

Masking Up under Biden: The Perils of Tribalism, Bureaucracy and Lawsuits

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One crackling theme streaking through the US elections of 2020 was the issue of mask wearing. Critics initially felt that face masks were of the too important category in combating the novel coronavirus: purchasing and using them was tantamount to prizing valuable protective equipment from doctors and frontline workers. But COVID-19 continued to rage, and various public health bodies including the World Health Organization revised their initially cautious approach. Masks, manufactured in abundance, could be an affordable non-pharmacological method of halting the spread of the pandemic.

The facemask became the symbol of the now departed Donald Trump's view of the world: to don such a covering was an admission of weakness, an effete alternative to the rugged, at times idiotic notion of pioneer individualism. Had he stuck to a debate on scientific literature (causation not being correlation and vice-a-versa), he might have been on firmer ground. Instead, he preferred to dismiss mask wearing as [an act of political correctness](#).

Joe Biden, in contrast, promised to scotch any such reservations on coming to office. On August 20, 2020, he [declared](#) in accepting the Democratic nomination that his COVID-19 plan would involve a "national mandate to wear a mask." He called it "a patriotic duty" rather than an onerous burden.

The logistics for any such national policies would always be challenging and potentially imperilling. Trump, scoffing at the validity of such measures, [suggested in a press briefing](#) last year that Biden was incapable of identifying "what authority the president has to issue such a mandate or how federal law enforcement could possibly enforce it or why we would be stepping on governors throughout our country, many of whom have done a very good job and know what is needed."

A prevailing conventional view is that the province of public health and safety remains the purview and power of state governments. In 1905, the Supreme Court in [Jacobson v Massachusetts](#) held by 7-2 that states have the power to enact compulsory regulations in regulating public health. The justices were particular interested in mandatory vaccination laws, and found that, states had "the police power ... to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of public health."

In July 2020, James Phillips of Chapman University and John Yoo of UC Berkeley [expressed the view](#) that the constitutional republic would find vast federally imposed measures, even those protecting the health of the populace, problematic and undesirable. "Our founders established a national government of limited, enumerated powers, and reserved the

authority over everything else to the states.”

There was no shortness of irony in this, given Yoo’s [advice](#) to the George W. Bush administration when serving in the office of Legal Counsel advocating vast executive powers justifying, among other things, the use of torture and warrantless surveillance. During times of national emergency, the executive power expands. Not, it seems, during a public health crisis.

For all that, the authors do make valid points. Biden would have to rely on Congressional measures that he himself could enforce. One source of authorising power can be found in the Commerce Clause, empowering Congress to “regulate Commerce ... among the several States.” Mask wearing protocols might be tagged to interstate travel, though it would be problematic compelling non-travelling citizens to wear them.

According to the authors, wearing a mask might not be commercial in nature, but mandating mask wearing would increase commerce. But Supreme Court jurisprudence on the subject, notably in the [Obamacare case](#), has held that “Congress cannot create commerce in order to then regulate it.”

David Carillo of the California Constitutional Centre at UC Berkeley’s School of Law [notes](#) that Biden is on safe ground when it comes to mandating the use of masks in federal buildings and on federal property via executive order. Such a power would not extend to mandatory mask wearing “on interstate buses and trains because only the US Congress can regulate interstate commerce by law, not the president by directive.”

Legal challenges are inevitable, and Quinnipiac University School of Law’s William Dunlap [sees](#) litigants pressing courts to “look and see what Congress has done and compare the president’s rules with existing congressional rules to see whether they contradict each other or support each other.”

On January 20, 2021, the new president signed an [Executive Order on Protecting the Federal Workforce and Requiring Mask-Wearing](#), enacting regulations very much in line with Carillo’s advice. “Put simply, masks and other public health measures reduce the spread of the disease, particularly when communities make widespread use of such measures, and thus save lives.”

The order also encourages a “masking across America,” with the Secretary of Health and Human Services and the Director of the Centers for Disease Control and Prevention tasked with engaging “as appropriate, with State, local, Tribal, and territorial officials, as well as business, union, academic, and other community leaders, regarding mask-wearing and other public health measures”. The aim of such engagement is to maximise “public compliance with, and addressing any obstacles to, mask-wearing and other public health practices identified by CDC.”

A [second Executive Order](#) requires mask wearing on certain domestic modes of transportation covering airports, commercial aircraft, trains, public maritime vessels, intercity bus services and “all forms of public transportation as defined in section 5302 of title 49, United States Code.” But Biden also acknowledges that consultation shall take place between the heads of agencies and “State, local, Tribal and territorial officials” along with “industry and union representatives from the transport sector; and consumer representatives.” The fangs of the regulation seem, if not missing, then distinctly blunt.

Both orders, in other words, amount to a national mask framework of sorts but point to a grand suggestion rather than an imperative for mask wearing. The orders do little to clarify the machinery of enforcement, and how strictly the task will be pursued. Agencies will be given the lead, but this entire effort risks crumbling before the twin forces of confused bureaucracy and dedicated tribalism. Republicans are already promising derailing lawsuits. Representative Chip Roy (R-Texas) preferred the more vulgar alternative. "On day one," [he tweeted](#) in December in response to Biden's promise, "I will tell you to kiss my ass."

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