vaccine Mandates

To show the difficulty in gleaning arguments from a journal article about the COVID-19 vaccine mandate, provided below are five arguments from a single article with three arguments in favor of mandating the vaccine and two against:

In favor:

Utilitarian\textsuperscript{118}

(1a) It is right to maximize the good for an individual.
(1b) It is right (and better) to maximize the good for a greater number of people than for an individual.
(1c) The COVID-19 vaccine mandate “fairly minimiz[es] individual and communal harms, [maximizes the good] at the expense of individual autonomy.”\textsuperscript{119}
(1d) Therefore, it is right (and better) to mandate the COVID-19 vaccine.

Nonmaleficence\textsuperscript{120}

(2a) “A vaccine mandate is ethically justified if it benefits the person being vaccinated, minimizes harms to vaccinated individuals, vaccination benefits outweigh any potential burdens, and it is the most effective and least risky

\textsuperscript{117} CATECHISM OF THE CATHOLIC CHURCH, supra note 108, ¶ 1793.
\textsuperscript{118} Lindsay Sween et al., Ethics and Pitfalls of Vaccine Mandates, 86 ASA MONITOR, Feb. 2022, at 25 (detailing a “public health ethics approach to justifying vaccine mandates”).
\textsuperscript{119} Id. (citing James F. Childress et al., Public Health Ethics: Mapping the Terrain, 30 J. L. MED. & ETHICS 170, 170 (2002)).
\textsuperscript{120} Id. (citing PUBLIC HEALTH ETHICS: THEORY, POLICY, AND PRACTICE (Ronald Bayer et al. eds., 2006)).
method to prevent disease spread compared to other potential interventions.”

(2b) “Existing vaccines meet all these criteria.”

(2c) “[T]herefore, vaccine mandates are ethically justified.”

Precautionary Principle

(3a) “[P]ublic health [officials] must ‘protect populations against reasonably foreseeable threats, even under conditions of uncertainty. . . . Given the potential costs of inaction, it is the failure to implement preventive measures that requires justification.’”

(3b) Vaccine mandates are a step toward protecting populations against reasonably foreseeable threats, even under conditions of uncertainty.

(3c) Therefore, “despite the uncertainty of the long-term effects of the vaccines,” vaccine mandates do not require justification.

(3d) Not mandating vaccines is the failure to implement preventive measures.

(3e) Therefore, “it is the failure to vaccinate that must be ethically justified.”

Against:

Compulsory Research Participation

(1a) “[C]ompulsory participation in ongoing medical research . . . is ethically proscribed.”

(1b) “Since an EUA [emergency use authorization] uses less safety and efficacy data than is required to achieve Biologics License Application (BLA) approval (i.e., to be licensed for ‘on-label’ use), they remain experimental until data collection is complete.”

(1c) “While under EUA [emergency use authorization], vaccine mandates may be viewed as compulsory participation in ongoing medical research . . . .”

(1d) Therefore, while under EUA, vaccine mandates are proscribed.
(1e) *But*, “the Pfizer-BioNTech vaccine received BLA approval” on August 23, 2021.131
(1f) The Pfizer-BioNTech vaccine is no longer experimental.
(1g) Therefore, the Pfizer-BioNTech vaccine is no longer proscribed.

“No Health Initiatives Cannot Be Used to Protect Individuals, Only Communities”132

(2a) "Mandates to protect individuals [cannot] be ethically justified under public health initiatives, which are only justified to prevent harming others.”133
(2b) “Initially, the goal of vaccination was to decrease individual morbidity and mortality based on existing data.”134
(2c) Decreasing individual morbidity and mortality does not prevent harming others and is thus not a matter of public health.
(2d) Therefore, mandates to protect individuals from individual morbidity and mortality cannot be ethically justified under public health initiatives.
(2e) *But*, in 2021, “two Israeli studies . . . demonstrated decreased viral transmission following vaccination . . . .”135
(2f) Decreased viral transmission following vaccination prevents harming others, which is a matter of public health.
(2g) Therefore, vaccination mandates are ethically justifiable under public health initiatives.

Over time, these arguments against the COVID-19 vaccine mandate were defeated. It is easy to see why forming conclusions about a subject as complex as the COVID-19 vaccine mandate can prove overwhelming, especially for those who do not understand epidemiology or virology. People are bound to arrive at different conclusions about whether to receive the vaccine. While the notion of forcing people to arrive at the same conclusion and receive the vaccine for the sake of public health may seem attractive, it is unethical on the grounds of the sanctity of conscience.

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
4. Sanctity of Conscience

Regardless of whether a person’s conscience is well informed or in error, the person’s conscience must be respected and protected. In other words, a person must be treated with dignity. Speaking about the dignity of the human person in *Gaudium et Spes*, Bishop Barron says there are “three special signs of the dignity of the human person: intellect, conscience, and freedom.” According to *Gaudium et Spes*, “The intellectual nature of the human person is perfected by wisdom and needs to be, for wisdom gently attracts the mind of man to a quest and a love for what is true and good. Steeped in wisdom[,] man passes through visible realities to those which are unseen.” About conscience, *Gaudium et Spes* says the following:

In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: do this, shun that. . . . Christians are joined with the rest of men in the search for truth, and for the genuine solution to the numerous problems which arise in the life of individuals from social relationships. Hence the more right conscience holds sway, the more persons and groups turn aside from blind choice and strive to be guided by the objective norms of morality. Conscience frequently errs from invincible ignorance without losing its dignity.

Finally, on the matter of freedom, *Gaudium et Spes* claims:

Only in freedom can man direct himself toward goodness. Our contemporaries make much of this freedom and pursue it eagerly; and rightly to be sure. Often however they foster it perversely as a license for doing whatever pleases them, even if it is evil. . . . [M]an’s dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within, not under blind internal impulse nor by mere external pressure.

One always has the freedom not only to inform one’s conscience but also to choose to act according to it, even if the conscience is mistaken or the acts that follow from one’s conscience do not conform with the actions.

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138. *Id.* para. 16.
139. *Id.* para. 17.
other rational people may choose. Problems that can arise here are (1) not all people choose to do what is good (e.g., rob a bank to obtain money they need), or (2) people sometimes choose to do what they think is good (e.g., not receive a COVID-19 vaccine). What they think is good is not in accordance with the law or the orders they may receive from some authority (e.g., a military commander). It is this second point that warrants further investigation.

5. Limits on Freedom of Conscience

It is a mistake to believe that when one acts against the law or an order based on conscience, one is absolved of responsibility or will not suffer negative consequences that result from disobedience. Suppose, for example, a person is driving over the speed limit in a small town he or she has never been to before and gets pulled over by a police officer. Representing the law, the police officer has the authority to ticket the driver but may let the driver off with the warning: “If I catch you speeding again, I will give you a ticket.” The driver now knows what the speed limit through the town is; the driver’s conscience is now informed. After being let off, the driver can still freely choose whether to obey the speed limit or risk getting a ticket. No one is forcing the driver to speed, that is, press the accelerator down against his or her will. There will be consequences, though, if the driver chooses to speed and gets caught.

In his encyclical *Veritatis Splendor*, Pope Saint John Paul II warns about granting too much freedom to conscience. If individual conscience becomes the “supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil,” moral subjectivism threatens “the idea of a universal truth about the good, knowable by human reason.”\(^{140}\) He says that notion of conscience also changes; it “is no longer considered in its primordial reality as an act of a person’s intelligence, the function of which is to apply the universal knowledge of the good in a specific situation and thus to express a judgment about the right conduct to be chosen here and now.”\(^{141}\) The result is that “each individual is faced with his own truth, different from the truth of others.”\(^{142}\)

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141. Id.
142. Id.
British philosopher John Stuart Mill recognized individual rights, but he also admitted that the exercise of individual rights can, at times, conflict with the public good. In his introductory (chapter I) of *On Liberty*, Mill says:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreatying him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

To apply both Saint John Paul II’s and Mill’s reasoning to the speed-limit example, suppose every driver is allowed to drive at whatever speed he or she thinks is best. Even a few drivers with the mindset of “speed for me, but not for thee” can threaten the safety of everyone on the road.

Research later showed that the COVID-19 vaccine neither prevented people from contracting COVID-19 nor prevented them from spreading it to others. The vaccine did, however, lessen the severe effects of COVID-19 if people contracted it. In *Ethics and Pitfalls of Vaccine Mandates*, Lindsay Sween, Rhashedah Ekeoduru, and David Mann, all of whom are doctors, say that traditional ethical principles (autonomy, beneficence, non-maleficence, and justice) regarding medical ethics do not apply in

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144. See *Vaccines FAQ*, supra note 35 (explaining how vaccines “reduce the risk of virus transmission but probably not completely in everyone”).

145. See id. (“Vaccines stimulate the human body’s own protective immune responses so that, if a person is infected with a pathogen, the immune system can quickly prevent the infection from spreading within the body and causing disease.”).


147. Id. at 24 (citing Tom L. Beauchamp & James F. Childress, *PRINCIPLES OF BIOMEDICAL ETHICS* (8th ed., Oxford Univ. Press 2019)).
situations such as public health emergencies.\textsuperscript{148} In these situations, collective beneficence, nonmaleficence, and justice take priority over individual autonomy.\textsuperscript{149}

The DoD mandated that military members receive the COVID-19 vaccine.\textsuperscript{150} By choosing not to receive the vaccine, a very small percentage of service members found themselves at odds with their chains of command. The military cannot force noncompliant members to sit in a chair while a physician administers the vaccine—that would be forcing members to receive the vaccine against the members’ conscience. But for those service members who refuse, the military can either discipline or separate them, subject to military policies if in accordance with the law. Considering what is at stake—their careers—it is very important for military members to inform their consciences as best they can. They, however, are not left to their own devices; several bodies, such as religious organizations, have offered information and advice on how to approach the vaccine mandate.

C. Responses to the Three Primary Objections

Being in the military or part of some organized religion places a person within a hierarchy. For the military or an organized religion to function well, its members must listen and follow orders, that is, members must be obedient. Some religions (e.g., Catholicism, Judaism, and Islam) have provided information about the vaccines to quell members’ fears about receiving a vaccine that has used aborted fetal cells or certain animal products at some point in the testing, development, or delivery of the COVID-19 vaccine.\textsuperscript{151}

In response to questions about the morality of receiving the COVID-19 vaccine, the Archdiocese for the Military Services, USA issued its \textit{Statement}

\textsuperscript{148} See id. (suggesting “traditional ethical frameworks are not appropriate for justifying public health initiatives”).\textsuperscript{149} Id.\textsuperscript{150} See Memorandum from Frank Kendall III, \textit{supra} note 18 (noting the August 2021 vaccine mandate issued by the Secretary of Defense).\textsuperscript{151} See Congregation for the Doctrine of the Faith, \textit{Note on the Morality of Using Some Anti-COVID-19 Vaccines, The Holy See} (Dec. 21, 2020), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20201221_nota-vaccini-anticovid_en.html [https://perma.cc/AQ3L-ZRQK] [hereinafter \textit{Note on the Morality}] (declaring the use of COVID-19 vaccines, using cell lines originating from aborted fetuses, morally acceptable); see also OR. HEALTH AUTH., OHA 3592B, \textit{VACCINE FACTS FOR JEWISH FAITH COMMUNITIES 1} (2021) [hereinafter OHA 3592B] (stating the “vaccines in the U.S. do not contain any ingredients that come from animals”).
Military members need not be Catholic, Christian, nor a believer within any faith to recognize the existence and importance of conscience and to benefit from the protection of conscience.

Response to Objection 1: It Is Morally Wrong to Receive a Vaccine That Used Fetal Cells in the Development Stage

Archbishop Thomas P. Broglio, the Archbishop for the Military Services, stated that being vaccinated is an “act of charity.” Similarly, the United States Conference of Catholic Bishops on Doctrine and Pro-Life Activities stated that it is morally permissible to receive the COVID-19 vaccinations currently available in the United States. Finally, and most important to Catholics, the Congregation for the Doctrine of the Faith, which is the Church’s highest doctrinal authority, speaking for the Bishop of Rome [Pope Francis], has made clear its position on the vaccines available to mitigate the COVID-19 pandemic providing the following discussion:

The fundamental reason for considering the use of these vaccines morally licit is that the kind of cooperation in evil (passive material cooperation) in the procured abortion from which these cell lines originate is, on the part of those making use of the resulting vaccines, remote. The moral duty to avoid such passive material cooperation is not obligatory if there is a grave danger, such as the otherwise uncontainable spread of a serious pathological agent—in this case, the pandemic spread of the SARS-CoV-2 virus that causes Covid-19. It must be considered that, in such a case, all vaccinations recognized as clinically safe and effective can be used in good conscience with the certain knowledge that the use of such vaccines does not constitute formal cooperation with the abortion from which the cells used in production of the vaccines derive.

153. Id.
155. Note on the Morality, supra note 151, para. 3 (emphasis in original) (citation omitted).
While it is morally illicit to abort a fetus for the purpose of developing a vaccine, this was not the case in the development of the COVID-19 vaccine. The vaccines themselves “do not contain aborted fetal cells. However, Johnson & Johnson did use fetal cell lines—not fetal tissue—when developing and producing their vaccine, while Pfizer and Moderna used fetal cell lines to test their vaccines and make sure that they work.”\textsuperscript{156} The fetal cell lines in question came “from elective abortions that occurred several decades ago in the 1970s–80s. They are now thousands of generations removed from the original fetal tissue.”\textsuperscript{157} This is what makes receiving the COVID-19 vaccine passive material cooperation (i.e., receiving the actual vaccination) and remote.\textsuperscript{158}

The Congregation for the Doctrine of the Faith also says:

At the same time, practical reason makes evident that vaccination is not, as a rule, a moral obligation and that, therefore, it must be voluntary. In any case, from the ethical point of view, the morality of vaccination depends not only on the duty to protect one’s own health, but also on the duty to pursue the common good.\textsuperscript{159}

Many faiths around the world and various denominations within them share this same sentiment, that is, receiving the vaccination is not only permissible, but it aligns with the duty to protect others out of charity.\textsuperscript{160}


\textsuperscript{157} Id.

\textsuperscript{158} See Note on the Morality, supra note 151, para. 3 (noting the use of cell lines originating from aborted fetuses in vaccine development does not indirectly legitimize abortions).

\textsuperscript{159} Id. para. 5 (emphasis in original).

\textsuperscript{160} For a more detailed list of faiths and denominations within them that have approved receiving the COVID-19 vaccine, \textit{see} Mark E. Wojcik, Sincerely Held or Suddenly Held Religious Exemptions to Vaccination?, 47 HUM. RTS. 20, 20 (2022).

Most religions and religious groups today do not object to medical vaccinations. To the contrary, they most fully support vaccinations. For example, the Vatican’s Pontifical Academy for Life has stated that “COVID-19 exists, and the only way to return to normal is to get vaccinated.” Pope Francis himself supports vaccinations against COVID-19, stating that getting jabbed is “an act of love.” The U.S. Conference of Catholic Bishops similarly said that “being vaccinated can be an act of charity that serves the common good.” According to research from Vanderbilt University, other Christian denominations that have no theological opposition to vaccines include Amish, Anglican, Baptist, Eastern Orthodox, Jehovah’s Witnesses, Mennonites, Mormon, Pentecostal Christians, Quakers, Seventh-day Adventist, and Unitarian-Universalist. Vaccination is widely accepted in countries that are predominantly Buddhist. Hinduism and Islam have no prohibitions against vaccination. Judaism supports vaccinations to protect life and health. And the National Spiritual Assembly of the Baha’is of the United States urges followers to “adhere
Response to Objection 2: The Body Is a Temple That Should Not Receive Foreign or Unnatural Substances, and That God Will Protect the Body from Sickness

This objection appears to come from members of smaller church congregations, not larger, more organized religions such as Judaism, Catholicism, or Islam. Major religions and larger denominations within Christianity, for example, have tended to advise their adherents to receive the vaccine.161 Preventing others’ suffering from sickness is a sign of charity toward one’s neighbors. There is not just one template for religious-exemption requests—internet searches reveal that different congregations raise distinctive issues and quote different scriptural references to argue that the body is a temple and God will protect the body from sickness.162

Responding to Jewish faith communities, the Oregon Health Authority (OHA) assured them that the COVID-19 vaccines do not contain animal products:

scrupulously to public health guidelines that have been established in their state” including “protocols for . . . vaccination.”

The research from Vanderbilt University found theological opposition to vaccination only within the Dutch Reformed Church, Christian Scientists, and a handful of faith-healing denominations (Faith Assembly, Faith Tabernacle, the Church of the First Born, and the Endtime Ministries). But even within these groups there is not universal opposition to being vaccinated. Some members of Dutch Reformed Congregations may decline vaccinations because they interfere with divine providence, but others may accept vaccinations as a gift from God to be used with gratitude. The Church of Christ, Scientist, for its part, teaches that disease can be prevented or cured by focused prayer, but there are no strict rules against vaccination. The founder of the Church, Mary Baker Eddy, stated that “[t]hrough the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results.”

Id. (alteration in original).

161. See id. (noting the religions which have stated their support for vaccine use outnumber those which have theologially opposed vaccination).

The Moderna and Pfizer-BioNTech vaccines in the U.S. do not contain any ingredients that come from animals. There are no pig or cow products in these vaccines. They contain messenger RNA, water, sugar, salts and lipids (fats) that are not derived from animals. The Johnson & Johnson vaccine contains inactive adenovirus, salts, sugar, and an emulsifier, none of which are derived from animals.\footnote{Id. at 1–2 (citations omitted).}

The OHA also expressed that for the Reform and Orthodox faith communities, receiving the vaccination fulfills the obligation of protecting not only one’s own life but the lives of others.\footnote{Id. at 1.}

Likewise, Sharia (Islamic law) advocates for receiving the COVID-19 vaccine. For any vaccine to be halal, or ritually fit, it must contain “purity of contents.”\footnote{Id.} Some countries consider COVID-19 vaccines halal, or ritually fit, while others consider them haram, or forbidden. “Substances used in vaccine manufacturing may be of animal origin, including swine or derivatives, dead animals, or blood . . . .”\footnote{See Yan Mardian et al., Sharia (Islamic Law) Perspectives of COVID-19 Vaccines, 2 FRONTIERS TROPICAL DISEASES 1, 2 (2021) (addressing the halal aspect of vaccines).} If a vaccine’s contents contain haram elements such as swine derivatives, how do they become approved?

Understanding how rulings are issued is certainly helpful here:

To effectuate God’s will, Islamic scholars provide their interpretation through the Islamic body of law called Fiqh (Islamic jurisprudence). While Sharia is the decree of God, Fiqh is accomplished via analysis by Ulama (clerics) of Al-Quran and Al-Hadith [record of the words, actions, and the silent approval of the Islamic Prophet Muhammad]. Fiqh is neither sacred nor fixed, as it results from human opinion at a certain place and time and can be modified according to circumstances. When Muslims need clarity, Ulama perform \textit{ijtihad} (best efforts) based on their understanding of Sharia and issue a \textit{Fatwa} (ruling) to address questions. Since Fatwas are based on Fiqh and Ulamas’ \textit{ijtihad}, varying scientific background and religious experience of Ulamas or authorized institutions may engender multiple different rulings on an issue, including vaccines.\footnote{Id.}

Since people and their experiences vary, so will the Fatwas declaring whether vaccines are halal or haram.

The Holy Al-Quran provides guidance as well:

\footnote{OHA 3592B, supra note 151, at 1.}
So eat from the good, lawful things which Allah has provided for you, and be grateful for Allah’s favours, if you [truly] worship Him [alone].

He has only forbidden you [to eat] carrion, blood, swine, and what is slaughtered in the name of any other than Allah. But if someone is compelled by necessity—neither driven by desire nor exceeding immediate need—then surely Allah is All-Forgiving, Most Merciful.¹⁶⁸

There are several ways in which vaccines that would normally be considered haram become halal. Regarding swine derivatives such as porcine trypsin¹⁶⁹ and porcine gelatine¹⁷⁰ (which are used in various stages of vaccine production), the use of a required label stating “Contains trace quantities of porcine content” can aid in making a vaccine halal. For administrators to declare pharmaceuticals halal, the ingredients contained therein “must specifically: (1) be free of parts or derivatives of animals declared non-Halal by Sharia law or not slaughtered according to Sharia law; (2) not contain najis (impurities); and (3) not be poisonous, intoxicating, or pose a health hazard to users when taken according to prescription.”¹⁷¹ Methods such as hydrolysis, filtration, and “mixing of [an impure] substance with [a pure substance] until it is dissolved, causing loss of properties even though the substance still exists” can be used for purification purposes.¹⁷²

Even though not all Ulamas and Fatwa councils agree on what makes vaccines halal or haram,

¹⁶⁸. AL-QURAN, SURAH AN-NAHIL: 114–15 (alterations in original).
¹⁶⁹. See Mardian et al., supra note 165, at 2–3 (“Although semi-synthetic (recombinant) trypsin is commercially available, porcine trypsin is commonly used for its lower cost and availability. Porcine trypsin is washed from harvested cells before further processing. Its presence is typically assessed by validated techniques, studies of which have mostly demonstrated undetectable amounts of porcine trypsin in final products.”).
¹⁷⁰. Id. at 2.
¹⁷¹. Id. at 3–4 (citing Yvonne S. K. Khoo et al., Unique Product Quality Considerations in Vaccine Development, Registration and New Program Implementation in Malaysia, 16 HUM. VACCINES & IMMUNOTHERAPEUTICS 530 (2020)).
¹⁷². Id. at 4.
during the COVID-19 pandemic, all councils agreed that an effective and safe COVID vaccine is a basic necessity, or darurat (emergency). . . . COVID-19 vaccines are recognized as necessary or critical for saving lives and ensuring that societies can function. They are equivalent in status to other established basic human needs such as food and shelter, and therefore are eligible to be classified as darurat. A vaccine that protects against harm from SARS-CoV-2 is essential to uphold the principles of sanctity of human life and avoidance of harm.173

Two final questions remain about this second objection. First, if people consider the COVID-19 vaccine to be a foreign or unnatural substance, then what concern should we have for prosthetics, dentures, or hip and knee replacements? All these devices are foreign and unnatural to the body, but they compensate for disease and injury and improve people’s quality of life.

Second, regarding the belief that God will protect the body from sickness, this is perhaps very difficult, if not impossible, to prove. If a person does not contract COVID-19, is it due to God’s protection, good hygiene, a good diet, exercise, quarantining, or some other reason?

Response to Objection 3: The Immune System Was Created by God and Should Not Be Altered

This objection is easy to defeat because it is based on false information. The COVID-19 vaccine does not alter one’s DNA. According to UCLA Health:

The Pfizer and Moderna vaccines use messenger RNA (mRNA) technology. RNA is a short-lived, temporary messenger, and it only works in one direction. This means that the RNA does not interact with [one’s] DNA and never enters the part of the cell where [one’s] DNA is located.174

The Novavax COVID-19, adjuvanted vaccine doesn’t contain any genetic material . . . 175 [The Johnson & Johnson vaccine uses viral vector technology; however, the genetic material delivered by such technology does not interact with a person’s DNA—only the virus’ DNA is manipulated.]176

173. Id. (citing John D. Grabenstein, What the World’s Religions Teach, Applied to Vaccines and Immune Globulins, 31 VACCINE 2011 (2013)).

174. COVID-19 Vaccine: Addressing Concerns, supra note 156.

175. Id.

D. Some Observations

The military COVID-19 vaccine mandate has highlighted the dilemma of following orders when doing so would be a violation of one’s conscience. Some members have remained unconvinced and followed their conscience to reject the COVID-19 vaccine, even after being presented with reasonable and accurate information about the safety and efficacy of these vaccines or having received approval from the very religious organizations that they claim as the basis for their objection(s).

On that point, Archbishop Broglio says:

Individuals possess the “civil right not to be hindered in leading their lives in accordance with their consciences.” Even if an individual’s decision seems erroneous or inconsistent to others, conscience does not lose its dignity. This belief permeates Catholic moral theology as well as First Amendment jurisprudence. As stated by the United States Supreme Court, “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection.”

He also says, “The denial of religious accommodations, or punitive or adverse personnel actions taken against those who raise earnest, conscience-based objections, would be contrary to federal law and morally reprehensible.” He does go on to state that out of charity for others, those who refuse to receive the COVID-19 vaccine should take measures they can to prevent the spread of the virus: “face coverings, social distancing, undergoing routine testing, quarantining, and remaining open to receiving a treatment should one become available that is not derived from, or tested with abortion-derived cell lines.”

In the meantime, there is still the concern about what will happen to members who have refused the vaccine. A future public health emergency (PHE) may prompt another vaccine mandate. Members may have to choose between following an order or following their conscience (which could possibly end their military service). But the burden should not fall to

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178 Id.
179 Id.
members alone. To help guide members’ decisions, chaplains, lawyers (specifically, Area Defense Counsel), and physicians need to provide members with the most current, accurate information in a format that is easy for members to understand to help inform their conscience. And those same professionals are hopefully also helping to shape the thought processes and actions of our military leaders.

IV. THE LAW

Building from The Science and The Ethics, Part IV (The Law) will address the significant legal challenges that arose following the military’s announcement of its vaccine mandate. As previously mentioned in this Article, the processing of exemptions triggered a bombardment of litigation. And while there has been no final determination by the United States Supreme Court in any of the lawsuits filed by service members (due to Congressional action discussed more below),¹⁸⁰ several lower courts have been highly critical of the DoD’s approach in the processing of religious exemptions. Thus, there is some risk that the historically strong practice of judicial deference to military decision-making may have taken a step backwards, potentially to the detriment of future military actions.

A. The Mandate Meets the Exemptions—Medical, Administrative, and Religious

As indicated in their vaccine mandate orders, both Secretary Austin and Secretary Kendall permitted service members to seek medical exemptions for health reasons like a vaccine allergy.¹⁸¹ To obtain exemptions, service members were required to notify their unit commanders and visit their military medical providers. A local provider would then decide whether to grant an exemption, and if granted, decide for how long the exemption should last (no longer than 365 days unless the exemption was permanent).

¹⁸⁰ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571–72 (2022) (“Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding ‘Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members.’”).

¹⁸¹ See U.S. DEPT OF ARMY, REG. 40-562, supra note 39, at 6 (laying out two types of exemptions from immunization: medical and administrative). The order states that granting medical exemptions is a medical function, while granting administrative exemptions is a non-medical function. Id. Specifically, paragraph 2–6.a. states, “Health care providers will determine a medical exemption based on the health of the vaccine candidate and the nature of the immunization under consideration. Medical exemptions may be temporary (up to 365 days) or permanent.” Id.
During any period of approved exemption, a unit commander could alter a service member’s duties; however, no disciplinary action would be taken.

Service members could also seek administrative exemptions if they were near separation or retirement. Secretary Kendall initially limited this exemption to those on “terminal leave”—a period of leave where retiring or separating service members depart their duty station and are not required to report back after completion of the leave. He later expanded administrative exemptions to cover all personnel who planned to separate or retire within five months, including those who planned to remain in the workplace for the full duration of time. Similarly, unit commanders would decide whether to approve these exemptions.

Lastly, service members could request religious exemptions (a subset of administrative exemptions but handled through a very specialized process). Secretary Kendall relied on the newly updated Department of the Air Force Instruction (DAFI) 51-201, Religious Freedom in the Department of the Air Force, for the processing of requests for religious accommodation. But unlike the other two exemptions, rather than giving local medical professionals or unit commanders discretion to decide whether the government’s interests outweigh the exemption requested, the DAFI centralizes the process requiring a commander at a Major or Field Command (think three or four-star generals) to make the final decision, and the Surgeon General of the Air Force to resolve all appeals. It was these religious accommodation requests that produced robust and often heated debate, then a flurry of litigation, and ultimately ended with Congressional action.

DAFI 52-201 is derived from DoD Instruction (DoDI) 1300.17, Religious Liberty in the Military Services, dated September 1, 2020, and both establishes policy in furtherance of the Free Exercise Clause of the First Amendment to the United States Constitution and implements requirements found in Section 2000bb-1 of Title 42 of the United States Code, also known as the

182. See id. (noting the limitations on administrative exemptions based on separation or retirement).
183. See Memorandum from Frank Kendall III, supra note 26, at 1 (“[Service members] with a retirement or separation date on or before 1 April 2022, may be granted an administrative exemption from the COVID-19 vaccination requirement until their retirement or separation date.”); U.S. DEP’T OF ARMY, REG. 40-562, supra note 39, at 6 (detailing the full extent of the administrative exemptions).
184. See generally DAFI 52-201, supra note 42 (emphasizing the importance of service members’ religious liberty).
185. See id. at 6 (describing the function of the Religious Resolution Team (RRT)).
Religious Freedom Restoration Act (RFRA). The RFRA grants “very broad” legislative “protection for religious liberty.” It adopts a blanket prohibition: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”

It then carves out a narrow exception: “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

DAFI 52-201, paragraph 1.1 begins by stating it is Air Force policy “to place a high value on the rights of Airmen and Guardians to observe the tenets of their respective religions.” Paragraph 2.1 goes on to note that “the Air Force has a compelling government interest in mission accomplishment,” including in “military readiness, unit cohesion, good order and discipline, and health and safety for both the member and the unit.” Commanders are also directed that they can only impose limits on such expressions “when there is a real (not theoretical) adverse impact” on
the interests above. Further, any imposed limits will employ the least restrictive means possible on expressions of sincerely held religious beliefs.

Religious accommodation claims in the military typically involve one of four categories: (1) worship practices; (2) dietary practices; (3) wear of religious apparel and grooming or personal appearance standards; and (4) medical treatment (to include immunization exemptions). In recent years, military commanders have become much more experienced in handling the first three categories of accommodations (e.g., requests by service members to observe religious holidays on duty days; the need to provide for kosher meals; and requests to wear turbans or grow beards). However, COVID-19 prompted commanders to consider an area that had not been explored in almost a generation, not since the Anthrax Vaccination Immunization Program (AVIP) more than twenty years prior—a program that ultimately caused very similar legal and congressional challenges.

While the legal standard in addressing these four categories of requests is the same, with COVID-19, the stakes were much higher as health and safety of the force were at risk. The Air Force was also moving from the occasional localized request to having thousands of requests submitted at once that required individualized review. COVID-19, both in scale and effects, was new, different, and overwhelming.

For perspective, the Air Force’s religious accommodation guidance when dealing with immunization exemptions can be described as an eleven-step process. “At step one, service members must submit a written request that describes why a COVID-19 vaccine burdens their religion.”

As previously discussed in the section of this Article dealing with conscience, moral principles and religious beliefs, most service members objected to the available COVID-19 vaccines because of their ties to aborted fetal tissue during development or testing. Others claimed that injecting their bodies with a novel substance containing undetermined long-term effects would violate their belief that their body is the temple of the Holy Spirit.

Steps two and three demand that service members receive counseling, and they are required to “meet with their unit commanders to discuss how

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192. Id. at 2–3.
193. See id. at 17–18 (listing the categories available for religious accommodations).
196. Id. at 407.
the failure to get vaccinated might limit their ability to deploy and alter their duty assignments. And they must meet with medical providers to discuss the risks from COVID-19 and information about vaccines."^197

During step four, military chaplains hold comprehensive interviews to evaluate the sincerity of a service member’s beliefs based on the service member’s demeanor and past conduct associated with their belief(s).^198 For example, does the service member have a lengthy history of attending religious services or does the member have a past practice of working with pro-life organizations?

For step five, “a ‘Religious Resolution Team [RRT]’ (made up of a lower-level commander, chaplain, public affairs officer, staff judge advocate, and medical provider) recommends whether to grant or deny an exemption."^199 Even in cases when the RRT agreed that the service member’s beliefs were sincere, at times they came to different results as to whether they recommended accommodation.

During step six, a staff judge advocate offers and provides legal analysis. As an example, in the case of Major Andrea Corvi, after the RRT recommended approval, the judge advocate also recommended granting her an exemption. The judge advocate reasoned that “the exemption would minimally affect military readiness because of her duties as an information-operations officer,” noting that it “would not affect ‘unit cohesion’ because of the ‘extremely low likelihood’ that her unit would ever deploy” and adding that service members are a healthier demographic and so face a greater risk of dying in a car accident than from COVID-19. And on that point, he is not wrong, as death from COVID-19 was such a remote risk, especially as compared to other causes of death in military members. As of the DoD’s last public reporting of COVID-19 statistics on December 8, 2022, the cumulative total of deaths spanning the entire pandemic was 96

^197. Id. (citation omitted).

^198. Id. at 407–08.

^199. Id. at 408.

^200. Id.

^201. See id. ("[T]he team that reviewed the request of Major Andrea Corvi, a class member, voted to approve it . . . .").

^202. Id.

^203. See U.S. Active Duty Military Deaths by Year and Manner 1980–2022, DEF. MANPOWER DATA CTR., https://dcas.dmdc.osd.mil/dcas/app/summaryData/deaths/byYearManner [https://perma.cc/XTN3-N9MP] (illustrating in 2021, the primary causes of death among all service members was: (1) self-inflicted (335); (2) accident (310); (3) illness (235) (includes COVID-19 with cancer, heart disease, etc.); (4) pending (65); (5) homicide (31); (6) hostile(13)).
service members, with only 16 of those being Air Force members. This low mortality rate is noteworthy, especially considering it contradicts the Air Force’s “compelling interests” case.

“At step seven, each officer in a service member’s chain of command recommends approval or disapproval.” As found in the cases reviewed by the various courts, commanders performed this review with varying degrees of diligence. Some considered a service member’s specific duties when analyzing the impact to mission, while others merely stated in conclusory fashion: “A compelling government interest exists to vaccinate all Airmen against COVID-19,” and there are no ‘less restrictive means available to achieve that compelling interest.’ We will return to this test later.

At step eight, the commander of the relevant Major or Field Command (three and four-star generals) adjudges the exemption and identifies the reasons for denial. Once again, at this stage, the records indicate varying degrees of individual-specific analysis were undertaken, with all memos summarily concluding that a compelling government interest exists, and no less restrictive means are available short of full vaccination. During steps nine and ten, “the Air Force completes procedural tasks” and “places a copy of the decision in a service member’s file, provides notice of the decision, and informs the service member of the right to appeal the denial.”

“At step eleven, the Surgeon General of the Air Force . . . decides any appeal.” Recalling the case of Major Corvi above, the Surgeon General denied her religious exemption because her assignment demanded “intermittent to frequent contact with others.” Significantly, “in the same month, she received a medical exemption for her pregnancy,” which allowed her and others with approved exemptions to continue interacting with people and working in close quarters for the duration of her medical

206. Doster, 54 F.4th at 408.
207. Id.
208. Id.
209. Id. at 409.
210. Id.
211. Id. at 423.
exemption.\textsuperscript{212} The Air Force has never fully explained why unvaccinated service members with a medical condition or pending retirement or separation posed “less of a risk of spreading COVID-19 than those who remain[ed] unvaccinated because of their religion.”\textsuperscript{213} And Major Corvi’s situation was not unique. Thousands of service members who were granted medical or administrative exemptions were allowed to remain on active duty and perform identical roles engaging in all duty functions (while incorporating appropriate mitigation actions and in a non-deployable status) that a similarly situated person requesting a religious exemption was not permitted to do after receiving their denial.

After a denial, which was virtually certain to occur in these COVID-19 cases, “commanders order service members to get vaccinated [within] five days” or face disciplinary action or administrative separation.\textsuperscript{214} By July 2022, the last date the Air Force publicly reported this data, 834 service members had been administratively separated under this policy.\textsuperscript{215} At the same time, 9,754 (approximately 2% of the Total Force) had requested religious exemptions and the Air Force had granted only 104 requests.\textsuperscript{216} However, this statistic is somewhat misleading as religious exemptions were only granted to those who qualified (or nearly qualified) for an administrative exemption because they would soon retire or separate from the military. Stated more bluntly, the Air Force had granted zero religious exemptions to anyone who did not plan to leave the service within a year. By way of comparison, in the month of December 2021 alone, the Air Force granted 2,047 medical exemptions and 2,207 administrative exemptions across its Total Force.\textsuperscript{217}

B. Off We Go\textsuperscript{218}—Into the Federal Courtrooms

Based on what appeared to be predetermined blanket denials of all religious accommodation requests, several Air Force service members filed
suit in various federal district courts, ultimately having their cases consolidated and certified as a single class action lawsuit (hereinafter referred to as the *Doster* case) in the United States District Court for the Southern District of Ohio and unanimously affirmed by the Sixth Circuit Court of Appeals.\textsuperscript{219} Similarly, the United States District Court for the Northern District of Texas certified a class action case involving Navy Seals, and it too was affirmed on appeal by the Fifth Circuit Court of Appeals.\textsuperscript{220} Both district courts, later affirmed by their respective circuit courts, issued preliminary injunctions against the respective services from taking adverse personnel actions against service members pending the resolution of their claims.\textsuperscript{221} In each case, when addressing the merits of the RFRA claims, the appellate courts concluded that the service members were likely to prevail on their claims that the services’ handling of requests for religious exemptions likely violated the law.\textsuperscript{222}

C. DoD Inspector General Raises Concern

In addition to the service members challenging the military’s processing of these claims, the DoD Acting Inspector General (DoD/IG) expressed concerns to Defense Secretary Austin in June 2022, according to a memorandum released three months later in September 2022.\textsuperscript{223} The memorandum’s purpose was to inform the Secretary “of potential noncompliance with standards for reviewing and documenting the denial of

song/ [https://perma.cc/8K9H-7PRV] (showing “Off we go into the wild blue yonder” is the first line of the official U.S. Air Force Song).

\textsuperscript{219} See *Doster*, 54 F.4th at 442 (citing Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 428 (2006)) (holding “the district court did not abuse its discretion in extending its narrowly written injunction to the broader class”).

\textsuperscript{220} See *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 348 (5th Cir. 2022) (“By pitting their consciences against their livelihoods, the vaccine requirements would crush [p]laintiffs’ free exercise of religion.”).

\textsuperscript{221} See *Doster*, 54 F.4th at 442 (holding the district court did not abuse its discretion by issuing a preliminary injunction which prohibited Air Force members from being disciplined for refusing the COVID-19 vaccine); *U.S. Navy Seals 1-26*, 27 F.4th at 345 (affirming the district court’s preliminary injunction which “simply prohibits adverse action against [p]laintiffs based on their requests for religious accommodation”).

\textsuperscript{222} See *Doster*, 54 F.4th at 421 (agreeing the plaintiffs demonstrated their religious beliefs would be burdened by the vaccine mandate); *U.S. Navy Seals 1-26*, 27 F.4th at 353 (stating the vaccine requirement would violate the plaintiffs’ First Amendment rights).

\textsuperscript{223} Memorandum from Sean W. O’Donnell, Acting Inspector Gen., to the Secretary of Defense (June 2, 2022), https://media.defense.gov/2022/Sep/27/2003085909/-1/-1/1/DENIALS%20OF%20RELIGIOUS%20ACCOMMODATION_20220602_REDACTED.PDF [https://perma.cc/PVD7-Q8FX].
religious accommodation requests of Service members identified through complaints submitted to [the DoD/IG]” through the DoD Hotline. The dozens of complaints reviewed were regarding denials of religious accommodation requests. The DoD/IG “found a trend of generalized assessments rather than the individualized assessment that is required by Federal law and DoD and Military Service policies.” Additionally, the DoD/IG found that the:

[V]olume and rate at which decisions were made to deny requests [was] concerning. The appeal authorities of the Services we reviewed indicated that an average of 50 denials per day were processed over a 90-day period. Assuming a 10-hour workday with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.

Because the military centralized the approval authority at the level they did (Major Commands and Field Commands), this backlog was, in some ways, a problem of their own choosing. As mentioned previously, there were more medical exemptions and administrative (non-religious) exemptions requested and processed than the total number of religious accommodation requests. While certainly there is a strategic reason that the military requires these requests to be elevated, it also prolonged the response time and overwhelmed senior leaders, leading to some of the concerns expressed above.

D. Military Free Exercise of Religion Cases and RFRA—The (Evolving) Legal Standard

There has been a long and varied history of how the military has handled requests for religious accommodation and how the courts have responded when challenges are made. Prior to the passage of the RFRA in 1993, federal courts applied standards developed over time based on the Free Exercise Clause of the Constitution.

224. Id.
225. Id.
226. Id.
227. Id.
228. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”).
most often, courts sided with the military noting, “the military is . . . a specialized society.”\textsuperscript{229} and that judicial review of military actions must be “far more deferential than constitutional review of similar laws or regulations designed for civilian society.”\textsuperscript{230} When there was a perceived wrong, at times Congress would take action in response.\textsuperscript{231} Since 1993 and the passage of the RFRA, the military, as well as the courts, have often taken inconsistent and mixed approaches to claims for religious accommodation without meaningfully applying the law.\textsuperscript{232} In 2014, that changed, as Congress directed the DoD to issue regulations enhancing service member protections for the religious exercise of conscience by forcing the military to incorporate the provisions of the RFRA into policy—something that astonishingly had not been undertaken in the twenty years since its passage.\textsuperscript{233} But it was not until September 1, 2020, that the DoD embraced both the spirit and the full letter of the law (RFRA) by making its most significant and meaningful updates to its regulations.\textsuperscript{234}

As mentioned previously, under the RFRA, the “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”\textsuperscript{235} This statute, codified as statutory law, is what the United States Supreme Court has called “the most demanding test known to constitutional law”—strict scrutiny,\textsuperscript{236} and clarified that the government will survive this type of scrutiny only in “rare

\textsuperscript{230} Id. at 507.
\textsuperscript{231} See 42 U.S.C. § 774 (following Goldman, Congress passed a law stating, “a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force,” and directing the DoD to prescribe regulations consistent with the law).
\textsuperscript{232} See generally Michael Berry & Antony Barone Kolenc, Born-Again RFRA: Will the Military Backslide on its Religious Conversion?, 87 Mo. L. Rev. 435, 446–74 (2022) (providing an in-depth historical analysis of military free exercise claims and the surrounding jurisprudence pre- and post-RFRA while offering insights on how the military should handle future religious accommodation claims).
\textsuperscript{234} See U.S. DEPT. OF DEF., DO-DI 1300.17, RELIGIOUS LIBERTY IN THE MILITARY SERVICES § 1.2(e), at 4–5, § 3.2, at 9–12 (2020) (discussing the DoD’s compliance with the RFRA).
\textsuperscript{236} City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
cases.” The RFRA’s text adopts a burden shifting approach by which the service member must first prove that a government action (in this case potential discipline and separation from service) places a substantial burden on a sincerely held religious belief and that they do not seek to use religion as a pretext to avoid the mandate. Once the service member satisfies these criteria, the burden shifts to the government.

Further, the RFRA requires an individual-by-individual approach, prohibiting the government from relying on generalities to meet either part of this test. The government must show that its “marginal interest” in enforcing a mandate against a specific “person” is compelling and that it cannot further its interest in another way that imposes less of a burden on that person’s religious exercise.

In the vaccine mandate litigation, the Air Force confidently claimed it had “a compelling interest in ‘mission accomplishment,’ including in ‘military readiness, unit cohesion, good order and discipline, and health and safety for both the member and the unit.’” This is an area where courts have historically given great deference to the military, but merely reciting it does not always make it so. The least-restrictive-means analysis under the RFRA, however, is even more difficult to satisfy than the compelling-interest inquiry. As the United States Supreme Court has explained, “[t]he least-restrictive-means standard is exceptionally demanding,” requiring that the government show “it lacks other means of achieving its desired goal without imposing a substantial burden.” Further, “‘[i]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.’”

The Air Force’s ability to survive strict scrutiny was undoubtedly weakened by its approval of medical exemptions and administrative exemptions (for those pending retirement or separation) while denying virtually all religious requests. By approving thousands of the former and

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none of the latter, the government sent a signal that accommodation was possible, just not for those exercising their faith. Importantly, as mentioned above, pregnancy produced a surefire medical exemption, even though the CDC had previously approved the vaccines as safe and effective for pregnant women and determined that pregnant women had a two-fold risk of experiencing severe illness.\textsuperscript{243} So, if readiness and health of the service member formed part of the compelling interest, why mandate a lower-risk population while exempting a higher-risk one? Further, the early days of the pandemic prior to the mandate forced the military to find alternative ways of accomplishing the mission. We learned how to mitigate risk (masking, testing, and isolating), work remotely when in-person activities were not available, and support and accommodate co-workers who had varying personal healthcare and family care needs.

Recognizing the shift of United States Supreme Court jurisprudence in recent years becoming more protective of religious liberties and concerned about the danger posed by COVID-19, military scholar and former president of the National Institute of Military Justice, Eugene Fidell, argued that perhaps the religious exemption should have been rescinded altogether.\textsuperscript{244} An admitted skeptic as to the sincerity of many of the religious exemption claims, he stated, “[I]f . . . the existence of other exemptions requires recognition of a religious exemption, then there should be no exemptions at all.”\textsuperscript{245} While this sounds like an extreme position to take, when looking at the various federal district and circuit court decisions, along with Justice Alito’s and Justice Gorsuch’s dissent in the United States Supreme Court’s partial stay in the Navy Seals case (discussed below), the military may well have undermined its chances of surviving strict scrutiny by allowing any exemptions, that is if it was determined to deny all religious requests as appears to have been the case.

In the Doster case, the Sixth Circuit found that the evidence was “undisputed—that the Air Force has a ‘uniform’ practice of denying religious exemptions to anyone who wants to remain in the service[,]” and that “[a]ccording to the Air Force, it has examined each member’s unique

\textsuperscript{243} See U.S. DEPT OF ARMY, REG. 40-562, supra note 39, at 6 (discussing the immunization exemptions available to pregnant women).

\textsuperscript{244} See Eugene R. Fidell, The Vaccine Mutiny, THE BULWARK (Mar. 17, 2022, 5:30 AM), https://www.thebulwark.com/the-vaccine-mutiny/ [https://perma.cc/BJ6E-5NTT] (“If [service members] are not interested in protecting their own health that’s one thing, but allowing them to threaten the health of shipmates and platoonmates is entirely different.”).

\textsuperscript{245} Id.
circumstances and reached the conclusion that its compelling health and readiness interests in requiring vaccination win out over every conceivable mix of specific duties and alternative means." 246 It further found that the evidence was “undisputed—that the Air Force treats those requesting religious exemptions differently from those requesting other exemptions,” and that “[a]ccording to the Air Force, religious exemptions are not comparable to the other exemptions because, for example, the former are permanent whereas the latter are temporary.” 247

The position that all religious accommodation requests were permanent while medical and administrative ones were mostly temporary was a strategic flaw in the military’s reasoning and processing of these cases. For example, take the case of service member A and service member B. Service member A is allergic to ingredients in a vaccine and requests a medical exemption. He would receive a temporary medical exemption, permitting him to wait until a new vaccine was developed that did not contain the allergy-triggering ingredient. Service member B requests a religious accommodation based on her objections to the use of fetal cells in the development of a vaccine. She could have been treated similarly, receiving a temporary religious exemption, permitting her to wait for a new vaccine to be developed without using fetal cells. Thus, temporary exemptions in both cases would alleviate the physical and spiritual obstacles for each of the service members described above. Lastly, the pandemic itself may run its course during a temporary exemption of either of these service members, eliminating the need for either service member to receive the vaccine. And in fact, that is precisely where we stand today, post-recission of the vaccine mandate.

Could strategic leaders and commanders have taken an incremental approach by granting and revisiting temporary religious accommodations every six months while having service members practice other mitigation steps as the mission allowed? Would this have been a less restrictive means than requiring complete vaccination or face severe career consequences if refused? Certainly, some commanders may have concluded that for specific individuals or certain missions, vaccination was a requirement as the risks, when balanced, were too high, but as the record of cases reviewed in Doster indicates, often a religious accommodation could have easily been made.

247. Id.
E. Sincerely Held or Suddenly Held and the Cumulative Impact of Large Numbers

Another approach that the Air Force (and other Services) could have taken would have been to engage in greater scrutiny of the sincerity of the various religious exemption claims. Anecdotally, chaplains and the RRTs have been generous in accepting that the various religious objections were based on sincerely held beliefs that were substantially burdened by the vaccine mandate. However, as discussed in Part III, there were likely concerns in some cases that these beliefs may have been more suddenly held than they were sincerely held. While it is incredibly delicate to investigate and challenge one’s conscience and beliefs, it may provide greater context, and cover for commanders to sort out those sincere in their objections versus those using faith as a pretext for avoidance for other reasons (political, etc.).

In her dissent in *Hobby Lobby*, Justice Ginsburg claimed an “overriding interest . . . in keeping the courts ‘out of the business of evaluating’ . . . the sincerity with which an asserted religious belief is held.” In this view, an inquiry into sincerity would make the courts arbiters of religious scripture and doctrine. However, there is a long tradition of courts being able to uncover insincere claims. While neither commander nor court should examine the moral truth behind a religious belief, a “factual inquiry into fraud is something courts are well equipped to do by examining objective criteria.”

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248. *See Wojcik, supra* note 160, at 20 (“[W]hen should individuals be allowed to claim religious exemptions from the COVID-19 vaccine mandates? . . . [Especially] when they suspect that a claimed religious belief or practice is not sincerely held but rather is either only recently invented or falsely claimed?”); *see also* Fidell, *supra* note 244 (listing the medications people routinely use but are probably unaware of the fetal cell lines which have been used in the testing and development of the medications).

249. *See Fidell, supra* note 244 (stating many of the “claims made by plaintiffs are difficult to take seriously . . . and farfetched”).


There is precedent in various contexts to investigate the sincerity of religious claims. The recent case of Ramirez v. Collier, involving a death row inmate in Texas who was seeking prayer and touch from his pastor during his final moments, highlights this potential approach. While the majority sided with the inmate in this case who sought relief under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute requiring the same standard of review as RFRA (compelling government interest and least restrictive means), Justice Clarence Thomas authored a lone dissent challenging, among other things, the sincerity of Ramirez’s religious claims, writing: “The evidence that demonstrates Ramirez is bringing abusive litigation to delay his execution also strongly suggests that he does not sincerely believe that his pastor needs to touch him in the execution chamber.” While this was a solitary dissent, one of the current Court’s staunchest protectors of religious liberties opened the door to the idea of a fraud-based inquiry.

Considering both preservice, when registering with the Selective Service System under the Selective Service Act, and active duty, our nation has long recognized conscientious objection as a basis for exemption from the draft and a basis for discharge for those already serving on active duty. The DoD defines a conscientious objector as one:

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254. Id. at 416. In an 8–1 vote, the Supreme Court ruled for the death row inmate—sending Ramirez’s case back to the lower court. Id. at 436–47. In Chief Justice John Roberts’s majority opinion, the Court ruled that a categorical ban on the laying of hands and audible prayer violated Ramirez’s rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). See id. at 433 (“Ramirez is likely to prevail on his claim that Texas’s categorical ban on religious touch in the execution chamber is inconsistent with his rights under RLUIPA.”); see also 42 U.S.C. §§ 2000cc–1 to –3 (establishing a federal law which protects the religious rights of inmates). Like the RFRA, RLUIPA bars government authorities from imposing “a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless it can show the burden is the least-restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000cc–1(a).

255. Ramirez, 595 U.S. at 460 (Thomas, J., dissenting).


258. See U.S. DEPT’ OF DEF., DOD DI 1300.06, CONSCIENTIOUS OBJECTORS § 1.2, at 3 (2017) (discussing the discharge policy for active service members who have a conscientious objection).
a. Who is conscientiously opposed to participation in war in any form.
b. Whose opposition is based on a moral, ethical, or religious belief.
c. Whose position is firm, fixed, sincere, and deeply held.  

Further, the burden of proof lies on the service member to “establish by clear and convincing evidence that: (1) The nature or basis of the claim falls within the definition of and criteria prescribed herein for conscientious objection[,] [and] (2) Their belief in connection therewith is firm, fixed, sincere, and deeply held.” While it would be challenging to determine sincerity in each of the various COVID-19 exemption requests and would involve a more time and fact intensive inquiry, the above process might provide a roadmap for consideration in cases where there is doubt.

Lastly, another approach that the military could have better articulated in the COVID-19 litigation was the military’s concern about the cumulative impact a high volume of religious exemption requests would have on overall mission accomplishment. When considering compelling governmental interests, DAFI 52-201, paragraph 2.4.1.3 allows for consideration of “[t]he cumulative impact based on the real potential for multiple requests of a similar nature.” While this exception language does not appear in RFRA (nor are the authors aware of any court that has closely considered this in the military context), if a unit commander could show a real negative impact on the mission based on the volume of requests, both in its ability to timely and meaningfully process those requests and if the impact of granting accommodations (e.g., remote working) in large numbers were to render units incapable of performing the overall mission, this cumulative impact argument may help demonstrate how the government’s compelling interests outweigh those of the individual service members in those instances.

F. The U.S. Supreme Court Wades into Navy COVID-19 Mandate Case

On March 25, 2022, the United States Supreme Court waded into the military COVID-19 litigation granting the United States Navy’s emergency request for a partial stay from the lower court’s injunction. In a 6–3 decision, the Court allowed the Navy to consider vaccination status when making “deployment, assignment, and other operational decisions.”

259. Id. § 3.1, at 4.
260. Id. § 3.3, at 6.
261. DAFI 52-201, supra note 42, at 3.
263. Id.
In a concurrence, Justice Brett Kavanaugh voted for the Navy, citing the President’s commander-in-chief powers granted under Article II of the Constitution and highlighting the bedrock constitutional principle: “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”\footnote{264} Conceding the district court was likely well-intentioned in its analysis of the issues, Justice Kavanaugh found that the court nonetheless “inserted itself into the Navy’s chain of command, overriding military commanders’ professional military judgments.”\footnote{265} He further found that:

RFRA does not justify judicial intrusion into military affairs in this case. . . .\footnote{266} [B]ecause the Navy has an extraordinarily compelling interest in maintaining strategic and operational control over the assignment and deployment of all Special Warfare personnel—including control over decisions about military readiness. And no less restrictive means would satisfy that interest in this context.\footnote{267} He argued, “The Court ‘should indulge the widest latitude’ to sustain the President’s ‘function to command the instruments of national force, at least when turned against the outside world for the security of our society.’”\footnote{268}

In a vigorous dissent, Justice Alito, joined by Justice Gorsuch, called the partial stay granted by the majority a rubber stamp that does a “great injustice” to the “Navy Seals and others in the Naval Special Warfare community.”\footnote{269} Justice Alito echoed some of Justice Kavanaugh’s concerns, writing, “I am also wary . . . about judicial interference with sensitive military decision making.”\footnote{270} But, even “[g]ranting a substantial measure of deference to the Navy,” Justice Alito wrote “[t]hat ‘[o]ur review of military regulations challenged on First Amendment grounds’ is deferential [and] does not ‘render entirely nugatory in the military context the guarantees of the First Amendment.’”\footnote{271}


\footnote{265. Austin, 142 S. Ct. at 1302 (Kavanaugh, J., concurring).}

\footnote{266. Id.}

\footnote{267. Id. (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring)).}

\footnote{268. Id. (Alito, J., dissenting).}

\footnote{269. Id. at 1306.}

\footnote{270. Id. at 1306–07 (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).}
concluded that while he agreed the Navy had “a compelling interest in preventing COVID-19 infection from impairing its ability to carry out its vital responsibilities . . . [and] minimizing any serious health risk to Navy personnel. . . . [T]he Navy’s summary rejection of . . . religious exemptions was by no means the least restrictive means of furthering those interests.”

G. Congress to the Rescue: The DoD is Saved by the NDAA

On December 23, 2022, Congress enacted the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), which ordered the Secretary of Defense to rescind the military’s COVID-19 vaccine mandate. To comply, on January 10, 2023, Secretary Austin issued a memorandum rescinding the vaccine mandate for Armed Forces members. Secretary Kendall followed suit for the Air Force, later issuing guidance on removing adverse actions and handling future religious accommodation cases. The practical and legal effect of this legislation, coupled with the follow-on action by the military, appears to have rendered all military COVID-19 mandatory vaccination litigation “moot.” As noted by the Sixth Circuit in a recent order, twelve federal appellate judges on three courts of appeals have unanimously concluded that the NDAA and

271. Id. at 1305.
276. Because federal courts only have constitutional authority to resolve actual disputes, legal actions cannot be brought or continued after the matter at issue has been resolved—leaving no live dispute for a court to resolve. In such a case, the matter is said to be “moot.” See Moot, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/moot [https://perma.cc/8QFQ-V5GQ] (“In law, an issue or case being moot means that it has lost its practical significance because the underlying controversy has been resolved, one way or another.”).
the military’s implementation of that legislation mooted similar preliminary injunction appeals.277 By passing the NDAA, Congress not only saved the careers of those service members who had refused the vaccine and had not yet been involuntarily separated but also saved the DoD from probable courtroom losses by preventing the courts from ultimately resolving the issues on the merits. Nearly a year after the mandates were rescinded, demonstrating a continuing concern for more than 8,000 service members involuntarily separated for refusing the COVID-19 vaccination, Congress passed the National Defense Authorization Act for Fiscal Year 2024.278 Section 526 requires the Service Secretaries to consider reinstating those service members who were involuntarily separated solely on the basis of COVID-19 vaccination refusal, and who also submitted a timely request for a religious, administrative, or medical exemption.279 Requests for reinstatement must be filed within two years of the date of separation.280 With the clock ticking, the jury is still out as to whether this provision will have any meaningful impact; however, it is likely that most separated service members have permanently moved on.281

277. See Roth v. Austin, 62 F.4th 1114, 1119 (8th Cir. 2023) (finding the NDAA provides the Airmen preliminary injunctive relief); Dunn v. Austin, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023) (dismissing the appeal as moot); Short v. Berger, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023) (dismissing appellant’s appeal “in light of the January 10, 2023 Memorandum issued by the Secretary of Defense”); Navy Seal 1 v. Austin, No. 22-5114, 2023 WL 2482927, at *1 (D.C. Cir. Mar. 10, 2023) (determining appellants’ appeals moot because of the January 10, 2023 Memorandum).


279. § 526, 137 Stat. at 254–55. Section 526 requires consideration of reinstatement of members of the armed forces involuntarily separated on the basis of refusal to receive a vaccination against COVID-19. Section 526(a)(1) requires that after a request for reinstatement, “the Secretary concerned shall consider reinstating such covered individual – (A) as a member of the Armed Force concerned; and (B) in the grade held by such covered individual immediately before the involuntarily separation . . . .” § 526(a)(1). Section 526(b) defines covered individuals as those “(1) involuntarily separated from an Armed Force solely on the basis of the refusal of such individual to receive a vaccination against COVID-19; and (2) who, during the period beginning on August 24, 2021, and ending on February 24, 2023, submitted a request for a religious, administrative, or medical exemption from a requirement to receive a vaccination against COVID-19.” § 526(b).


281. See Oren Liebermann, Only 43 of More Than 8,000 Discharged from US Military for Refusing Covid Vaccine Have Rejoined, CNN (Oct. 2, 2023, 4:51 PM), https://www.cnn.com/2023/10/02/politics/us-military-covid-vaccine/index.html [https://perma.cc/ZQ3Q-NJF] (citing data by the military branches, CNN reported in October 2023 that only forty-three service members sought to rejoin in the eight months following the mandate’s rescission. “Experts speculated that younger troops may have left and found other career paths, while older service members may have seen it as a reason to accelerate retirement.”).
H. “Judge, can we just forget this ever happened?”

There is little doubt that the Air Force and the Navy were flying and sailing into very strong headwinds in both Doster and the Navy Seals cases. Both circuit courts emphatically concluded at the preliminary injunction stage that the plaintiffs were likely to prevail on the merits of their claims that the Air Force and Navy violated the RFRA and the Free Exercise rights of service members in processing their religious accommodation requests. The reasoning by the court in the Doster case was of sufficient threat that after Congress passed the NDAA, the Air Force petitioned the Sixth Circuit for a rehearing to vacate the unanimous panel decision and the lower district court’s injunction. This would essentially annul the lower court opinions and make them disappear. In a brief order issued on April 17, 2023, the Sixth Circuit rejected the Air Force’s petition stating, “even if the preliminary injunctions were now moot, that fact would not provide a basis for the ‘extraordinary remedy of vacatur’ of the panel’s opinion.” Judge Kethledge, concurring in the denial of the request, joined by three other judges, issued a brief but stinging statement, writing, “Judicial precedents are presumptively correct and valuable to the legal community as a whole.” “In this case, our opinions will stand as a caution against violating the Free Exercise rights of men and women in uniform—which, by all appearances, is what the Air Force did here.” In a similar fashion, in dismissing the appeal in the Navy Seals case as moot, the Fifth Circuit declined the Navy’s invitation to vacate, holding that the “Navy has not argued, much less shown, that the public interest would be served by vacatur.”

I. Judicial Deference to the Military: Could It Be a Casualty of the War on COVID-19?

As referenced previously, the United States Supreme Court has a long tradition of deferring to military judgment, and the justices have long accepted arguments put forward by military leaders without subjecting them to the same level of scrutiny as their civilian litigant counterparts. While the Court grants all parties before the Court some presumption of subject-

283. Id. at 794 (Kethledge, J., concurring) (alteration in original) (citing U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship, 513 U.S. 18, 26 (1994)).
284. Id.
matter expertise that warrants varying degrees of deference, the Court has consistently shielded the military from the same rigor.

Courts have done so because the “military constitutes a specialized community governed by a separate discipline from that of the civilian,” and the “complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.” Indeed, when Congress enacted the RFRA, it specifically acknowledged the importance of maintaining order and discipline within the military ranks, and it noted the expectation that courts would adhere to the tradition of judicial deference in matters involving the armed forces. However, it also expressed its clear understanding that the RFRA’s heightened standard of review of religious accommodation determinations made by federal agencies would apply to the military.

This tradition of judicial deference has been cataloged and capably analyzed by several scholars taking various approaches and methods of analysis. This Article does not seek to reproduce their work or focus on the past; however, it does seek to read the proverbial tea leaves and see if in these post-COVID-times the landscape may, or should change, at least as it applies to reviewing military decision-making in the areas focusing on

288. The Committee on the Judiciary stated:

Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of . . . military personnel under the compelling governmental interest test. Seemingly reasonable regulations based upon speculation, exaggerated fears of thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest. However, examination of such regulations in light of a higher standard does not mean the expertise and authority of military . . . officials will be necessarily undermined. The Committee recognizes that religious liberty claims in the context of . . . the military present far different problems for the operation of those institutions than they do in civilian settings. . . . [M]aintaining discipline in our armed forces [has] been recognized as [a] governmental interest[.] of the highest order.

H.R. REP. NO. 103-88, at 8 (1993); see also S. REP. NO. 103-111, at 11–12 (1993) (discussing the impact the RFRA will have on the military).

First Amendment rights—especially those dealing with the Free Exercise of Religion.

“With great power comes great responsibility.”

The DoD exercised its power with the broad COVID-19 vaccine mandate, and some have argued it failed in its responsibility to protect religious beliefs during its subsequent handling of religious accommodation requests. This unforced error places this crucial doctrine in the crosshairs of the courts, and the military may have shot themselves in the foot in its handling of the COVID-19 shot.

This legal chapter in our history is seemingly closed, with no final holding made or precedent set. As such, we lack a final answer from our highest court as to whether this mandate, or a similar mandate in the future handled in the same way, would be found to violate the RFRA and the Free Exercise Clause, which is unfortunate. But, we do know that the United States Supreme Court and Congress may be more suspect of military claims moving forward.

In one of the Air Force cases dealing with religious accommodation denials, Federal District Court Judge Tilman E. Self III, a former Army artillery officer, wrote, “judges don’t make good generals,” and “are not given the task of running the military.” Judge Tilman goes on to state, “But, by that same token, it’s a two-way street: Generals don’t make good judges—especially when it comes to nuanced constitutional issues. It’s that simple. Whether Defendants’ COVID-19 vaccination requirement can withstand strict scrutiny doesn’t require ‘military expertise or discretion.’”

He ends his discussion by closing:

All Americans, especially the Court, want our country to maintain a military force that is powerful enough to thoroughly destroy any enemy who dares to challenge it. However, we also want a military force strong enough to respect and protect its service members’ constitutional and statutory religious rights. This ruling ensures our armed services continue to accomplish both.

290. *With Great Power Comes Great Responsibility*, QUOTE INVESTIGATOR (July 23, 2015), https://quoteinvestigator.com/2015/07/23/great-power/ [https://perma.cc/C84F-QNC4]. Several major world figures such as Lord Melbourne, Winston Churchill, and Franklin D. Roosevelt are credited with employing versions of this adage. More recently, this saying has entered popular culture by Spider-Man creators, Stan Lee and Steve Ditko. Id.


292. Id. (quoting Orloff v. Willoughby, 345 U.S. 83, 93 (1953)).

293. Id. at 1351 (quoting Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971)).

294. Id. at 1357.
V. SOME CONSEQUENCES AND CONCLUSIONS

There have been several casualties of the war on COVID-19 both in the military and society as a whole. Beyond the obvious tragic loss of life, Americans at large and service members alike lost some ways of life, at least temporarily, and some with long-lasting effects. As a nation, we also lost some trust and faith in our leaders and institutions. Yet in the end, in a familiar dance that we have done so often over time, it took all three branches of government to strike what is likely the proper balance now.

To recap, in the early days of a terrifying and uncertain global pandemic, amidst the Fog of COVID-19, executive branch leaders acted decisively and likely necessarily in pursuit of the greater good. Yet, as the fog began to lift, these same leaders likely overreached in certain areas that infringed on cherished rights and freedoms.

Conscience matters—it must—but grace should not be a one-way street. During these turbulent COVID-times, we often exhorted others to extend grace to one another. During times of great distress and uncertainty, leaders should be afforded the benefit of grace as they will not always get things exactly right. In this case, however, the only individuals not afforded that benefit of grace were those requesting it due to sincerely held beliefs.

The military demands each service member to inform their conscience and act on it. While the vast majority of service members received the COVID-19 vaccine (and most did so prior to the start of the mandate), a small minority refused to receive vaccinations on the grounds of conscience. This put them in the unenviable position of either violating their conscience—something they should never do—or suffering considerable, negative consequences, including possible severe impacts on their careers, such as separation from military service. Faced with this burden, service members specifically challenged the processing of religious accommodation exemptions by seeking relief in our judicial branch. Here, many service members sued based on conscience and faith, with several federal courts siding with the service members against their military leaders.

Lastly, while the cases were in legal limbo working through the appellate courts with a likely destination to the United States Supreme Court, perceiving an injustice was occurring to those who serve, our legislative

branch—Congress—with the power of the purse, issued their own mandate for the DoD to rescind its vaccine mandate, thus preserving both the conscience of the service members and their ability to continue to serve. As part of the after-action, there are some lessons that were hopefully learned.

The DoD addressed the safety and efficacy issues that plagued its handling of the AVIP mandate twenty-plus years prior by waiting for full FDA approval prior to issuing a mandate for COVID-19 vaccination.\textsuperscript{296} This was smart, but once FDA approval came for the COVID-19 vaccines, the DoD never made a convincing argument for a threat to the Total Force, as was done with smallpox in the Revolutionary War and influenza in WWII. The DoD should have done what had been done with anthrax (after much litigation and Congressional action), influenza, and adenovirus, which is to take a risk-based and targeted approach. At the time of the COVID-19 vaccine mandate, the Air Force was over a 70\% vaccination rate.\textsuperscript{297} The data were consistent prior to the initiation of the vaccine mandate that COVID-19 is most hazardous for the elderly and adults over fifty-five, but the risk was incredibly low for those of military age. Public health measures and vaccine mandates to mitigate infections in older adults decrease total deaths, but the IFR for unvaccinated individuals of military age would have a different risk and reward curve. These IFR data, taken together with the availability of medical treatments and mitigation strategies, suggested a risk-based vaccine program based on age, co-morbidities, and unique mission requirements would have aligned more with how the DoD has treated all but one of their currently mandated vaccines (i.e., HAdV). As described above, HAdV is mandated for the IET population but only required of others, such as accessioning officers or academy cadets, as deemed necessary by local commanders via local medical authorities.

Because the COVID-19 vaccine neither stopped a person from getting infected nor from passing the virus to others, it appears that the military’s COVID-19 vaccine mandate, and especially its handling of the religious accommodation requests, expended considerable time, talent, and treasure to move the needle (pun intended) in marginal and unnecessary ways.

\textsuperscript{296} Brian P. Elliot & Steven Chambers, \textit{A Historical Analysis of Vaccine Mandates in the United States Military and Its Application to the COVID-19 Vaccine Mandate}, \textit{40 VACCINE} 7500, 7501–02 (2022) (describing the backlash the military’s AVIP vaccine mandate received due to its efficacy and safety issues).

\textsuperscript{297} See Losey, supra note 30 (stating statistics for the Department of the Air Force indicate “71\% [of service members] are fully vaccinated?”).
One area in which the United States military prides itself is in its unique ability to rapidly adjust to changing circumstances to seize the advantage over an adversary. In our collective fight against COVID-19, the military seems to have lost its way and disregarded decades of operational art. In the 1970s, famed United States Air Force fighter pilot, strategist, and philosopher Colonel John Boyd coined the term “OODA Loop” where he systematically outlined the steps involved in decision-making to achieve better and more efficient results. In its most basic form, the OODA loop is: Observe-Orient-Decide-Act. In Robert Coram’s biography of Boyd, he describes a briefing Boyd delivered in 1976 where he stated that:

Generating a rapidly changing environment—that is, engaging in activity that is so quick it is disorienting and appears uncertain or ambiguous to the enemy—inhibits the adversary’s ability to adapt and causes confusion and disorder that, in turn, causes an adversary to overreact or underreact. . . . [T]he message is that whoever can handle the quickest rate of change is the one who survives.

While the COVID-19 pandemic certainly caused confusion and disorder, one can argue that it was the United States military that overreacted in its vaccine mandate. And while the pandemic required a quick rate of change, leaders across the DoD appear to have remained stagnant as the scientific evidence began to suggest that a mandate was no longer necessary.

This Article is not an attempt to malign United States military leadership, nor indicate that there were any approaches that would have easily solved the challenges presented by the COVID-19 pandemic. Instead, we point out several tools that could have helped the DoD leadership move beyond the necessary, but not solitary fact of safety and efficacy, as the most important element of a successful vaccine roll-out.

Regardless of the tools employed (or not employed), the DoD failed as an organization to fully incorporate the data from the widely distributed CDC publications discussed above, thereby failing to fully inform the decisions around whether a risk-based vaccine program could have achieved a similar outcome regarding force protection from the outbreak. A risk-


based mandate and a localized decision-making process for religious exemption requests, like with medical and administrative exemptions, with reporting up to higher headquarters for situational awareness and strategic oversight, would likely have had the same impact of protecting the Total Force while avoiding the negative consequences and collateral damage\footnote{In the military, collateral damage is referenced in the context of targeting military objectives. In this case, while neutralizing COVID-19 was the intended military objective, for those service members who refused the vaccine, their careers and constitutional rights could be considered collateral damage. \textit{See Collateral Damage, MERRIAM-WEBSTER DICTIONARY}, https://www.merriam-webster.com/dictionary/collateral%20damage [https://perma.cc/5LPY-ESN2] (“[I]njury inflicted on something other than an intended target.”).} of trying to enforce a broad vaccine mandate that ultimately ended more than 8,000 careers while limiting some of our most cherished constitutional rights.