



Could the President or Congress Enact a Nationwide Mask Mandate?

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As Coronavirus Disease 2019 (COVID-19) cases continue to [rise](#) in the United States, the Centers for Disease Control and Prevention (CDC) has [called](#) on Americans to wear non-medical cloth face masks in public settings and when social distancing measures are difficult to maintain. [According](#) to the CDC, the latest available case studies show that face masks—particularly when used universally within a community setting—can slow the spread of COVID-19. In response to the latest case surges, a [growing](#) number of states and localities have instituted jurisdiction-wide mandates requiring the use of face masks under specified circumstances. At the same time, mask wearing remains largely voluntary in many states. Recently, Georgia’s governor [suspended](#) broader mask mandates instituted by at least 15 localities across that state, limiting the requirement instead to certain [discrete](#) circumstances (e.g., to workers of certain personal care businesses while providing services to patrons). Amidst these varied approaches, [several public officials](#) have begun to call for a federal nationwide mask mandate to stem the tide of COVID-19 cases. This Sidebar provides an overview of the relevant federal authority to issue such a mandate, as well as other legal considerations for Congress. (Federal authority to mandate mask wearing in more limited settings, such as within certain federal properties, is beyond the scope of this piece).

Executive Branch Authority to Mandate the Wearing of Face Masks

There are no existing federal laws that explicitly address mask wearing for public health purposes, but certain existing authorities could potentially form the basis for such executive action. One such law could be [section 361](#) of the Public Health Service Act (PHSA). That provision, which has been [characterized](#) as “broad [and] flexible,” grants the Secretary of Health and Human Services—[delegated](#) in part to the CDC—the authority to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” A broad [construction](#) of this authority may permit the CDC to issue regulations mandating the use of masks in circumstances that would prevent the foreign

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or interstate transmission of COVID-19. CDC's exercise of this authority would nevertheless be restricted by the Constitution and other generally applicable statutory requirements, such as the Administrative Procedure Act or the Religious Freedom Restoration Act of 1993. The latter statute [requires](#) courts to grant certain religious exemptions from a generally applicable rule that imposes a substantial burden on a regulated person's religious exercise.

On the other hand, the structure and language of section 361 may subject it to a narrower construction. Following the broad statement of authority identified above, section 361 provides that “[f]or purposes of carrying and enforcing such regulations,” the agency “may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [its] judgment may be necessary.” The remaining subsections of section 361 further contemplate the issuance of regulations related to the apprehension, detention, examination, and conditional release of individuals for purposes of preventing the spread of communicable diseases. Given this structure and language, regulations issued pursuant to this authority have primarily been confined to two general types of control measures: (1) [quarantine and](#) isolation measures of people and goods (administered by the CDC) and (2) measures that [control](#) or treat areas, animals, or articles that are susceptible or subject to contamination or infection (administered by the U.S. Food and Drug Administration (FDA)). This limited construction may be consistent with a [canon](#) of statutory interpretation that confines the meaning of a general term (e.g., “other measures” deemed necessary by the agency) to matters comparable to the more specific terms enumerated in the statute. Further complicating the analysis is the evolving [political](#) dimension of the mask mandate debate. In assessing an agency's statutory authority, the Supreme Court has [cautioned](#) that courts must “be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of [significant] economic and political magnitude to an administrative agency.” In light of these considerations, it is therefore difficult to predict whether courts would conclude that the CDC's authority under section 361 would extend to the nationwide mandating of face masks.

Congress's Authority to Mandate the Wearing of Face Masks

Congress's authority to act legislatively on this subject [derives](#) from its enumerated powers in the Constitution. In this context, the Spending Clause and the Commerce Clause of the Constitution [are](#) two potential sources of such authority.

The Spending Clause empowers Congress to tax and spend for the general welfare. Under this [authority](#), Congress may offer federal funds to nonfederal entities and prescribe the terms and conditions under which the funds are accepted and used by recipients. This power is generally expansive, but funding conditions when applied to the states are subject to certain [limitations](#). Applying this authority in the context of a mask mandate, Congress could incentivize states to enact a mask mandate meeting certain federal requirements by imposing it as a condition of receiving certain federal funds. This use of the Spending Clause authority, assuming it falls within the broad parameters of being for the “general welfare,” would be permissible so long as (1) Congress provides clear notice of the mask mandate that states must enact; (2) the mandate is related to the purpose of the federal funds; (3) this conditional grant of funds is not otherwise barred by the Constitution; and (4) the amount of federal funds offered is not “so coercive as to pass the point at which pressure turns into compulsion.”

The Commerce Clause [grants](#) Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This authority [empowers](#) Congress to regulate “three broad categories of activities”: (1) “channels of interstate commerce,” like roads and canals; (2) “persons or things in interstate commerce,” and (3) activities that substantially affect interstate commerce. While Congress's authority under the Commerce Clause is expansive, a majority of the Supreme Court in *National Federation of Independent Business (NFIB) v. Sebelius* agreed that there exists a discrete limit to this authority—that Congress [cannot](#) compel individuals to engage in commercial

activity. According to Chief Justice Roberts, in a portion of the opinion [not](#) joined by other justices but largely [echoed](#) by the view of the four dissenting justices, the Commerce Clause does not empower Congress “to regulate individuals precisely because they are doing nothing.” While it is uncertain whether this conclusion [constitutes](#) binding precedent, it suggests that a broad mandate (e.g., one that generally requires individuals to wear masks) may be particularly susceptible to challenge because such a mandate could be construed as compelling individuals who are “doing nothing” to engage in an activity—mask wearing—that is not even a commercial activity. On the other hand, a federal mandate that requires mask wearing as a condition to engage in existing economic activities, such as employment or patronage of certain businesses, [may](#) raise less serious constitutional concerns.

In addition to the limits that inhere in these authorities, Congress’s exercise of these authorities is also subject to certain external constraints. In the context of public health regulations, the [key](#) constraints are those grounded in federalism and the protection of individual rights. Pursuant to the principles of [federalism](#), the Supreme Court has [interpreted](#) the Tenth Amendment to prevent the federal government from commandeering or requiring state officers to carry out federal directives. This principle thus prevents Congress from requiring states or localities to mandate masks. It does not, however, impede Congress from using its Spending Clause authority to incentivize states to do so, as long as the amount offered is not so significant as to effectively coerce, or functionally commandeer, states into enacting the mandate.

In terms of protection of individual rights, there may be a few external constraints on Congress’s ability to impose a mask mandate. In a recent [order](#) denying a church’s request to enjoin, pending appeal, the enforcement of an Executive Order in California that, among other things, restricts public gatherings including at places of worship, Chief Justice Roberts observed that such public health decisions during a pandemic are primarily entrusted to politically accountable officials. The Chief Justice cautioned that those decisions, undertaken “in areas fraught with medical and scientific uncertainties,” are subject to only “broad limits” and “should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.” As a consequence, any challenge to a mask mandate may have to overcome general judicial hesitation to invalidate a public health regulation during the midst of a pandemic.

Nevertheless, as more states began to implement mask mandates, some have challenged the mandates as exceeding various provisions of the bill of rights. Challengers have, for instance, [argued](#) that the act of mask wearing is an expressive conduct that implicates the First Amendment right to freedom of speech and the right against compelled speech. In a recent case challenging Maryland’s face covering requirement, certain veteran plaintiffs [argued](#) that face covering is an expressive conduct that conveys a “sign of capture on the battlefield, and subservience to the captor.” In rejecting this argument, the court concluded that “especially in the context of COVID-19”—which the court observed is an ongoing public health crisis “more severe than any seen for a hundred years”—“wearing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message.” In general, courts faced with challenges of state COVID-19-related mandates (such as restrictions on gatherings) [based on](#) the First Amendment’s Free Exercise Clause have also concluded that this constitutional concern is mitigated under *Employment Division, Department of Human Resources of Oregon v. Smith* and its progeny. In *Smith*, the Court held that neutral, generally applicable laws (i.e., ones that do not target specific religious groups)—which would include a general mask mandate—are subject to limited scrutiny under the Constitution.

Other Legal Consideration for Congress

In considering the choices among available authorities, Congress may wish to consider certain unique enforcement challenges posed by a direct federal mask mandate. In general, enforcing mask mandates has been a challenge [even](#) for states, which can leverage their state and local law enforcement apparatus to

enforce such mandates ([typically](#) through ticketing and fines). This general enforcement apparatus, however, is not available to the federal government, which [lacks](#) states' general police power and, as discussed above, cannot commandeer state officers to carry out federal directives, risking enforcement gaps in the context of federal public health regulations. For instance, even though section 361 of the PHS Act empowers the CDC to issue quarantine and isolation orders to prevent the spread of communicable disease, the CDC—as a public health agency—has no law enforcement apparatus to independently enforce such orders. [Section 365](#) directs customs officers (e.g., U.S. Customs and Border Protection (CBP) officers) and U.S. Coast Guard (USCG) officers to aid in the enforcement of quarantine and isolation rules and regulations. In practice, however, under the cooperative [Memorandum of Understanding](#) between HHS and the Department of Homeland Security that implements section 365, CBP and USCG's role is limited to providing enforcement support only at ports of entry (i.e., when screening passengers arriving from foreign countries), and primarily [when](#) transporting a person to a medical facility. As a result, this authority is [historically](#) rarely invoked. The CDC in fact asserted its quarantine authority—which [restricts](#) the movement of individuals exposed to a contagious disease—in the context of COVID-19 for the [first](#) time in 50 years. In the handful of times the CDC has invoked its isolation authority—which separates an infected individual from those uninfected—it has [typically](#) rescinded its federal isolation order after the first 72 hours of detention once a local public health authority has agreed to accept custody of the patient. This landscape means that, depending on the scope of a direct federal mask mandate, there may not be an existing federal mechanism suitable to enforce it.