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Background

Global COVID-19 Vaccine Administration

The COVID-19 pandemic has resulted in over 400 million cases resulting in over 5.7 million deaths so far, and those numbers continue to grow, in large part due to unrestricted spread and the rise of variants, such as Delta and Omicron.[1] In the United States alone, there have been over 77 million cases with over 917,000 deaths, and the milestone of one million deaths appears inevitable.[2] Fortunately for much of the world, the Pfizer/BioNTech, Moderna, and Johnson & Johnson vaccines provide impressive, lifesaving protection against the original SARS-CoV-2 virus, preventing serious cases of Coronavirus Disease 19 (COVID-19).[3] However, not every country has seen the same benefit come from the development of the vaccines. As of December 23, 2021, 73% of shots have been administered in countries that fall into the categories of "high-income" or "upper-middle-income." Meanwhile, countries classified as "low-income" have seen only 0.9% of total doses administered.[4] While the inequality

[1] *Coronavirus World Map: Tracking the Global Outbreak*, THE NEW YORK TIMES (Feb. 12, 2022), https://web.archive.org/web/20220213001946/https://www.nytimes.com/interactive/2021/world/covid-cases.html.
[2] *Coronavirus in the US: Latest Map and Case Count*, NEW YORK TIMES (Feb. 12, 2022), https://web.archive.org/web/20220213001946/https://www.nytimes.com/interactive/2021/us/covid-cases.html.
[3] Kathy Katella, *Comparing the COVID-19 Vaccines: How Are They Different?*, YALE MEDICINE (Mar. 30, 2022)https://web.archive.org/web/20220212230255/https://www.yalemedicine.org/news/covid-19-vaccine-comparison.
[4] Azi Paybarah, *Omicron is prompting rich nations to expand booster access. That may prolong the pandemic, the W.H.O. warns.*, THE NEW YORK TIMES (Dec. 23, 2021) https://web.archive.org/web/20220114024615/https://www.nytimes.com/2021/12/23/world/omicron-boosters-who.html.

reflected in this data is troubling by itself, wealthy countries are also served by ensuring that vaccine doses are made available to countries with fewer financial resources.

The Effect of Inequitable Vaccine Distribution on the United States

Public health experts have stressed the importance of global inoculation to counter the spread of the virus. According to experts, the more the virus is allowed to spread, the more variants will emerge, and each new variant could potentially evade the protection of the vaccine.[5] It is, therefore, in the best interest of the United States and other developed countries of the world to ensure that the vaccine is being shared according to the need of the global population, rather than according to the ability of low-income countries to pay private corporations for the vaccine which is the key to ending the global pandemic.

Unfortunately, this has not been the path taken for vaccine distribution. Despite experts' warnings, significant doses have been distributed to wealthy countries to be used as boosters, rather than to poorer countries to provide initial inoculation.[6] Pleas to increase distribution of COVID-19 vaccine to low-income countries have been consistent, and a notable instance of such advocacy was a letter sent to the Biden administration by 175 public health experts on August 10, 2021 requesting measures significantly more rigorous than the current vaccine sharing programs implemented by the United States.[7] Those experts pointed to the likelihood that the

[5] Dan Diamond, et Al., *'Act now' on global vaccines to stop more-dangerous variants, experts warn Biden*, THE WASHINGTON POST (Aug. 10, 2021) https://web.archive.org/web/20220113104718/https://www.washingtonpost.com/health/2021/08/10/health-experts-demand-global-vaccines-pandemic/.

[6] Josh Holder, *Tracking Coronavirus Vaccinations Around the World*, THE NEW YORK TIMES (Apr. 11, 2022) https://web.archive.org/web/20220213031156/https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html.

[7] *Compare Experts Call on Biden to ramp up global vaccine production*, THE WASHINGTON POST (Aug. 11, 2021) https://web.archive.org/web/20220113105029/https://www.washingtonpost.com/context/experts-call-on-biden-to-ramp-up-global-vaccine-production/0460154c-ceb5-4799-a502-e6bb9bd35e4a/?itid=lk_inline_manual_4 (experts request distribution of 10 million doses of vaccine per week and expansion of mRNA vaccine production to capacity

lack of sufficient vaccine production and distribution would lead to future variants which could resist the current vaccines and gain other traits that make the virus more dangerous. True to the predictions of the experts, the Omicron variant arose out of African countries in November, and was identified in South Africa.[8] The first case in the United States was identified on December 1, 2021.[9] As the Omicron variant spread through the United States, the high transmissibility of the variant wreaked havoc on the health care infrastructure.

Despite the assessment that Omicron was less severe than the original mutation or Delta, the first widespread variant, Omicron retained the life-threatening symptoms of the previous versions of the virus, especially for unvaccinated individuals who contracted the virus.[10] This combination led to much of the US healthcare system, particularly emergency rooms, being overwhelmed to the point where patients in need of care are turned away, only to come back more sick than before.[11] While many hope that there will be no further mutations of the virus that exacerbate the issues that Omicron highlighted, without widespread vaccine distribution and vaccinations, future variants seem inevitable. What then can be done to work towards vaccine

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to 8 billion doses per year) *with* Monica Alba, et Al., *Biden Administration sending 9 million Covid vaccine doses to Africa*, NBC NEWS (Dec. 3, 2021) https://web.archive.org/web/20220206202129/https://www.nbcnews.com/politics/white-house/white-house-announce-shipment-9-million-covid-19-vaccines-africa-n1285299 (Biden administration plans to distribute 200 million doses of vaccine in 2021 and 300 million doses in 2022) *and* Sheryl Stolberg, *White House Plans Major Expansion of Covid Vaccine Production*, THE NEW YORK TIMES (Nov. 17, 2021) https://web.archive.org/web/20220123044342/https://www.nytimes.com/2021/11/17/us/politics/biden-covid-vaccine-manufacturing.html (Biden administration plans to expand manufacturing capacity to at least one billion additional doses per year).

[8] Tim Lister, et Al., *How South African Scientists discovered Omicron and set off a global chain reaction*, CNN (Dec. 2, 2021) https://web.archive.org/web/20220123064148/https://www.cnn.com/2021/12/02/world/south-africa-omicron-origins-covid-cmd-intl/index.html.

[9] Rob Picheta, *The first cases of Omicron variant identified around the world*, CNN (Dec. 2, 2021) https://web.archive.org/web/20220110132850/https://www.cnn.com/2021/11/29/world/covid-omicron-variant-countries-list-cmd-intl/index.html.

[10] Will Stone, *ERs are overwhelmed as omicron continues to flood them with patients*, NPR (Jan. 13, 2022) https://web.archive.org/web/20220211192736/https://www.npr.org/sections/health-shots/2022/01/13/1072902744/ers-are-overwhelmed-as-omicron-continues-to-flood-them-with-patients.

[11] *Id.*

distribution if the Biden administration's efforts do not rise to the level required to solve the problems?

Proposed Legal Solutions to Inequitable Distributions

One such proposed solution is a waiver on international intellectual property rights guaranteed by the World Trade Organization's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[12] Such a waiver would allow intellectual property protections for vaccines and other medical products related to COVID-19 to be ignored by other companies around the world.[13] The waiver, proposed by India and South Africa with an aim to ensure that vaccine production is not bottlenecked by intellectual property ownership, could mobilize all potential manufacturers to meet global demand for vaccines.[14] Despite gaining the support of nearly all WTO member nations, the waiver is unlikely to pass. All decisions made by the WTO must be unanimous, so the narrow opposition by Switzerland, Norway, and the United Kingdom defeats the measure if those nations cannot be persuaded otherwise.[15] While there appears to be some room for negotiating an agreement that excludes India and China from the waiver but allows African nations, where the vaccines are most needed, to be included, no

[12] Subhayan Chakraborty, *Despite India push, global IPR waiver proposal for COVID stagnates at WTO*, MONEY CONTROL (Feb. 8, 2022) https://web.archive.org/web/20220209044637/https://www.moneycontrol.com/news/trends/current-affairs-trends/despite-india-push-global-ipr-waiver-proposal-for-covid-vaccines-stagnates-at-wto-8056421.html.
[13] Tom Lee et Al., *Intellectual Property, COVID-19 Vaccines, and the Proposed TRIPS Waiver*, AMERICAN ACTION FORUM (May 10, 2021) https://web.archive.org/web/20211223030432/https://www.americanactionforum.org/insight/intellectual-property-covid-19-vaccines-and-the-proposed-trips-waiver/.
[14] Subhayan Chakraborty, *Despite India push, global IPR waiver proposal for COVID stagnates at WTO*, MONEY CONTROL (Feb. 8, 2022) https://web.archive.org/web/20220209044637/https://www.moneycontrol.com/news/trends/current-affairs-trends/despite-india-push-global-ipr-waiver-proposal-for-covid-vaccines-stagnates-at-wto-8056421.html.
[15] *Id.*

agreement has been reached.[16] The delay has been costly. The proposal for a waiver began in October 2020. According to the NGO Doctors Without Borders (formally known as Médecins Sans Frontières or MSF), in the one year since the first proposal by South Africa and India was tabled, more than 3.6 million people died, which MSF says was mostly due to lack of vaccine availability.[17]

However, critics of the waiver point to the steps already taken by vaccine producers to help with global production of vaccines. These critics cite the fact that Moderna has promised not to enforce its COVID-19 vaccine patents during the pandemic.[18] Further, the TRIPS agreement does not currently apply to countries in the WTO classified as Least-Developed Countries, or LDCs.[19] Those LDCs are therefore able to appropriate the intellectual property of companies and practice their patents without fear of repercussions from violating the TRIPS agreement. The evidence of the advantages of companies keeping a loose hold on their intellectual property during the pandemic is most clear in Cape Town, South Africa, where a biotechnology company, Afrigen Biologics and Vaccines, has successfully replicated the Moderna vaccine.[20]

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[16] Priti Patnaik, *EXCLUSIVE: Efforts to limit the implementation of the TRIPS Waiver, proposals to exclude India & China*, GENEVA HEALTH FILES (Feb. 4, 2022) https://web.archive.org/web/20220204100447/https://genevahealthfiles.substack.com/p/exclusive-efforts-to-limit-the-implementation.

[17] Subhayan Chakraborty, *Despite India push, global IPR waiver proposal for COVID stagnates at WTO*, MONEY CONTROL (Feb. 8, 2022) https://web.archive.org/web/20220209044637/https://www.moneycontrol.com/news/trends/current-affairs-trends/despite-india-push-global-ipr-waiver-proposal-for-covid-vaccines-stagnates-at-wto-8056421.html.

[18] Tom Lee et Al., *Intellectual Property, COVID-19 Vaccines, and the Proposed TRIPS Waiver*, AMERICAN ACTION FORUM (May 10, 2021) https://web.archive.org/web/20211223030432/https://www.americanactionforum.org/insight/intellectual-property-covid-19-vaccines-and-the-proposed-trips-waiver/.

[19] Congressional Research Service. *Potential WTO TRIPS Waiver and COVID-19* (IF11858), Prepared by Shayerah Akhtar, et Al. The Hill (Sep. 13, 2021) https://web.archive.org/web/20211231203354/https://crsreports.congress.gov/product/pdf/IF/IF11858.

[20] Amy Maxmen, *South African scientists copy Moderna's COVID vaccine*, NATURE (Feb. 3, 2022)

Unfortunately, the successful replication of the vaccine using only the information in the patents has taken a long time. Whereas the first Moderna vaccines were administered in the United States in the middle of December, 2020.[21] The vaccine was not reported to have been successfully replicated until the beginning of February, 2022.[22] In this 14-month period, Moderna was strongly criticized for failing to reach deals with countries classified as "low-income" by the world bank, charging more for shots sent to "middle-income" nations than to countries like the United States and the European Union, and failing to deliver the doses that it did sell.[23] Between December 2020 and February 2022, the world saw the rise of both the Delta and Omicron variants, which lead to more cases and deaths. Notably, Delta and Omicron were first identified in India and South Africa, respectively. At the time those variants arose, both countries' populations were undervaccinated.[24] The lengthy process of replicating the vaccine took valuable time that could have been spent administering the vaccine to people in countries outside of the current vaccine producers' production capacity. However, even with a successful copycat vaccine, it will take more time to allow manufacturers to develop processes for mass-production of new mimics of the original vaccines.[25] In the time it took to develop the mimic,

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https://www.nature.com/articles/d41586-022-00293-2.

[21] Madeline Holcombe, et Al., *The Moderna vaccine is now in some Americans' arms as Covid-19 cases in the US pass 18 million*, CNN (Dec. 21, 2020) https://web.archive.org/web/20220117075848/https://www.cnn.com/2020/12/21/health/us-coronavirus-monday/index.html.

[22] Amy Maxmen, *South African scientists copy Moderna's COVID vaccine*, NATURE (Feb. 3, 2022) https://www.nature.com/articles/d41586-022-00293-2.

[23] Rebecca Robbins, *Moderna, Racing for Profits, Keeps Covid Vaccine Out of Reach of Poor*, THE NEW YORK TIMES (Nov. 9, 2021) https://web.archive.org/web/20220126192340/http://www.nytimes.com/2021/10/09/business/moderna-covid-vaccine.html.

[24] *COVID-19 Data Explorer*, OUR WORLD IN DATA (Last accessed April 14, 2022) https://ourworldindata.org/explorers/coronavirus-data-explorer?time=2021-12-01&facet=none&Metric=People+vaccinated+%28by+dose%29&Interval=7-day+rolling+average&Relative+to+Population=true&Color+by+test+positivity=false&country=IND~ZAF.

[25] Amy Maxmen, *South African scientists copy Moderna's COVID vaccine*, NATURE (Feb. 3, 2022) https://www.nature.com/articles/d41586-022-00293-2.

variants arose, and millions of people died. It seems reasonable to expect the same result with no change in the global approach.

Therefore, many now point not to relaxation of patent enforcement, but open sharing of trade secrets that are jealously guarded by the pharmaceutical companies to ensure their future profits.[26] Referred to commonly as "know-how," trade secrets are a different form of intellectual property than copyright or patent. Whereas copyright and patent rights are granted to an author or inventor for a limited term of years in return for publishing the work, trade secrets do not represent the same transaction between an originator and the public domain. Rather, trade secrets are kept secret, exactly as the term implies. Much of the information desired by potential vaccine producers and manufacturers is sequestered in the trade secrets of the pharmaceutical companies, rather than shared in the patents which are disclosed to the public and, in some cases, are not being enforced.

Therefore, rather than focusing exclusively on the sharing of patent-protected information, some organizations are imploring pharmaceutical companies to share this know-how so that companies mimicking their products can efficiently scale up their productions with the knowledge that has already been obtained by the major vaccine makers.[27] However, these requests have not been answered, likely in part because the companies who would have to share their trade secrets see them as potential sources for stunning profits in the future, and would lose out on those profits if they shared their secrets, because they have no right to prevent others from

[26] Mark Schultz, *Trade Secrecy and Covid-19*, GENEVA NETWORK (Mar. 3, 2022) https://web.archive.org/web/20211018070838/https://geneva-network.com/research/trade-secrecy-and-covid-19/.
[27] *One year after first shot, Moderna and Pfizer must urgently share COVID-19 vaccine "recipe"* , Doctors Without Borders (Dec. 8, 2021) https://web.archive.org/web/20220113140023/https://www.doctorswithoutborders.org/what-we-do/news-stories/news/one-year-after-first-shot-moderna-and-pfizer-must-urgently-share-covid.

using that information once it is disclosed. The pertinent question is therefore not whether low-income countries and biotechnology companies in those countries can gain access to patented technology, but how to ensure that the know-how and trade secrets that are being kept by the companies who are producing insufficient vaccine doses might be shared with the rest of the world, so that future variants can be prevented, and deaths avoided.

This journal article will consider the legal possibilities available specifically to the United States federal government to prevent vital intellectual property rights from being used to exacerbate and propagate a global pandemic. Specifically, this article proposes that Congress has a responsibility to amend the Defend Trade Secrets Act so that the President has the power to compel a U.S. citizen or business who operates in interstate commerce to disclose their trade secrets in a time of crisis that threatens national health or national security.

This proposal of legislation raises questions concerning the constitutional power of the federal government to take such an action. Specifically, this article addresses the questions (1) whether the federal government has the ability to take such an action under the current legislation in place to safeguard national security, (2) under which constitutional powers the federal government would be capable of effecting such legislation, and (3) how such legislation might be enacted such that it would avoid infringing on the First Amendment rights of the private entities holding the rights to the trade secrets.

Because such legislation would be legal under the Constitutional doctrines promulgated by the Supreme Court, this article concludes by appealing to the fact that failure to take such an action is costing lives both within the United States and without, and that Congress has a responsibility to act.

This possible, and significant, legislation is inspired by two analogous federal statutes in the United States: 28 U.S.C. § 1498 and the Defense Production Act (DPA).

DISCUSSION

The Legal Analogues

The first relevant extant federal statutory analogue to the proposed legislation is 28 U.S.C. § 1498. This federal statute effectively allows the federal government to co-opt a patent registered in the United States. Specifically, the statute allows inventors who own a patent which the United States practices without license or permission to sue the United States for just compensation.[28] While recent case law disrupts the common description, it is still a useful analogy to think of the statute as an exercise of eminent domain over intellectual property, specifically patents.[29] The statute allows the United States to exercise a patent, but creates a cause of action against the United States for the patent owner to recover "reasonable … compensation." [30] Such compensation usually falls around ten percent royalty rate to be paid to

[28] *See* 28 U.S.C. § 1498(a). From the relevant paragraph:

"Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action if the owner is an independent inventor, a nonprofit organization, or an entity that had no more than 500 employees at any time during the 5-year period preceding the use or manufacture of the patented invention by or for the United States. Notwithstanding the preceding sentences, unless the action has been pending for more than 10 years from the time of filing to the time that the owner applies for such costs and fees, reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

[29] *See* Zoltek Corp. v. U.S. 672 F.3d 1309 (Fed. Cir. 2012).

[30] 28 U.S.C. § 1498.

the owner of the patent.[31] This power has been exercised several times in recent history, both as a threat and in actual use, from night vision goggle production or anthrax antidote to threaten "breaking" a patent for a prohibitively-priced drug to treat Hepatitis C.

The proposed statute should follow a similar regime. Trade secrets are currently protected under federal law by the Defend Trade Secrets Act (DTSA). Prior to the enactment of the DTSA in 2016, trade secret protection was found exclusively at the level of state law. However, with the federal government's entry into the arena of protecting trade secrets, it is also appropriate to allow for a similar "eminent domain" statute to allow the United States to appropriate trade secrets.

There exist notable differences between the functions of patents and trade secrets that mean the analogy between the proposed law and 28 U.S.C. § 1498 is not a direct match. Notably, patent law is derived from the Constitution and is a balance struck between a legal monopoly granted by the United States in exchange for the information to enter the public domain after being secured "for limited times."[32] On the contrary, trade secrets are not a kind of intellectual property enumerated by the Constitution. Instead, trade secrets find federal protection in the commerce clause of the Constitution.[33] The most salient difference is the lack of inevitable entry into the public domain of a trade secret. As long as a trade secret is kept secret, any misappropriation of the secret gives rise to a cause of action, although there must be a nexus of interstate commerce in order for the DTSA to apply, as Congress's power under the commerce

[31] *See* Deca Ltd. v. U.S. 640 F.2d 1156, 1181 (Ct. Cl. 1980) (finding that a royalty rate of 7.5 percent is appropriate); and Gargoyles, Inc. v. U.S. 113 F.3d 1572, 1581 (Fed. Cir. 1997) (finding that a royalty rate of 10 percent determined by the trial court was not clear error).
[32] U.S. Const. art. I § 8, cl. 8.
[33] Conor Tucker, The DTSA's Federalism Problem: Federal Court Jurisdiction over Trade Secrets, 28 Fordham Intell. Prop. Media & Ent. L.J. 1 (2017).

clause is limited to interstate commerce. Further, unlike a patent, a trade secret need not be disclosed in order to be protected. In fact, such a disclosure would cause a trade secret owner to immediately lose their trade secret, as publicly available information cannot be misappropriated. Therefore, the proposed legislation raises a significant question regarding First Amendment protections: when can the government compel commercial speech?

The second analogous law is the Defense Production Act of 1950. The legislation was enacted to grant broad powers to the president to require private citizens and entities to take actions in the interest of national defense.[34] However, in the several dozen times the Act has been reauthorized, Congress has expanded the purposes for which the president is permitted to utilize the law. Specifically, while the law still purports to grant authority to take action in the interest of national defense, "national defense" is defined to mean:

> The term "national defense" means programs for military and energy production or construction, military assistance to any foreign nation, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5195 et seq.].[35]

The referenced Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act defines emergency preparedness as:

> all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. [36]

[34] Jared Brown Et Al., Cong. Research Serv., R43118, *Defense Production Act of 1950: History, Authorities, and Reauthorization* 2 (2013).
[35] 50 U.S.C. App. § 2152(13)
[36] 42 U.S.C. §5195(a)(3).

Thus, despite Congress's initial purpose that the statute be an avenue by which the President could better control industry, specifically to wage war, the scope of the act has been significantly expanded.[37] Instead of limiting the President's grant of power here to issues related to the ability to defend and wage war, the grant is more expansive, such that the President has the ability to respond to a wider range of emergencies.

The DPA has become relatively more popular in the 21st Century. President Obama utilized the Act in 2011 to compel telecommunications companies to reveal confidential information to help prevent cyber-espionage by China.[38] However, with the onset of the coronavirus pandemic, the Act received much more use and discussion than it had prior. Early in the pandemic response, President Trump used the Act to classify ventilators and other protective equipment as "essential to the national defense" such that they would be subject to production priorities set by his administration.[39] Following this initial invocation in response to the pandemic, the Act was utilized many more times in relation to goods necessary to combat the pandemic and goods that had faced shortages due to the pandemic.[40]

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[37] Jared Brown, Cong. Research Serv., R43118, *Defense Production Act of 1950: History, Authorities, and Reauthorization* 5 (2013).

[38] Michael Riley, *Obama Invokes Cold-War Security Powers to Unmask Chinese Telecom Spyware*, BLOOMBERG NEWS (Nov. 30, 2011), https://web.archive.org/web/20111202215935/http://www.bloomberg.com/news/2011-11-30/obama-invokes-cold-war-security-powers-to-unmask-chinese-telecom-spyware.html.

[39] David Welna, *Trump Invokes a Cold War Relic, The Defense Production Act, for Coronavirus Shortages*, NPR (Mar. 18, 2020), https://web.archive.org/web/20200319212323/https://www.npr.org/2020/03/18/818069722/trump-invokes-a-cold-war-relic-the-defense-production-act-for-coronavirus-shorta.

[40] *See* Morgan Chalfant, *Trump Signs Executive Order to Prevent Price Gouging, Hoarding of Medical Supplies*, THE HILL (Mar. 23, 2020), https://web.archive.org/web/20200325033454/https://thehill.com/homenews/administration/489125-trump-signs-executive-order-to-prevent-price-gouging-of-medical; Brett Samuels, *Trump Uses Defense Production Act to Require GM to Make Ventilators*, THE HILL (Mar. 27, 2020), https://web.archive.org/web/20200327203418/https://thehill.com/homenews/administration/489909-trump-uses-defense-production-act-to-require-gm-to-make-ventilators; Jennifer Jacobs, *Trump to Order U.S. Meat Plants to Stay Open Amid Pandemic*, BLOOMBERG NEWS (Apr. 28, 2020), https://web.archive.org/web/20200428190646/https://www.bloomberg.com/news/articles/2020-04-28/trump-says-he-s-issuing-order-for-tyson-s-unique-liability; Exec. Order No. 14001, 86 F.R. 7219 (Jan. 21, 2021) (Executive

Both 28 U.S.C. § 1498 and the DPA offer important examples of the power available to the federal government. Both statutes demonstrate the significant ability of the federal government to mandate compliance from the private sector. However, neither is sufficient to compel a private individual or entity to disclose its trade secrets to the government. This conclusion is more readily obvious regarding 28 U.S.C. § 1498. Clearly, a statute allowing the United States to practice a patent is not applicable to trade secrets. Therefore, it is useful only as an analogy for the proposed legislation. The conclusion that the DPA does not provide the requisite authority to compel trade secret licensing is less obvious, but is a result of federal trade secret law and how the Supreme Court analyzes the powers Congress has granted the president.

Trade Secret Law in the United States

The passage of the Defend Trade Secrets Act of 2016 (DTSA) created a federal cause of action for an owner of a trade secret to sue for misappropriation of a trade secret that is related to interstate commerce.[41] Prior to the passage of the DTSA, a person or entity whose trade secret had been misappropriated could sue only under state law, although Congress did criminalize the theft of trade secrets with the Economic Espionage Act of 1996.[42] The DTSA introduced the powerful mechanism of federal jurisdiction for trade secret misappropriation plaintiffs to use.

The DTSA imposes two main requirements for information to be considered a trade secret: first, the owner of that information must have "taken reasonable measures to keep such information secret; and the information derives independent economic value, actual or potential,

order from President Biden directing the executive branch to identify shortfalls in the supply of goods needed to combat COVID-19 and invoking the Defense Production Act to fill those gaps).

[41] 18 U.S.C. § 1836(b)(1).

[42] Eric Goldman, *The New 'Defend Trade Secrets Act' is the Biggest IP Development in Years*, FORBES (Apr. 26, 2016),

from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information."[43] An obvious corollary to this definition is that if the information is made public at any time, it can no longer be protected as a trade secret. However, that does not mean that any sharing of a trade secret will cause the information to enter the public domain. Importantly, courts are generally willing to recognize confidentiality agreements between an owner of a trade secret and other parties to constitute "reasonable measures" that do not destroy the secrecy of that information.[44]

The DTSA only protects trade secrets from misappropriation through improper means, which is also specially defined in the legislation as "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[45] The statute also provides that it *is* permissible to discover another's trade secret through the processes of "reverse engineering, independent derivation, or any other lawful means of acquisition."[46]

While intellectual property rights contemplated by the Constitution are limited to a term of years, the same limitation does not apply to trade secrets.[47] Rather, while copyrights and patents find their origin in the Intellectual Property Clause of the Constitution, federal trade secret protection is regulated by Congress according to its commerce clause power.[48] Therefore, trade secrets provide a distinct advantage over patent law in that information kept as a trade

[43] 18 U.S.C. § 1839(3).
[44] *See* Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d 174, 180 (7th Cir. 1991) (Finding that contractual precautions the trade secret owner took to retain secrecy, along with physical security precautions, was sufficient to survive summary judgment.).
[45] 18 U.S.C. § 1839(6).
[46] *Id*.
[47] U.S. Const. art. I § 8, cl. 8.
[48] 18 U.S.C. § 1836(b)(1).

secret can be kept from the public domain forever, as long as the owner of the trade secret takes reasonable measures to keep the information secret, the information retains its economic value, and it is not obtained by some lawful means.[49]

Legislation as it Exists Today does not Suffice

As discussed above, the President has broad authority to compel private entities to comply with government directives under the DPA, such as requiring companies to manufacture certain goods or disclose proprietary information relevant to preventing espionage by foreign powers.[50] However, the President's power to force disclosures of proprietary information has never been invoked outside of the context of protecting against foreign espionage, and even in that context, not since the passing of the DTSA in 2016. Despite the unclear legal standard, advocacy groups such as Doctors Without Borders have asked President Biden to utilize the DPA to force the companies with vaccine production trade secrets to share those with the government. [51]

Neither Compelled Licensing nor Disclosure is Elaborated in the DPA

The first problem that arises when contemplating the proposed of trade secret licensing or disclosure under the DPA is a historical one. The DPA has been the topic of conflict between the Judicial and Executive branches of the federal government before: in the 1952 case *Youngstown*

[49] 18 U.S.C. § 1839(3); 18 U.S.C. § 1839(6).
[50] *See* Brett Samuels, *Trump Uses Defense Production Act to Require GM to Make Ventilators*, THE HILL (Mar. 27, 2020), https://web.archive.org/web/20200327203418/https://thehill.com/homenews/administration/489909-trump-uses-defense-production-act-to-require-gm-to-make-ventilators; Michael Riley, *Obama Invokes Cold-War Security Powers to Unmask Chinese Telecom Spyware*, BLOOMBERG NEWS (Nov. 30, 2011), https://web.archive.org/web/20111202215935/http://www.bloomberg.com/news/2011-11-30/obama-invokes-cold-war-security-powers-to-unmask-chinese-telecom-spyware.html.
[51] *MSF to President Biden: Free the Vaccine for COVID-19*, DOCTORS WITHOUT BORDERS (Nov. 10, 2021), https://www.doctorswithoutborders.org/latest/msf-president-biden-free-vaccine-covid-19 (last visited 4/10/2022).

Sheet & Tube Co. v. Sawyer.[52] In *Youngstown*, the Court decided that President Truman's executive order allowing the Secretary of Commerce, Charles Sawyer, to take control of privately-owned steel mills was unconstitutional because the DPA did not explicitly permit him to seize property in the way he had ordered his Secretary of Commerce to do.[53] Likewise, the DPA as it exists today does not explicitly permit the President to force a private entity to license or disclose its trade secrets, unlike how the DPA explicitly allows the President to require acceptance and performance of a government contract.[54] Just as the Court in *Youngstown* held that President Truman's action constituted a conflict between the legislative and executive branches, it is also likely that a hypothetical executive order under the DPA from President Biden compelling trade secret licensing or disclosure would be a similar affront to the separation of powers.

The *Youngstown* case is also famous for the analyses of the separation of powers presented by the concurring Justices. Of particular import to a potential trade secret disclosure is Justice Frankfurter's description of "gloss" on the words of the Constitution.[55] It might be argued that due to President Obama's use of the DPA in 2011 to compel telecommunications companies to disclose some of their proprietary information, there exists an expectation that future presidents would also be able to compel other private entities to also disclose their trade secrets.

When evaluating the President's power to take an action not explicitly granted to him by Congress, as is the case here, it is appropriate to look to historical practice to learn whether the

[52] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952).
[53] *Id*. at 663 (Clark, J. concurring).
[54] Jared Brown et Al., Cong. Research Serv., R43767, *Defense Production Act of 1950: History, Authorities, and Considerations for Congress* 5 (2020).
[55] Youngstown, 343 U.S. at 610.

executive branch has taken such steps without protest from the legislature. After all, it is efficient for the branches of government to find standard practices acceptable to both branches and work within those practices. However, a single instance of trade secret disclosure that was enforced without objection by the private companies will not qualify as Justice Frankfurter's "gloss." In his concurrence, Justice Frankfurter uses powerful language to describe the type of practices that might qualify to create a gloss on the executive power of the President: "[A] systemic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government…"[56]

The Supreme Court has repeatedly been willing to find that the President has the power to carry out an action despite a lack of textual authority in Article II of the Constitution. This method of reasoning was used relatively recently when the Court found that there is such historical gloss on the Article II executive power that the President has executive authority to set foreign policy, despite that power not being expressly enumerated in the Constitution.[57] In *Garamendi*, the Court pointed to a history of a recognized authority in the President to make "executive agreements with other countries" dating back to the beginning of the United States.[58] Needless to say, a single act taken by President Obama would not reach the level of systemic governmental action that would qualify as gloss.

Therefore, it is highly likely that if President Biden took action under the DPA to compel vaccine-producing companies to license or disclose their trade secrets with the federal

[56] *Id*. at 610-611.

[57] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-414 (2003).

[58] *Id*. at 415.

government or manufacturers chosen by the government, the vaccine companies would be successful in challenging the order in court. Because the DPA does not include an explicit grant of power for the President to require such licensing or disclosure, the order would be ineffective.

The Effect of the DTSA on a Potential DPA Mandate

Another vital method for analyzing whether the President has authority to take action also arises out of a concurring opinion from *Youngstown*. In his concurring opinion, Justice Jackson describes three scenarios in which the President may act with differing levels of endorsement from Congress.[59] The first category of circumstances include actions by the President where he "acts pursuant to an express or implied authorization of Congress."[60] In this situation, the President acts with the greatest authority he can wield, as he acts with both his own authority and all the authority which Congress may grant him.[61] Justice Jackson writes that in this situation, "[the President] may be said to personify the federal sovereignty."[62] That is, the President will only be found to have acted impermissibly in such an instance if the federal government as a whole lacks the power to take such an action.[63]

The second category of presidential action is circumstances in which the President acts, but Congress has neither granted nor denied the President the authority to take that action.[64] In these circumstances, the President has only his own constitutional powers to justify his actions, but he is not denied the ability to act where presidential and congressional powers overlap.[65]

[59] Youngstown, 343 U.S. at 635-638.
[60] *Id*. at 635.
[61] *Id*.
[62] *Id*. at 636.
[63] *Id*. at 636-637.
[64] *Id*. at 637.
[65] *Id*.

Justice Jackson refers to the powers over which Congress and the President have overlapping authority as the "zone of twilight," and that in this zone, when Congress does not take action to inhibit the President's power, the legislature "enable[s], if not invite[s]" unilateral presidential action.[66] Justice Jackson goes on to say that when a decision on whether a President has the power to take an action that falls into this "zone of twilight" must be made, the question is more focused on whether the surrounding context necessitates the action the President took, rather than focusing on the pure legal theory.[67]

The final category that Justice Jackson elaborates are situations where the President acts in direct opposition to the "express or implied will of Congress."[68] It is in these scenarios in which the President has the least amount of power. He can rely only on the powers granted to him, and can make use of none of the powers granted to Congress.[69] The President only has the ability to act in these circumstances if Congress has no authority to take such actions.[70]

The proper question to ask, then, is if President Biden wishes to compel disclosure of trade secrets by pharmaceutical companies regarding the manufacturing products of COVID-19 vaccines, into which of these categories of presidential power would that action fall? As has already been discussed, there is no existing statute passed by Congress that explicitly permits the President to compel private entities to disclose their trade secrets. There is no explicit ability for the President to compel trade secret disclosure in the DTSA or the DPA, and while the DPA has been used as justification to compel disclosures of proprietary information in the past, that use

[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 637-638.

was not subjected to judicial scrutiny. Without the explicit endorsement from Congress that the President has the ability to compel trade secret disclosure, the President's power to do so falls into either the second or third category.

However, there is some evidence that Congress has implicitly denied the executive branch the power to compel trade secret disclosure. The evidence is found in analyzing what powers Congress has delegated to the President in other areas of law compared to what has been delegated by the DPA and the DTSA. The first piece of the analysis is to note that Congress has already passed statutes allowing for the federal government to take control of private citizen's intellectual property, namely in 28 U.S.C. § 1498. Because Congress contemplated the need for the United States to exercise a patent or a copyright in 28 U.S.C. § 1498, it is reasonable to understand that Congress perceives such a statute to be necessary to enable the President to take control of a private citizen's intellectual property. Therefore, because no explicit allowance exists in the DPA or the DTSA, it is reasonable to believe that by excluding such a provision from those acts, Congress has implicitly denied the President the right to compel private citizens to disclose or license their trade secrets to the federal government. Because an implicit denial of right can be found by analyzing the context of the DTSA and the analogous legislation, a court would find that the President's power to compel disclosure or licensing of trade secrets lies in the third category Justice Jackson described in *Youngstown*. As a result, the only way the President could legally effectuate such an action would be if he had the power to do so under his Article II powers and Congress did not have any powers of its own to allow such actions. Because trade secrets are protected at the federal level under Congress's power to regulate interstate commerce,

this is not the type of act delegated to the President independent of Congress, and therefore he would be unable to effectuate such an order.[71]

Based on what can be deduced on Congressional intent from the DPA, DTSA, and 28 U.S.C. § 1498, an action taken to compel disclosure or licensing of trade secrets from pharmaceutical companies regarding vaccine manufacturing would fall into Justice Jackson's final category. Therefore, the President would not have the power to effectuate such an order under the current statutory landscape. In order for necessary, pandemic-ending, lifesaving measures to be taken, Congress would have to pass legislation granting the President the power to compel trade secret disclosure or licensing. This legislation would fit well into either the DPA or the DTSA, and would be predicated on Congress's power to provide for national defense, defined as it is in the DPA.[72] With such legislation in place, the power of the President to compel trade secret disclosure or licensing would move into the first category Justice Frankfurter elaborated in his concurrence in *Youngstown*. Instead of his powers being restricted only to what is granted exclusively to the executive branch, as is currently the case, the President would be able to act with the full power possessed by the federal government.[73] With the full force of the federal government, the President would have the requisite power to effect such an order.

The Proposed Legislation would not Violate the 1st Amendment

Even when the federal government as a whole has the power to act, that action may still infringe on a constitutional right, and therefore be constitutionally invalid. Such an issue arises

[71] 18 U.S.C. § 1836(b)(1).
[72] *See* U.S. Const. art. I § 8, cl. 1; 50 U.S.C. §4552(14).
[73] *Youngstown*, 343 U.S. at 637.

here, as compelled disclosure or licensing of a trade secret constitutes compelled speech, which is generally impermissible under the free speech protections of the First Amendment.[74]

Generally, courts are loath to compel speech from individuals.[75] In one of the most famous Supreme Court cases on the topic of free speech, the Court held that a state cannot compel schoolchildren to recite the pledge of allegiance in public school.[76] While much First Amendment litigation arises out of restrictions on speech, it is clear from the Court's jurisprudence that regulation is not the only form of speech control that is impermissible. Specifically, the Court has elaborated:

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.[77]

In these decisions, the Court has recognized an individual's right to preserve their own "freedom of mind."[78] Important in the analysis the courts employ in cases where they find a freedom from governmentally-compelled speech is that the speaker would be compelled to state some belief.[79] This reasoning maps strongly to the general policy of the Court that speech will be protected when it is "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[80] Importantly, the Court does not include fact-based speech in the lists of speech that are highly protected by the First Amendment.

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[74] Burns v. Martuscello, 890 F.3d 77, 85 (2d Cir. 2018).
[75] *See Id*. ("In our view, compelled speech presents a unique affront to personal dignity.").
[76] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).
[77] Riley v. Natl. Fedn. of the Blind of N. Carolina, Inc., 487 U.S. 781, 796–97 (1988).
[78] Burns v. Martuscello, 890 F.3d 77, 85 (2d Cir. 2018) (quoting W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
[79] *See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) ("It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.").
[80] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

Rather, courts have recognized that compelled speech that does not offend the protections of the First Amendment when the state is not compelling an affirmation of a belief.[81] Notably, in *State v. Grover*, the Supreme Court of Minnesota found that a statute mandating that school professionals report child abuse or face criminal prosecution (known as mandatory reporting requirements) did not violate a principal's First Amendment right to free speech.[82] Therefore, because the act of reporting facts does not constitute expressive conduct, the First Amendment is not implicated.[83]

The question for the proposed statute is then whether a court would consider a compelled disclosure or licensing of trade secrets to be expressive conduct or simple reporting of facts. Because the trade secrets in question are facts about how the companies in question manufacture the COVID-19 vaccines, it is clear that the speech that would be compelled by the government would be factual, rather than expressive. As a result, if the companies challenged the proposed statute, courts would follow the lead of the Minnesota Supreme Court in *State v. Grover* and find that without a determination that the compelled speech is expressive, the First Amendment is not violated.

While it would be appropriate for a court to find that the First Amendment is not implicated at all in such a case, it remains a possibility that some courts would not dismiss claims of unconstitutionality out of hand, and may apply a standard as strict as intermediate scrutiny to the First Amendment analysis of the statute. Intermediate scrutiny is likely to be the highest scrutiny a court will apply to the proposed legislation, as the interests at play resemble those

[81] State v. Grover, 437 N.W.2d 60, 64 (Minn. 1989).
[82] *Id*. at 65.
[83] *Id*. at 64.

subject to the commercial speech test promulgated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. While the speech in question does not fit into the commercial speech doctrine, as compelled speech is clearly not "speech proposing a commercial transaction," it is nevertheless a useful approximation of what might be expected in a court's analysis.[84] In fact, courts may apply a less strict standard of review than intermediate scrutiny, as the Supreme Court has shown a willingness to rely on rational basis review when a state compels speech in conjunction with commercial speech which is "purely factual and uncontroversial information."[85] The Court in *Zauderer* held that in the context of commercial speech, compelled speech in conjunction with advertisements does not violate the advertiser's First Amendment rights as long as the disclosure required by the state is "reasonably related to the State's interest in preventing deception of consumers."[86] However, because the speech in *Zauderer* originated with the advertising party reaching out to the public, the facts are still slightly removed from potential claims of unconstitutionality against the proposed act, so intermediate scrutiny will be assumed.

As defined in *Craig v. Bolren*, intermediate scrutiny requires that a government action must serve important governmental objectives, and must be substantially related to the achievement of those objectives.[87] Additionally, if the *Central Hudson* test is applied in full, the statute must also be narrowly tailored to serve that governmental interest.[88] Therefore, the specific wording and application of the proposed statute are vital to ensure that it survives the test of intermediate scrutiny. The first two prongs at issue are met with relative ease, if the statute

[84] C. Hudson Gas & Elec. Corp. v. Pub. Serv. Commn. of New York, 447 U.S. 557, 562 (1980).
[85] Zauderer v. Off. of Disc. Counsel of S. Ct. of Ohio, 471 U.S. 626, 651 (1985).
[86] *Id.*
[87] Craig v. Boren, 429 U.S. 190, 197 (1976).
[88] C. Hudson, 447 U.S. at 565 (quoting In Re Primus, 436 U.S. 412, 438 (1978)).

is worded properly to indicate that the purpose the statute serves is to ensure national security and the trade secrets whose disclosure or licensing are compelled are the kind of trade secrets that would directly aid in the safeguarding of national security.

However, the issue of ensuring that the statute is narrowly tailored is especially important for a statute that requires private entities to share trade secrets. As discussed above, if a trade secret is disclosed to the public, then the information loses its status as a trade secret, for at that point the information would be able to be attained by anyone in the public via lawful means.[89] Therefore, the statute should proscribe how the information should be dealt with to ensure that it does not enter the public domain, for if the private entity absolutely loses its intellectual property to the public domain, rather than only temporarily to respond to national crises, the law would no longer be considered to be narrowly tailored. An appropriate way to ensure that the trade secrets do not enter the public domain is to implement an extensive licensing program with strong confidentiality agreements in place, as courts have been willing to accept confidentiality agreements as sufficient measures for an owner of a trade secret to retain their rights.[90] Therefore, with national security purposes indicated and the rights of the private entities protected, the law would be capable of passing intermediate scrutiny.

CONCLUSION

In the midst of the COVID-19 pandemic where global need for vaccine doses is not being met, the trade secrets of the pharmaceutical companies who produce the vaccines constitute vital knowledge that, if shared with the rest of the world, would save countless lives. Despite appeals to global leaders from the scientific community, the inoculation needs of low-income countries

[89] 18 U.S.C. § 1839(6).
[90] Rockwell Graphic Systems, Inc 925 F.2d at 180.

have consistently not been met. The result of this failure to equitably distribute doses of vaccine has been significant, preventable loss of life in wealthy and impoverished countries alike. Greater vaccine distribution would have the dual effect of saving the lives of the people who receive the vaccines in lower-income countries and preventing further mutations of the virus from causing more waves of death in the United States.

Because the companies who produce these vaccines have shown an unwillingness to adequately share their trade secrets with manufacturers capable of expanding vaccine production, it has become imperative that international agreements be made to relax intellectual property rights to help save the lives of millions around the world. However, as demonstrated by the inability of countries to agree on a TRIPS waiver, it has become incumbent upon the federal government of the United States to take the actions it can to help disseminate the information under its purview to right this wrong.[91]

However, under the current legislation in place in the United States, the executive branch is not authorized to take the vital steps to compel the pharmaceutical companies to disclose or license their trade secrets. Therefore, it is imperative that Congress pass new legislation which empowers the President to take those actions. The proposed legislation is necessary to ensure the safety and national security of the United States through preventing spread of disease at home, as well as ensuring stabilization abroad.

However, regardless of the perceived necessity of a governmental action, the federal government is permitted to take only actions that can be justified by a power dedicated to it in

[91] Subhayan Chakraborty, *Despite India push, global IPR waiver proposal for COVID stagnates at WTO*, MONEY CONTROL (Feb. 8, 2022) https://web.archive.org/web/20220209044637/https://www.moneycontrol.com/news/trends/current-affairs-trends/despite-india-push-global-ipr-waiver-proposal-for-covid-vaccines-stagnates-at-wto-8056421.html.

the Constitution.[92] Even when the federal government is given a power to take an action by the powers granted to it by the Constitution, that action may also infringe on rights protected by that same Constitution. Therefore, it is imperative to craft legislation that stays within the bounds of the powers of Congress and the President delineated in the Constitution, and to avoid impermissibly infringing on the rights of the affected private citizens or entities. These requirements can be crafted by careful wording of the legislation to stay within the bounds set by the Supreme Court in previous cases.

In order to properly fall within the bounds of power of Congress and the President, such legislation could be enacted under Congress's authority to provide for national defense of the country. As demonstrated by the Defense Production Act of 1950, Congress's power to provide for the national defense may be construed very broadly to include "emergency preparedness" such as minimizing the effects of a hazard upon the civilian population. [93] When Congress delegates these powers to the President, he would be able to act with the full authority of the federal government, ensuring that the President's actions will not be declared void for want of authority.

Due to the nature of how the trade secrets would be compelled from the private entities, the First Amendment rights of those entities would be implicated. Therefore, to ensure that the statute would survive intermediate scrutiny with the added prong for commercial speech in *Central Hudson v. Public Service Commission of New York*, it is of utmost importance to specify that the only trade secrets that will be subject to mandatory disclosures or licensing would be those trade secrets which would directly benefit the national security of the country. Further, it is

[92] U.S. Const. amend. X.
[93] 42 U.S.C. § 5195a(a)(3).

important to also ensure that the trade secrets of the companies will be kept confidential so that the companies can continue to enjoy their trade secrets once the pandemic crisis has subsided. Otherwise, should the private entities lose their trade secret protection, a court could easily find that the statute is not sufficiently narrowly tailored, and is therefore invalid.

Therefore, if the legislation is properly crafted, it would properly enable the President to act to compel pharmaceutical companies who manufacture COVID-19 vaccines to license their trade secrets to other manufacturers. This licensing would ease the manufacturing bottleneck of vaccine distribution, and help doses of COVID-19 vaccine be distributed to low-income countries, thereby preventing death in those countries and future mutations of the virus. The result of preventing future mutations by denying the virus a population of unvaccinated humans within which it could mutate would indirectly benefit the United States by preventing future waves of COVID-19 variants. As demonstrated by the waves of disease caused by the Delta and Omicron mutations, the mutations cause severe hazards to civilians, overflowing hospitals, choking supply lines, and killing Americans on a massive scale. Therefore, it is vital for Congress to introduce such legislation to help curb the COVID-19 pandemic and ensure that the United States is better prepared for a global pandemic in the future. While solutions such as the proposed legislation remain, Congress is shirking its duty to provide for the defense and welfare of Americans by failing to take action that could save countless lives, both at home and around the world.