

VACCINE MANDATE UPDATE: Sixth Circuit Denies Challengers' Request for Full-Court Review

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However, because the Circuit judges divided 8-8 and thus a majority did not approve the request, an initial *en banc* hearing was denied. Yet this denial was accompanied by strongly worded opinions which provide a preview of some of the arguments, reasoning, and perspectives that may follow.

In a concurring opinion, Judge Karen Nelson Moore—an appointee of former President Bill Clinton—largely limited her remarks to explain why she believed the request was ill-advised. She noted, among other things, that proceeding initially with the full court is “often unproductive” and “always [an] inefficient process” that strains court resources. Instead, she stressed that a “three-judge panel of our court has already devoted significant time to this case” and changing course at this juncture would “subvert our normal process.” She did not wade into the merits of the dispute.

The other half of the court disagreed. Chief Circuit Judge Jeffrey Sutton—an appointee of George W. Bush—explained why in his own dissenting opinion. Judge Sutton stressed the extraordinary nature and importance of the dispute before the court as a reason to proceed to *en banc* hearing.

But his dissenting opinion did not stop there. Judge Sutton explained at length many of the reasons he believed the challengers would likely prevail in invalidating the mandate—primarily, the absence of a clear delegation of authority to issue such a mandate.

Judge Sutton was not alone in doing so. In a separate dissenting opinion, Judge John Bush—an appointee of Donald Trump—echoed Judge Sutton’s concerns, but added additional reasons to reject the mandate that extended beyond the issue of delegation—namely, the balance of powers between the federal government and states as enshrined in the Constitution.

At the end of the day, however, Judge Sutton acknowledged that the Sixth Circuit will likely not have the last say on this rule, as review by the United States Supreme Court appears to be inevitable. So, at this point, the fact that a three-judge panel will hear the case—while disfavored by the vaccine mandate challengers—does not seem posed to substantially change the likely trajectory of this dispute. As always, stay tuned for further developments.