

MMITM Ep 23 - Constitutional Law Professor Adam Winkler: Legal Issues Around Coronavirus

Announcer: From Curtco Media, what are you gonna do about.

Bill Curtis: Well, we're all coming to terms with our stay at home existence, health risks and nosediving economy. We've brought together a distinguished panel to discuss the unique, somewhat uncharted roads of governance, little known constitutional rights and obligations that exist during a pandemic. Welcome to a Corona focused edition of Politics, Meet me in the Middle. I'm Bill Curtis here alone in a sanitized studio in Malibu, California. My co-hosts here, well, not really here, but remotely connected via Zoom, starting with our Pulitzer Prize winning historian, author and professor are socially distant database of everything historical. Ed Larson. Hey, Ed, how you doing?

Ed Larson: Great to hear you again.

Bill Curtis: And also from her home, Jane Albrecht, our well-researched protector of commonsense and critical thinking. Jane is an international trade attorney who has represented U.S. interests in Washington and Europe, Russia and then some. She's worked on numerous presidential campaigns. And frankly, she's our resident conscience. Our special guests and constitutional authority, Adam Winkler. He's a lauded professor at UCLA Law School. He's a specialist in American constitutional law and the Supreme Court. He's published award winning books like *We the Corporations* *How American Businesses Won Their Civil Rights*, which feeds into some of our subjects today, as well as *Gunfight, the Battle over the Right to Bear Arms in America*, which is a remarkably independent, meet me in the middle sort of approach. And he can be found on CNN, ABC and Face the Nation. And now he's finally made it. He's on Politics. Meet me in the Middle. Welcome, Adam.

Adam Winkler: Thank you so much for having me. It's a real pleasure.

Bill Curtis: Adam, before we really get started, we understand you're also a child star. You had a role as the son of Robert De Niro and Liza Minnelli. I'm not sure how you

ever survived their upbringing in New York, New York. Why did you go the law route rather than Hollywood?

Adam Winkler: Right. I mean, I grew up in a Hollywood family. And in fact, everyone in my family, my immediate family is in the entertainment business with the exception of me. I was in a movie directed by Martin Scorsese, starring Robert De Niro and Liza Minelli, a movie called New York, New York. I don't know, having worked with Martin Scorsese and Robert DeNiro, I kind of feel like I have peaked at a very early age and there was nothing left for me in the industry.

Bill Curtis: Getting back down to business, Ed we usually like to start this kind of discussion off with you. And I'd like to talk about your latest op ed in the Hill about continuing on with our elections in the wake of a pandemic. Do you really envision that if we're on some kind of semblance of safer at home or social distancing, we should or even can proceed with a timely election?

Ed Larson: Sure. We certainly have a lot of free time and we can vote by mail. We held presidential elections and federal elections at the height of the Civil War, at the height of World War 2, during World War 1, during the Spanish Flu. We held them all those times and they all worked. It is the lifeblood of our democracy. We wouldn't be America without elections. The constitution, in fact, requires them.

Bill Curtis: Jane or Adam, can you describe how you would see this election playing out? I'm having trouble seeing this as a workable environment.

Jane Albrecht: My understanding is that if there is no election, that as of January 20th or 21st, 2021, Trump and Pence would no longer be President and Vice President, at which point you would probably have the, person who would take over would be the Speaker of the House, which in this case is Nancy Pelosi. Ed, can you comment on that?

Ed Larson: Sure. Janes is correct. The Constitution is absolutely clear. The terms of our president and vice president by the Constitution end on January 20. There's another federal statute that says the federal elections must occur on the first Tuesday after November 1st. Now, states don't have to use elections to pick their electors. They could

do it by their legislators. They could do it any way they want to. But if they use elections, it has to occur in this year, November 3rd. There's no choice about that. There's no way to change the Constitution because it has to be by constitutional amendment. The only way to change the federal statutes when these things have to happen is by an act of Congress passed by both houses of Congress and signed by the President.

Bill Curtis: So, Adam, I wonder if we could bring you in here. And I'd like to ask you, do you think that we're in for a repeat of the 2000 Bush-Gore election where the Supreme Court's going to have to decide who our next president is or whether or not this election was properly held?

Adam Winkler: I do think that we are in for a repeat of Bush versus Gore. Not necessarily that we're going to see the Supreme Court step in and decide the winner, as we saw in Bush versus Gore. But the underlying problems that led to the Supreme Court's intervention in that case are likely to befuddle this current election, too, especially if we have to make major changes for accessibility in light of the corona virus. You know, it's a problem that we don't have an election system in our United States. We have 51 election systems with the District of Columbia and every different state has its own process and its own secretary of state, and they're running things their own way. And that was part of the problem that led to Bush versus Gore in the sense that there was a state that was out of control. And we are we're likely to see, again, wide divergences between the states in terms of how they respond to this crisis, as we're already seeing significant variation in how the states have responded. So this restructuring the election system so that we have a meaningful election is going to be more of a challenge than one might imagine.

Jane Albrecht: Whether we have a Supreme Court contest to this election or not I do think will depend upon how close the election is. I think Trump and the GOP would not hesitate to challenge if they could flip the election. But to have to challenge the legitimacy of the elections in many states in order to get what they want is a political calculation that Trump may be willing to do. But even some of the GOP may be hesitant to do.

Bill Curtis: I just foresee a Supreme Court process that may be a longer, more arduous, more difficult process than the one we experienced in 2000.

Adam Winkler: And the thing to remember about 2000 was that it was unnecessary. You know, the Supreme Court

Jane Albrecht: Absolutely.

Adam Winkler: did not need to get involved. You know, actually, the Constitution has a whole bunch of provisions and it's been amended on this very basis since its original architecture to deal with contested elections. There's a whole institutional way of doing it, a whole process with it. So we don't, really the Supreme Court didn't need to step in. And I would hope that one lesson that the justices may have learned since Bush versus Gore is that they didn't need to step in to decide that election and that they only did harm to themselves. We'll see what happens. You know, there are principles in Bush versus Gore about the presidential election not really being a federal election, but the presidential elections is a state election, and that the states can really do almost anything they want with the state legislature can keep it to itself. And we'll see if states move to something like that. I doubt it. I think what we're going to see is probably variation in terms of access. And then you're going to have some states that are on the frontlines are going to say, we want to make it easier for people to vote and we want to give people vote by mail and things like that, things that they didn't already have.

Ed Larson: We, all through American history, states have conducted voter suppression. That's what they do. Some suppress votes. Some don't. Federal courts have never gotten involved in that. Well, it is a federal election every two years. It is a state run federal election. An absolute. I totally agree with Adam. These are ones that turned over to 51 different jurisdictions. And those jurisdictions can basically conduct them any way they want to.

Adam Winkler: The one thing we can predict is that this will burst some very interesting, unexpected litigation, raising an issue that we wouldn't have predicted in advance, but that we'll be all occupied with in about six months time. Let's hope it turns out to be a minor and insignificant one, but only certainty is that there's going to be litigation because there are going to be changes.

Jane Albrecht: Yeah. Yeah, I would agree with you.

Bill Curtis: Ed, this is going to be then a question for you. In our history, what are some of the circumstances where there was thought to be tremendous fraud in the paper balloting and poll place voting?

Ed Larson: Well, before we had the Australian ballot, the ballot we customarily do now, you had party ballots and there was just case after case where people would, party workers in different precincts would stop the ballots or count them in different ways. You know, we've had a long history of problems here and there. But what they are is, they were like in the, with the election we've been talking about, 2000. What we had in 2000 is an election that literally was too close to fairly call. But when you have a sea change election like the election of Reagan or Eisenhower, Roosevelt, there's no amount of cheating and tinkering that's going to affect the results.

Bill Curtis: Ok, let's switch this over to Adam. I want to talk a little about the pandemic. The laws of quarantine. What are government's powers and things like shelter in place orders and civil liberties and how that relates to the Constitution? Adam, tell us, are there specific laws and constitutional rights in place for such a circumstance?

Adam Winkler: Well, you know, it's surprising where we live in a time in which this kind of quarantine seems like such a foreign experience to all of us. It's so bizarre. But of course, for the first hundred twenty some years of American history, after the founding of the Constitution, we had lots of quarantines. They weren't nationwide quite like the one we're having here. But the quarantining of vessels, quarantining people on land to our contagious diseases. This is something that public health authorities faced all the time. And in fact, the battle to fight these contagious diseases from cholera, yellow fever, things like that, really provided the real basis for the rise of government in the 19th century, where we see the rise of government regulation of how you can live, where telling you you have to throw out your trash in a certain way and they have that trash disposal in a certain way. You can't slaughter animals in your home. And what not, all done to prevent these kind of contagious diseases that were early versions, if you will, of coronavirus.

Bill Curtis: So does our federal government have the right to shut us down, kind of in a Wuhan style?

Adam Winkler: Well, there is one of the real questions that we're seeing is how this pandemic affects civil liberties. There's a whole bunch of things that are happening in the pandemic that raised constitutional questions. What is the power that states have to force you to stay at home? A shelter in place order, stop you from doing business, stop you from using your property, stop you from going to religious assemblies, stop you from going to political assemblies. You couldn't do a political convention today in California if you had one scheduled because the law doesn't allow you to do it. So that's you know, that's a real constitutional right that would be burdened in this way. Courts are shut down. We see states discriminating against other states. There's a lot of constitutional issues that are arising. One of the interesting things is that they arise in a time of civil liberties. But the civil liberties era of American jurisprudence really starts after the great influenza of 1918 and really takes off in the years immediately after that. And in the 20s and 30s and 40s. And interestingly enough, we haven't thought about how these civil liberties really work in a time of some kind of global pandemic.

Bill Curtis: Help me understand the difference between what's the federal rights and obligations are in a pandemic and what the state obligations and rights are.

Jane Albrecht: That's a good question. A complicated one,

Adam Winkler: A complicated one. But one of the things that we definitely see is that just like we talked about with regards to Ed's op-ed about voting in the November election, and one of the problems that besets that kind of reform in that space is that it's so many different elections. The states lead and control the electoral process. It's the same thing really with the pandemic. Actually, throughout most of the course of American history, you have states leading the charge in the battle against pandemics of public health crises like this. And the federal government really comes in and plays an assistant role.

Bill Curtis: Does the Fed have the right to overrule the state?

Adam Winkler: One of the things that we find especially is that in dealing with an emergency pandemic of a health crisis like this is that the traditional limits on power really fall by the wayside. I think that while the president obviously wouldn't be able to

shut down traffic between states in an ordinary time, I think not only would he have the ability to do it, asserting emergency powers both under statute and under his inherent presidential powers, might suggest that that's exactly what the framers envision the President's emergency powers to be for. I also don't think the courts would step in and stop the president from doing something like this if it was genuinely thought to be in the interest of public health and not say, you know, to enforce the provisions of the Voting Rights Act.

Bill Curtis: You know, we're going to take a really quick break. I'm going to go gargle with purell. So we'll be right back in a swallow.

AMOYT - promo: Hello out there. This is Jenny Curtis. I am a podcast producer at CurtCo Media and I am currently sitting alone in a very empty podcast studio surrounded by hand sanitizer. And I'm recording this in an effort to reach out. It's not an easy time right now. We don't know what the day to day is going to look like for the next few weeks, even months. So I'm proposing something. Let's all make something together. Curtco Media has launched a podcast called A Moment of Your Time. These are bite sized episodes and each one features you out there. Go to Curtco.com/amomentofyourtime for more information. We may have to stay apart but let's create together.

Announcer: What you gonna do about.

Bill Curtis: So we're back and it turns out you're not really supposed to gargle with Purell. It tastes disgusting. Adam POTUS named Gun sellers an essential business. I wanted to see how you felt about that.

Adam Winkler: Well, this is one of the big issues that we're seeing in terms of constitutional rights that are potentially violated in the time of pandemic. We've seen the closing and shuttering of businesses that are deemed non-essential. And one of the issues in which we have seen division among the states, talk about federalism once again, is over whether gun stores in particular are considered essential businesses or not essential business. I can imagine an argument for why they aren't really essential businesses. At the same time, you do have a constitutional right to have a firearm and the government should be very hesitant before it puts some limits on those

constitutional rights. So states have gone in different directions on this. I mean, one thing I do note is that it does seem like there's a lot of stores that are open that don't exactly seem like essential businesses, but nonetheless, we want them to be open to provide basic services that, I see construction happening everywhere. There's a lot of restaurants that don't really need to be in business, but they're in business and we kind of want them to be. Because otherwise they're going to go under. They don't, I don't know, I think our notion of what counts as an essential business is not very strong or well-thought out to begin with.

Bill Curtis: Well, Adam, let me put you on the spot, then, because if you had written about this in your book, *Gunfight*, what kind of position would you have taken on this issue?

Adam Winkler: Oh, very interesting. Well, I don't know. I will say that I do understand why people would want the right of self-defense in a time of crisis. I think that's a very human emotion and very predictable that people will feel that way and people will want to arm up in these kinds of situations. At the same time, people should be aware of the knowledge and the data that show that having a gun in your home makes it that you or your loved one are the most likely victim of that gun ever being fired. So it is a danger and people should be very concerned about that.

Bill Curtis: Let's talk a little bit about how the press is being used during this time. And between the constant refrain of fake news and these kind of wars, between what the press is saying, what our leaders are saying, are we kind of undermining the role of media in their effort to help convey a legitimate message here in a pandemic?

Adam Winkler: I think so. I think, you know what, we have really demonized the media in America over the last 10, 15 years, and it's changed the public understanding of the reliability and trustworthiness of our mainstream media outlets. And when it comes to a story like this, a public health crisis where you really, we need to rely on experts, and that's not really just a matter of perspective. It's a space where we really need sources of information that we really trust. But when the president sees NBC and says, hey, you know, you're from Comcast, not Comcast. He likes to emphasize but Comcast, then people are not likely to take seriously what they hear on that media outlet. And indeed, we saw that play out with the Corona virus itself when a lot of media reports on Fox

News, for instance, and other outlets called this a Democratic hoax, that this was basically the discussion of this pandemic was just a way to get Trump. And so we don't really have that same kind of trust of media sources. At the same time, we should recognize that those trusted media sources were really just a very small moment in time, as Ed knows about newspapers back in a lot of the periods that he's written about. They were all almost always partisan shells and had very little reliable information in them. And so maybe we're just moving back to an older era where the media is your chosen outlet and it tells you what you want to hear in the most outrageous way possible without any real nuance or sophistication or the other side's views taken seriously.

Bill Curtis: Tell me, are these updates that we see every day by governors and the president or are they really designed to give a message of hope and the facts that we need or they really campaign and political rallies?

Adam Winkler: You know, I think that we've seen governors really step up and play the role of both a bully that the bully pulpit allows them to be to get people to get in their homes. We've seen governors really take command, use the media as a way to communicate with the federal government. It does seem like television is the best way to communicate with Trump if you need to. This is not all for show. These are governors doing highly unpopular things, telling people to stay inside their homes and to stop hanging out with the people that you want to and go out with, To put your restaurants, your favorite restaurants out of business and other stores. These are very unpopular actions. I think that what we're seeing is a lot of leadership taking taking it seriously and taking a stand because it is the right thing to do.

Ed Larson: I agree with Adam. I think there's a little bit of both on these. There is a little bit of substance and there's a little bit of show. But I think that was true, say, with Franklin Roosevelt's amazing fireside chats. They were also, they were both political, but they were also had a substantive element. They were trying to cajole and to lead. And so when you get Trump, if he gets to put on two hours of talking every day, he makes some political comments. He provides other information. And I think you see the same thing with Governor Cuomo in New York.

Bill Curtis: What can the government demand from both people and companies in order to bail out the situation?

Adam Winkler: Well, the government can demand a lot. And truth be told, you know, there is a law that Congress has passed giving the President the ability to nationalize certain industries for the purposes of fighting this crisis. He could invoke those laws to make ventilators, for instance, or other kinds of equipment. The president has not chosen to do that. But there is some authority to really get people to force people to do what they don't want to do. It's interesting, again, that, you know, we had just in recent years, one of the biggest Supreme Court cases was whether the Congress had the authority to force you to get off your couch and buy health care. And the idea that everyone would require health care at one point in their life was kind of pooh-poohed. But all of a sudden, health care again is now seen as something that you have kind of a right to. And we've seen one of the one of the very first pieces of reform passed by Congress is providing for free testing, for instance, recognizing that actually we need this help and you need this assistance. It will be very interesting to see from the historian's perspective what really gets changed as a result of this pandemic. I know I, for one, am never going to shake anyone's hands or give a High-Five again. Those are done, over.

Ed Larson: In an additional answer to your question, that the government can put any strings it wants to on the government, on the aid it gives to corporations. They've already said that corporations getting this money are not supposed to use it for stock buyback. These are things that the people may well demand as part of the people bailing these places out. They may well demand all sorts of restrictions. We saw a few put in the first bill. As more and more bills roll out we may see more and they're perfectly free to do so.

Adam Winkler: So I think that's generally right. But I do think that there are some limits. Right. So we couldn't see Congress insisting that companies forsake making political expenditures for receiving this money. You couldn't force Hobby Lobby to forsake its constitutional rights and its religious liberty as one of the conditions that you impose. On the doctrine that is pretty confusing in the Supreme Court, there's a doctrine called unconstitutional conditions. And it says that while government generally can condition

the money that it provides, either in loan or in a direct grant form to entities, generally it can't force them to forsake constitutional rights.

Jane Albrecht: One question I have is, as you know, the Supreme Court has twice affirmed the legitimacy of the Affordable Care Act or Obamacare. There's a case again before the Supreme Court that addresses that issue. How do you think the pandemic may affect the Supreme Court decision to legitimize or not legitimize the Affordable Care Act?

Adam Winkler: I don't really have a prediction about how it will influence them. But one of the things about the current Supreme Court and how it was comprised, the judges who are in those robes, I should say, are there because generally they have pretty firm judicial views on the major issues of American politics. And they're chosen for that reason. And I think as a result, they, it's a pretty, I think, relatively headstrong group of people who are probably feeling that they won't let crises undermine their philosophies and their beliefs. But the Supreme Court's already institutionally been really affected. They're not hearing all the cases that they were hearing before. They put on hold a whole bunch of cases, including an important case involving Donald Trump and whether there'll be access, Congress will have access to his financial records and his tax and his tax forms of previous years.

Bill Curtis: So what do you see them doing about that? Do you see them making a ruling?

Adam Winkler: I see them pushing it off to next term. I think a lot of people are hoping that a lot of that ruling will come down before the election. But I think that the, I think I'd be surprised if the Supreme Court meets again. It has not announced that the term is over for the term, but everything seems to be moving into January in terms of the cancellation schedule now. I expect the Supreme Court will be canceling the rest of its oral arguments and waiting till next term to figure out what they want to do.

Bill Curtis: Adam and Ed, as we wrap this chat up, are there any other constitutional issues that are really being stretched in this pandemic that perhaps we weren't prepared for in the past or I'm not sure how they're going to play out going forward.

Adam Winkler: Yeah, there's a whole bunch of constitutional issues that are raised by this pandemic. We've seen stores that sell guns that are being closed in some states as non-essential activities, abortion clinics being shut down. Obviously, there are very serious consequences for people. We're seeing disability discrimination by state or county hospitals with a shortage of ventilators are taking into account the health status of someone before they give them a ventilator. I think we are going to see a whole number of constitutional issues raised and it kind of depends on how bad it gets. We've already seen states impose limits on travel into their states, something that states probably certainly have the right to do under their traditional understanding of their police-powers, but also runs afoul potentially of the right to travel that is guaranteed by the Constitution. So I think there's a whole bunch of really interesting constitutional issues. And when we turn to the election, we get Ed's op ed that was so important talking about the importance of voting. We're going to see some real issues with regards to how the pandemic plays out with the right to vote and access to the ballot in ways that will make maybe our debates over voter I.D. seem quaint and yesterday.

Bill Curtis: Well, Adam Winkler, Jane Albrecht, Ed Larson, let's get together again when we can think of something non corona. Everybody stay safe. Stay healthy. It has been a pleasure. See you next week on POLITICS. Meet me in the Middle.

Bill Curtis: If you like what you hear, please tell your friends and let us know how we're doing by leaving a comment. It really helps if you give us a five star rating and we really appreciate it. You can also subscribe to the show on Apple podcasts, Stitcher or wherever you listen to your favorite podcast. This episode was produced and edited by Mike Thomas. Audio Engineering by Michael Kennedy. And the theme music was composed and performed by Celeste and Eric Dick. Thanks for listening.

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