Mask Mandate – Liberty Can Hang on One Word

As I mentioned recently, whether the courts protect or violate liberty in any given case is something of a coin toss. The matter could hinge on a single word. We just had a good example of that fact.

On April 18 U.S. District Judge Kathryn Kimball Mizelle, a Trump appointee in Tampa, Fla., ruled that the Centers for Disease Control exceeded its statutory authority when it mandated that most people wear masks when using public transportation in order to stem the spread of COVID-19. (*Health Freedom Defense Fund et al. v. Biden*.)

The judge's ruling hinged on a single word in §264(a) of the Public Health Services Act of 1944, on which the CDC claimed its authority: *sanitation*.

§264(a) states:

> The Surgeon General [or CDC apparently], with the approval of the [HHS] Secretary, is authorized to make and enforce such regulations as in his judgment are 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. For purposes of carrying out and enforcing such regulations, the Surgeon General [or CDC] 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 his judgment may be necessary.

For Judge Mizelle the question came down to exactly what *sanitation* means and whether mask-wearing is a method of sanitation. The answer depends, she said, on the sense, that is, the context, in which the statute uses that word.

She wrote: "A requirement that travelers wear a mask is not inspection, fumigation, disinfection, sanitation, or pest extermination, and the government does not contend otherwise." But, she added, the CDC does contend that the mask mandate is "akin to sanitation."

The judge rejected that contention. The statute does not define *sanitation*, so she relied on dictionaries for guidance, finding that the word refers to both cleaning something and keeping it clean:

> The context of §264(a) indicates that "sanitation" and "other measures" refer to measures that clean something, not ones that keep something clean. Wearing a mask

> cleans nothing. At most, it traps virus droplets. But it neither "sanitizes" the person wearing the mask nor "sanitizes" the conveyance. Because the CDC required mask wearing as a measure to keep something clean — explaining that it limits the spread of COVID-19 through prevention, but never contending that it actively destroys or removes it — the Mask Mandate falls outside of §264(a).

Mizelle had much more to say on why the second sense of the word doesn't apply, and she rejected other CDC claims.

My point is not to take issue with the result. I am delighted the CDC — one of those "expert" regulatory agencies that have effectively become unelected legislatures unto themselves — was reined in. Throughout the pandemic the CDC has tried to seize one unprecedented power after another. Fortunately it has not gone unchecked. When it imposed a moratorium on apartment evictions and forbade the cruise industry from operating, the courts said no. Now a court has said no to the mask mandate.

Rather, my point is that freedom can hang by a very thin thread. Judge Mizelle made a good case that in this statutory context, mask-wearing is not a method of sanitation. But what about the next judge who hears a CDC or other power-grabbing case? (As we've seen repeatedly, the party of the nominating president gives no assurance.) As former President Clinton aide Elaine Kamarck shows, it wouldn't have been a stretch for a judge to have upheld the mandate, and most Americans wouldn't have thought the reasoning off the wall. The difference between Mizelle and Kamarck looks like hair-splitting. But liberty is too precious to be left to hair-splitting.

As I wrote in 2009, after soon-to-be Supreme Court Justice Sonia Sotomayor assured the Senate Judiciary Committee that a "judge applies the law [and not her feelings] to the facts" of the case:

> Nothing in human affairs is that simple. Judgment and interpretation are required every step of the way. This is why, contrary to popular fable, the line between the rule of law and the rule of men and women is so fine as to be nonexistent. (See John Hasnas's important papers "The Myth of the Rule of Law" and the "The Depoliticization of Law" [pdf]). Laws, which are intended to be applied to an unlimited number of unforeseeable future circumstances, do not speak for themselves. Human beings must interpret them. This does not mean language is inherently impenetrable. (I could hardly write if I believed that.) However, there is a broad middle ground between impenetrability and perfect clarity. As libertarian legal scholar Randy Barnett noted, "While I do not share [the] view of law as radically indeterminate, I sure think it is a whole lot more *under*determinate than Judge Sotomayor made it out to be in her testimony today."

Where does that leave us then? It leaves us with the question asked by the classical liberal legal philosopher Bruno Leoni, author of *Freedom and the Law* (1961): "It is a question of deciding whether individual freedom is compatible in principle with the present system centered on and almost completely identified with legislation." What's the alternative to legislature-based law? Leoni wrote: "Both the Romans and the English shared the idea that the law is something to be *discovered* more than to be *enacted* and that nobody is so powerful in his society as to be in a position to identify his own will with the will of the land."

It was law that judges discerned when resolving specific disputes brought before them by specific individuals; it was law based on custom and the reasonable expectations it gave rise to. The system stood in contrast to legislature-made rules that are later interpreted by judges. It wasn't a perfect system, but the comparison is not to Utopia but to what legislatures and judges routinely do. Leoni likened judge-discovered law to the spontaneous order of the free market and legislature-made rules to central economic planning:

> No solemn titles, no pompous ceremonies, no enthusiasm on the part of applauding masses can conceal the crude fact that both the legislators and the directors of a centralized economy are only particular individuals like you and me, ignorant of 99 percent of what is going on around them as far as the real transactions, agreements, attitudes, feelings, and convictions of people are concerned.

Under the best of circumstances, conventional political systems are dodgy places to seek the protection of liberty, even in matters of public health, where property rights, contract, and voluntary community should reign supreme. (On the efficacy of masks, see this.) If the mask-mandate case isn't convincing enough, have a look at the leaked draft of Justice Samuel Alito's draft opinion in the Supreme Court's latest abortion case.