

# The Mask Mandate That Was NOT Found Unconstitutional



By Paul Engel

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- Yes, the CDC's mask mandate has been vacated, but it was not found unconstitutional.
- By pointing out that the CDC exceeded its statutory authority, the court effectively told the government what it needs to do in order to bring the mandate back.
- This has implications not just for public transportation, but for the ability of government to tell you how to live your life.

You've probably heard about the "ruling" from a U.S. District Court Judge in Florida that "struck down" the CDC's mask mandate on public transportation. There has been plenty of discussion about what this means, how people have reacted, and the fact that the Biden administration is appealing this decision. What has been lost in most of the conversation is that the judge did not find the rule unconstitutional. What does this fact mean for the American people?

## Background

Reading from the judge's opinion, we get some of the background for this case.

*As travelers have been reminded for more than a year, federal law requires wearing a mask in airports, train stations, and*

*other transportation hubs as well as on airplanes, buses, trains, and most other public conveyances in the United States. Failure to comply may result in civil and criminal penalties, including removal from the conveyance. This masking requirement-commonly known as the Mask Mandate-is a Centers for Disease Control and Prevention (CDC) regulation published in the Federal Register on February 3, 2021.*

[HEALTH FREEDOM DEFENSE FUND,INC., et. al. v Biden et. al. Order](#)

I've made my position on mandates clear in this column many times. I have flown with a mask, not because the government required it, but because a private company did so. Yes, they required the mask because of an illegal government order, but that was between them and the federal government. Since the airlines refused to stand up against these illegal orders, I have since stopped flying on commercial airlines.

What I want to focus on here is the case that was brought against Joe Biden and his CDC by Health Freedom Defense and others.

*In July 2021, Sarah Pope, Ana Daza, and Health Freedom Defense Fund sued various government officials and the CDC, seeking a declaratory judgment that the Mask Mandate was unlawful and to have it set aside for violating the Administrative Procedure Act (APA)*

[HEALTH FREEDOM DEFENSE FUND,INC., et. al. v Biden et. al. Order](#)

This is another example of why it is so important to go beyond the headlines. All of the reporting about a federal judge's ruling (judges do not rule, they opine), who stuck down (not true either), the CDC's mask mandate missed one very important point. The judge never found that the mandate was unconstitutional, because the suit against President Biden and the CDC never asked her to.

## Statutory Authority

The CDC claimed that Congress gave them the authority to issue the mandate under the Public Health Services Act of 1944 (PHSA), 42 U.S.C. § 264(a).

*Thus, if § 264(a) authorizes the Mask Mandate, the power to do so must be found in one of the actions enumerated in the second sentence. That sentence provides for “inspection, fumigation, disinfection, sanitation, pest extermination, destruction . . .and other measures.” § 264(a). A requirement that individual travelers wear a mask is not inspection, fumigation, disinfection, destruction, or pest extermination, and the government does not contend otherwise.*

## [HEALTH FREEDOM DEFENSE FUND, INC., et. al. v Biden et. al. Order](#)

The Public Health Services Act (PHSA) lists what the CDC can do to prevent the spread of communicable diseases. Mask mandates are not on that list. The CDC claims that this mandate falls under “sanitation”, and is therefore authorized by Congress.

*Instead, it argues that the Mask Mandate is a “sanitation” measure or an “other measure” akin to sanitation.*

*The PHSA does not define “sanitation.” If “a term goes undefined in a statute, [courts] give the term its ordinary meaning.” ... Courts often start with dictionaries. Given that the statute was enacted in 1944, the Court looks to dictionaries from the early and mid-20th century to begin its analysis. They provide two senses of sanitation that are relevant here. First, sanitation may refer to measures that clean something or that remove filth, such as trash collection, washing with soap, incineration, or plumbing. ... Second, sanitation may refer to measures that keep something clean.*

[HEALTH FREEDOM DEFENSE FUND, INC., et. al. v Biden et. al. Order](#)

Redefining words to get them to mean something that supports your position is standard practice in the legal profession. However, using a simple dictionary search, the court found that the CDC's definition didn't cover what they wanted it to do.

*Put simply, sanitation as used in the PHSA could have referred to active measures to cleanse something or to preserve the cleanliness of something. While the latter definition would appear to cover the Mask Mandate, the former definition would preclude it. Accordingly, the Court must determine which of the two senses is the best reading of the statute.*

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Administrative Procedures Act.

Since the judge dealt with the question of the mandate violating the Administrative Procedures Act (APA), we should look at that as well.

*Notice and comment does not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The Mandate invoked this exception to forego notice and comment. So, the Court must determine whether a thirty-day notice-and-comment period was "impracticable, unnecessary, or contrary to the public interest."*

*This exception "is to be 'narrowly construed and only reluctantly countenanced.'" ... It applies only "in emergency situations" or "where delay could result in serious harm."*

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Congress, when it illegally delegates its lawmaking authority to the executive branch, puts rules in place as to how an agency could go about making those rules. One of those requirements is that there be a 30-day period, so that the people would be aware of the new rule and have the opportunity to comment on it. It should be a surprise to no one that the federal government gave itself a way to get around these pesky rules. If the rules are “impracticable, unnecessary, or contrary to the public interest”, Congress said it was OK to ignore the notice and comment period. Of course, who determines what is and is not necessary or impracticable? Who decides what is in the public interest? According to the CDC, in this case, they do. But what did the court find?

*Specifically, the APA requires that an agency invoking good cause “incorporate [its] finding and a brief statement of reasons” why it believes notice and comment is “impracticable” or “contrary to the public interest.” § 553(b)(B). Courts do not defer to the agency’s conclusion on good cause. ... The Court’s review of the CDC’s determination that good cause exists “is limited to ‘the grounds that the agency invoked when it took the action.’ ... The Court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.”*

*The Mandate asserted that “there [was] good cause to dispense with prior public notice and comment” because-given “the public health emergency caused by COVID19 [-] i t would be impracticable and contrary to the public’s health, and by extension the public’s interest, to delay the issuance and effective date of this Order.” ... This statement, without more, is insufficient to establish good cause to dispense with notice and comment.*

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In other words, the CDC said that there was good cause because, in their opinion, there was. Thankfully, the court disagreed. The APA also prohibits rules and regulations that are arbitrary and capricious.

*Plaintiffs raise three arguments on why the Mask Mandate was arbitrary and capricious. First, Plaintiffs argue that the Mandate failed to comply with 42 C.F.R. § 70.2. Second, that the Mandate was substantively unreasonable. And third, that the Mandate failed to adequately explain the CDC's reasoning. Because the Court agrees with Plaintiffs that the CDC failed to adequately explain its reasoning, the Court need not address whether the substantive decisions embodied in the Mandate were themselves arbitrary or capricious or whether the Mandate violated 42 C.F.R. § 70.2.*

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In short, the court said that since they've already found that the CDC did not adequately explain its reasoning on bypassing the notice and comment period, they didn't need to deal with the question of arbitrary and capricious.

### **Judge's Conclusion**

*"It is indisputable that the public has a strong interest in combating the spread of [COVID-19]."... In pursuit of that end, the CDC issued the Mask Mandate. But the Mandate exceeded the CDC's statutory authority, improperly invoked the good cause exception to notice and comment rulemaking, and failed to adequately explain its decisions. Because "our system does not permit agencies to act unlawfully even in pursuit of desirable ends," id., the Court declares unlawful and vacates the Mask Mandate.*

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Once again, we see the conflation of the federal government with the public. Whether or not we have a strong interest in combating the spread of COVID-19, that does not mean those in government have that interest as well. Based on the actual data from the CDC about the dangers of COVID-19, I could even dispute how strong that interest might be. In either case, the court found that the CDC had gone beyond the powers delegated to it by Congress and violated the laws regarding rule making. For that reason, the court “declared” (actually the judge opined), that the mandate was unlawful and therefore vacated it.

The one question that was neither asked nor answered was: Is the CDC’s mask mandate constitutional? Because, as the supreme law of the land, if the mandates are unconstitutional there is much more at stake than being forced to wear a mask on an airplane.

## **Constitutionality**

For any act of Congress to be valid, it must be made pursuant to the Constitution.

*There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.*

## Alexander Hamilton, Federalist Papers #78

So if an act of Congress contrary to the Constitution cannot be valid, we must start there. The Tenth Amendment states:

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

## [U.S. Constitution, Amendment X](#)

Therefore, the first question that should be asked about any law is, does it exercise a power delegated to the United States by the Constitution? That includes the Public Health Services Act, 42 U.S.C. § 264(a).

*The opening sentence of § 264(a) grants the CDC power to issue regulations that “in [its] judgment are necessary” to prevent the spread of communicable disease.*

## [HEALTH FREEDOM DEFENSE FUND, INC., et. al. v Biden et. al. Order](#)

Is the prevention of the spread of communicable diseases a power delegated to the United States? No. Is the regulation of public health delegated to the United States? No. Is regulation of public transportation a power delegated to the United States? Again, no. Some may claim that these powers exists under the General Welfare Clause, but that is not what the Constitution says:

*The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;*

## [U.S. Constitution, Article I, Section 8, Clause 1](#)

Not only is the general welfare in this clause limited to the United States (the proper noun of the union of states and exactly the same subject as in the Tenth Amendment), but this clause is limited to collecting taxes, not regulating them. As James Madison said in Congress in 1792:

*If Congress can apply money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare, they may take the care of religion into their own hands; they may establish teachers in every state, county, and*



*parish, and pay them out of the public treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post roads; in short, every thing, from the highest object of state legislation, down to the most minute object of police, would be thrown under the power of Congress; for every object I have mentioned would admit the application of money, and might be called, if Congress pleased, provisions for the general welfare.*

### **Bounty Payments for Cod Fisheries, [6 February] 1792**

Others may claim that Congress and the CDC act under the Necessary and Proper Clause. Once again, that is not what the Constitution says:

*To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

### **U.S. Constitution, Article I, Section 8, Clause 18**

Congress only has the power to enact laws necessary and proper for executing the power the Constitution has vested in the government of the United States, not whatever they think is necessary.

So if the United States has not been delegated the power to regulate the public health or prevent the spread of communicable diseases, the PHS Act is not a valid law and therefore void. Not only according to Mr. Hamilton, but the Supreme Court as well.

*Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as*

*well as other departments, are bound by that instrument.*

## [Marbury v. Madison Opinion](#)

### **Conclusion**

As I asked at the beginning of this article, what does this mean for the American people? If the judge is correct and the only problem with the mask mandate is that it wasn't implemented properly, then there is nothing stopping either the CDC or another agency from reinstating it, as long as they follow the Administrative Procedures Act. If, on the other hand, I am correct and the PHSA itself is unconstitutional and therefore invalid and void, then We the People never needed to follow it in the first place. The CDC, the states and cities that run the airports, the airlines, and everyone else were following a law that did not legally exist. That makes it just like all those who were afraid to say anything when the emperor walked around with no clothes. It's worse than that though, because they also committed a federal crime.

*Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both;*

### [18 U.S.C. §242](#)

For those who used violence in an attempt to get people to comply with this invalid order, things could get worse.

*and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or*

*imprisoned not more than ten years, or both;*

### [18 U.S.C. §242](#)

You may be asking, what rights, privileges, or immunities protected by the Constitution are violated by a mask mandate?

*No person shall ... be deprived of life, liberty, or property, without due process of law;*

### [U.S. Constitution, Amendment V](#)

If you are forced to wear a mask because of a law, statute, ordinance, regulation, or custom, you are being deprived the liberty to live your life as you see fit and the property you have in the control of your body. Since no one bothered to safeguard your rights during this process, you did not receive due process.

*An established course for judicial proceedings or other governmental activities designed to safeguard the legal rights of the individual.*

### [Due Process, The Free Legal Dictionary](#)

These mandates are not based on a person's actual infectiousness or danger to others. It simply assumes everyone is guilty of being a danger to others and therefore must have their rights restricted. Once again, we see that Founding Father John Jay was correct:

*Every member of the State ought diligently to read and to study the constitution of his country, and teach the rising generation to be free. By knowing their rights, they will sooner perceive when they are violated, and be the better prepared to defend and assert them.*

**John Jay, First Chief Justice of the supreme Court of the United States**

Perhaps, if we take this opportunity to learn our rights now, we can avoid such an infringement of them in the future.