

## *Jacobson v. Massachusetts: Alternate Perspectives in 2005*

### **Introduction**

**Richard A. Goodman, MD, JD, MPH**

Let me now invite US Attorney Nahmias for thoughts and comments.

### **Trial Lawyer's Perspective**

**David E. Nahmias, JD**

I appreciate the opportunity to be with you this afternoon, and I have been fascinated by hearing the academic perspectives on *Jacobson* which I think is an important and interesting case in terms of the structure it creates to look at some of these issues. I come at this from somewhat of a different viewpoint and that is as a trial lawyer, in particular as a United States Attorney whose office will be the one defending the government's action in the event of a public health crisis that involves any sort of federal issue including any of these individual constitutional rights issues. In all likelihood, and essentially, if you are a public health official acting on behalf of the state, we will be representing you and your decisions and actions on behalf of the government, and I think we will be defending you because I think in the event of any type of significant public health crisis that involves any kind of compulsion of a number of individuals or any individual in a particularly stringent way, in today's world, someone will run for that person to federal court and they will file a law suit. We have seen this recently in the Terri Schiavo case that ended up in a variety of state courts and ultimately in federal court, and when it gets to the federal court, the folks who will be acting on behalf of the government will be Assistant U.S. Attorneys. Now, it is going to go into a federal district court where you are going to run into a judge who probably has no experience or expertise in public health issues. Their last exposure might have been a biology class in high school, and it is not going to be someone whose background is in criminal prosecutions like mine and like most of my Assistant U.S. Attorneys because criminal cases are only going to come up if it is a bioterrorism or other criminal type of case. I have actually got a fair amount of confidence in the wake of the 9/11 attacks and the anthrax attacks that we have developed and trained our lawyers in conjunction with the CDC and other public health entities about what we do in terms of investigating and prosecuting a criminal case involving public health issues.

The people who are going to be defending these cases on behalf of the government are going to be civil Assistant U.S. Attorneys, people whose normal practice involves things like federal tort claims act and defending postal service people who backed their cars into other people and doctors who work at the VA and may have committed medical malpractice. They are going to have very little background or experience in this area, and one of the concerns and one of the values of this kind of conference is to focus our attention on the need to train those civil lawyers who work for the government in these issues.

Now, in terms of how we are going to use *Jacobson* if we had one of these cases, my view is we probably will cite it, but I do not know that it is going to do us much good. That is, because in large part, *Jacobson* establishes this balancing test, and balancing tests are good on the exact facts of the case that they decided with the same constitution of nine people on the Supreme Court, but we are 100 years later and a lot has changed and any balancing test depends in large part on the

circumstances of a particular case presented and the particular membership of the Supreme Court, and the membership of the Court has obviously changed significantly but the balance also has changed, and you can see this in the fact that *Jacobson* itself was not a unanimous opinion. It was 7 to 2. The kind of cases like, *Buck v. Bell*, that *Jacobson* has been cited as controlling in, obviously show you that the balance can be struck in ways that looking back on it, you would not necessarily agree with.

On the sides of the balance, on the individual liberty side, there has been a real revolution in the appreciation for individual constitutional liberties including the right to refuse unwanted medical treatment, which is the right usually cited. Although, I would cite another individual right too, and that is a right against compelled detention, or forcible restraint on the body, which is a fundamental right recognized in all kinds of cases, and that really goes back to the very beginnings of our constitutional history. Those rights have been really developed over the course of the last 100 years in cases as Wendy was talking about from the right to privacy cases including cases like *Cruzan*. I would note, that it is still unsettled, I believe, at the Supreme Court level whether a right to refuse unwanted medical treatment is a “fundamental liberty interest,” a liberty interest that can only be infringed by the government showing a compelling state interest that is exercised in the least restrictive means. I think that question has been left open. It clearly was not the test used in *Jacobson* which we have talked about in terms of reasonableness and necessity, and it is a test much harder to meet. The right to be free of government control of your liberty, quarantine-type cases, is I think pretty clearly a fundamental interest that would be much harder for the government to impair.

Now, on the government side of the balance, I think there is a great deal more skepticism about the government’s interest in these things and a lot of it is because of the history of bad decisions by the government of the sort that Charity laid out. I think there is a considerable amount of skepticism at all levels of the legal community and in the public when the government says, “We are doing this. We are going to lock someone up, or we are going to forcibly impose some kind of treatment on them because we know what is in the best interest of the public.” One thing that I think is pretty clear is that you are not going to see courts simply defer to legislative judgments about scientific and medical issues. One of the things that has not been talked much about in *Jacobson*, is kind of what Justice Harlan says, well, everybody knows that smallpox vaccination is a good thing and cite some studies and so forth and just kind of throws away the arguments to the contrary. I do not think that would be the case today. What you would much more likely get is a battle of experts which would come out in a hearing, not a trial probably, but in a hearing-like setting and what is interesting about those settings is they tend to give equal time to the two sides. Now, the result might be the same. The court might realize where the weight of scientific evidence is, but it would be presented to the public as kind of equal time, the way that most of our debates about political issues are. Both sides get equal time to present them even if one side is clearly right and the other side is clearly wrong, and that would come out even if scientific evidence is overwhelmingly in favor on one side, it would be presented as equal time in court. The side effect of that from a lawyer’s perspective or your perspective in trying to implement a public health emergency measure quickly is that you may be delayed because the court may put everything on hold for a while until it gets a chance to hear from everybody.

The other thing is, *Jacobson* talks about exceptions for individual cases, and in *Jacobson*, they were talking about exceptions for an individual whose own health needs would be a problem if they

were compelled to be vaccinated for smallpox. As you most of you know, there are lots of additional exceptions that are now read into the laws, particularly for religious and other kind of First Amendment oriented issues, and applying all of those exceptions today would require the application of another area of law which has not been mentioned much but really has developed entirely in the last 100 years and that is procedural due process. So anyone who claims that they had a right to an individual exception, we involve the courts in questions about what does that mean in terms of do they get a hearing, do they get notice, and do they get counsel? How much of the standard of proof is there and who bears the standard? Does the government have to prove that the person is not entitled to an exemption, or does the person ~ the individual ~ have to prove they are entitled to an exemption? I think a lot of these issues ~ and I know you have been talking about them in the context of state quarantine and other laws ~ are very unsettled, and again, from my perspective would mean we are in an unsettled situation as we deal with a crisis that may be developing on an hour to hour basis.

There are also real federalism issues of the sort that James was just discussing. We are likely to be in a situation where the local government, whether it is the city, the state, or a locality, does not want necessarily to take the kind of draconian measures that the federal government may be asking them to take to protect other parts of the area where the state government may be asking them to take, and you will get into issues about what are the federal powers in this area. One of the things that concerns me is that as I look at federal laws in these areas, they are pretty skimpy and when you are trying to go to a court and get them to take fairly severe action ~ a kind of trust the government, we are doing this for the common good action, skimpy laws leave you with a big problem.

Finally, I have mentioned there have been some statutory changes since *Jacobson*. A couple that I have mentioned, one is the Religious Freedom Restoration Act which requires if someone claims that even though a law is neutrally applied irrespective of religion, if he claims it burdens the exercise of their religious beliefs, the government has to prove that there is a compelling state interest. That is a very difficult test and one that usually requires significant evidence on the part of the government. Secondly, a law that is a little discussed until the recent enemy combatant cases, the Anti-Detention Act of 1971, provides that no citizen can be detained by the United States except pursuant to an act of Congress. The President has said that he has authority to detain enemy combatants, people fighting on behalf of the enemy, even though there is no law that specifically authorizes him to do that. Well, the Anti-Detention Act in the series of cases like *Hamdi* has been cited as saying, well, Congress did not authorize you to do that. Now, we have a federal quarantine statute, but again, it is pretty skimpy and whether that in the particular circumstances of the case where the federal government is detaining people would survive scrutiny under the Anti-Detention Act is an open question.

To sum it up, I would say that I might agree with James that *Jacobson* is still good law in its specific facts, which are pretty easy facts, compelled vaccination, compelled only by the payment of a fairly small fine if you do not want to do, it for a disease that everyone understands as a real problem and understands that vaccination is help. But even there, I am not sure because *Jacobson* is an old opinion, and again, to put it in the perspective of the enemy combatant cases, the cases where the Supreme Court had decided that you could lock up your enemies came from the Second World War, *Quirin* and *Eisentrager*, and those are the cases the government relied upon to set up Guantanamo, to detain people like Jose Padilla, believing that those cases provided the Supreme

Court authority for it. Well, the Supreme Court last term made clear that the law has changed in the interim six decades, and so whether the law that was established in *Jacobson* even on those facts would apply today, I think is an open question, but I think as you get into the harder cases, compelled treatment that is compelled by physical compulsion or criminal imprisonment or I think what is the hardest case which is actually locking someone up, quarantining or isolating them, I think *Jacobson* does not give us much direct support. It may frame the debate, but we are going to be out there flailing around a little bit as we try to find our way through these issues.

Again, one thing that I would really emphasize is that we need the guidance of groups like this to put together things like bench books and guides for everyday people who are going to be defending those actions in courts who have never heard about *Jacobson* until one day one of you locks up a group of people to keep them from spreading some epidemic disease and somebody runs to the federal court and files a writ of habeas corpus and says to a judge, “Let that person out. The state is violating their individual rights,” and some lawyer with no training in these areas has to get into court that afternoon and start making decisions. That is a little bit of a pessimistic note. My optimism is that we have focused so much more on these issues in the last few years and conferences like this really help us in organizing how we should address these issues.

**Richard A. Goodman, MD, JD, MPH**

Thanks Dave.