



## Masks, Planes, and the CDC Mandate

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**[00:00:00] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan, non-profit, chartered by Congress, to increase awareness and understanding of the constitution among the American people. On April 18th, a Federal Judge in Florida struck down the Center for Disease Controls mask mandate, on airplanes, trains, buses and other public transportation.

**[00:00:32]** In her opinion, Judge **[Mizelle 00:56:45]** said that CDC had exceeded its legal authority, the U.S. Department of Justice plans to appeal the decision. It's wonderful to be joined by two experts on constitutional law and the administrative state, and two great friends of We the People, to help us understand the legal arguments on both sides of the decision, and the broader debate about nationwide injunctions. Michael Dorf is Robert S. Stephens, Professor of Law at Cornell Law School. He also writes a bi-weekly column for Justia's website, Verdict, and post several times on his own blog, Dorf on Law. Mike, welcome back to the show.

**[00:01:16] Michael Dorf:** Thanks, it's great to be here.

**[00:01:17] Jeffrey Rosen:** And Adam White, is a senior fellow at the American Enterprise Institute, and co-director of the C. Boyden Gray Center for the study of the administrative state, at the Antonin Scalia Law School at George Mason University. Adam, it's wonderful to welcome you back as well.

**[00:01:31] Adam White:** Great to be back, thank you.

**[00:01:33] Jeffrey Rosen:** Michael, this is in flux, where are we procedurally and why does the case matter?

**[00:01:41] Michael Dorf:** The Justice Department did appeal, although they didn't do so immediately. They took a few days in consultation with the CDC, and undoubtedly with political people in the White House, to decide whether to appeal. And when they did appeal, they did something somewhat unusual, which is they did not ask for a stay of the district court's judgment. Ordinarily, in a big case like this, the federal government would ask to have the decision held in advance, while the appeal proceeded. But they didn't do that. Uh, there's some speculation about why they didn't do that. One possibility is, well, uh, the mask mandates are decreasingly popular, even in blue states, even among democrats.

[00:02:22] We saw some of the scenes of cheering on the airplanes when pilots announced people could take their masks off. And so they might have seen no political angle in, uh, seeking a stay in the immediate future. Um, but I think the bigger picture is that the federal government, especially in a democratic administration, sees this case as important, because the judge had a very, very narrow ruling, or narrow understanding of the meaning of the federal statute that authorizes the CDC to take measures in a pandemic. I imagine that the justice department is concerned that if this ruling is allowed to stand that, uh, it could, uh, tie the hands of the CDC in future cases, whether they involve masks or something else.

[00:03:10] I should say, however, that as I and various other commentators have noticed, that there is a real risk in appealing. In our system, a decision by a single federal district judge sets no precedent. It may have binding authority on the facts before it, but it doesn't set a precedent that is binding in future cases, involving other facts, whereas a decision by the court of appeals, here it's the 11th circuit, or even more so by the U.S. Supreme Court, does set a precedent. So there is a risk that in appealing, they could get the higher court to affirm Judge Mizelle's ruling, which would be sort of the opposite of what they're, they're hoping for.

[00:03:49] **Jeffrey Rosen:** Thank you very much for that, and for setting up the case so well. Adam, what are your thoughts about where we are procedurally, and why this case matters?

[00:03:57] **Adam White:** Well I think Michael put it very well, so far the appeal's only been filed, no stay requested, uh, and, and briefs won't begin to be filed until it looks like, sometime in May at the very soonest. I also agree with Michael, sort of the, trying to read the tea leaves on why the Administration has approached this case the way it has. I guess sort of building on what Michael said is, what caused the Biden Administration to move forward to the 11th circuit, notwithstanding the fact that there's some real risk of locking in a broader, more broadly applicable precedent, is that even if this case were to be left in the district court where it was initially decided, and the Administration didn't proceed forward, it does sort of help to settle the public's expectations or understanding about what the law is, allowing the district judge to have the last word, uh, would mean that the public would go forward, probably thinking that this case was much broader or much more broadly applicable, than just a single district judge.

[00:04:51] Uh, the public and law makers' understanding of the law would be shaped by the, at the very least if the administration or future administration ever had to return to this issue and promulgate new rules on a similar subject matter. They'd have to begin by explaining why a district judge many, many years ago got it wrong, and of course, normally a district judge's opinion doesn't mean much, but this is a pretty widely read and debated decision. Now there was a second part of the decision by the way, uh, or multi parts, another important one had to do with administrative process, so that's a issue I care a lot about with my own focus on administration. Um, I do think that the judge got that part of the opinion right, I'll be curious to see if the Administration even appeals that part though, because that part regarding the administrative process, can be pretty easily fixed in future, uh, rule makings, by just going through the notice and comment process.

**[00:05:42] Jeffrey Rosen:** Thank yo so much for that. Well, as you say, the decision had several parts. One was an interpretation of the underlying statute, and the second was about the administrative process. Let's begin with the statutory argument. Uh, Michael, what did the judge rule about why she thought the CDC lacked the authority to issue the mask mandate, and do you find her statutory argument commits that?

**[00:06:08] Michael Dorf:** Uh, let' begin with the text of the statute. So, this is a 1940s era law, that delegates to the CDC, the power to make and enforce such regulations, and now I'm quoting, as in his judgment, that's meaning secretary, are necessary to prevent the introduction transmission spread of communicable diseases, uh, basically from foreign countries within the United States. And then it lists a bunch of kinds of regulations that the CDC can impose. Uh, word, uses words like inspection, fumigation, disinfection. Sanitation, which a keyword, and various other things.

**[00:06:44]** And at the end it says, and other measures that in the secretary's judgment may be necessary. So the federal government relied on two alternative theories for saying the mask mandate was valid. First they say that the term sanitation, is about cleanliness, and when you're talking about a communicable disease, you mean cleanliness with respect to, uh, viruses, uh, and other sort of microscopic particles, and so masks are about, and so masks are about, about that. And the other is, they say, well other measures includes other health measures.

**[00:07:17]** What Judge Mizelle said, was that sanitation has two different meanings, one means the, the one that the, uh, federal government was asserting, but it also means to clean something, and she invoked a canon of statutory instruction that says, if there's a list of terms, then, uh, each word in that list takes its meaning from the context. And all of the other things in the list she said, were about cleaning something, not about keeping something clean, and a mask doesn't clean anything.

**[00:07:50]** Uh, and then she said about other measures, well, whenever you have a sort of catch all, the catch all also takes its meaning from the surrounding terms, and here all the other surrounding terms are about cleaning something, and other means, other measures to clean something. And so again, she relied on this idea. So, so that's her, her view. She says this is not a statute that authorizes, uh, measures to keep things clean. Uh, she also talks a little bit about the difference between spread from persons versus from surfaces and objects and so forth. Uh, but the basic idea is that she's parsing the statute and attributing to Congress the idea that this is not the kind of thing that Congress can do.

**[00:08:28]** Now you ask what do I think of it. Uh, I think that if she were the head of the CDC, that her reading of the statute would be potentially permissible, it would be possible to say, "Look, we don't have the authority to impose a mask mandate, or we're not going to interpret this statute to give us that authority." However, she's not the head of an agency, she's a federal judge reviewing what an agency has done. And other traditional principles of administrative law, judges are supposed to give deference to federal agencies, when construing ambiguous terms in a statute. She avoided that by saying these terms were unambiguous, but I think the amount of energy she had to expend to get to the result, sort of belies that conclusion.

**[00:09:17] Jeffrey Rosen:** Adam, you heard Michael's argument, she says that there are two potential meaning of the statute, one to clean something and the other to keep things clean. And, uh, the meaning was in fact ambiguous, and he disagrees with the judge's finding that it was not ambiguous, and therefore that the CDC's ruling did not deserve deference. What are your thoughts about the judge's statutory conclusions?

**[00:09:39] Adam White:** You know, a moment ago when I said that on the procedural issues, I think the judge got it right, pretty clearly got it right. Um, that's sort of an im- sort om implicitly signaling. I think this first issue is much more complicated, and I'm not totally convinced that she got it right, I'm not convinced that she got it wrong either. But maybe I'll put it this way. Uh, as Michael said, uh, the judge parses the first and second sentences of the paragraph of Section 264. The first sentence is a very broad sort of authorization for the secretary to make judgements about what's necessary, and then the second sentence lists all sorts of things, including sanitation or other measures.

**[00:10:16]** The judge quoting a six circuit opinion, a reason six circuit opinion said, "The second sentence narrows the scope of the first." The judge know, knows the first that it's quite a lot with the second sentence, and I'm not sure if she perhaps didn't go too far in narrowing it. There's a few things to say in favor of her opinion though. First, she points that Section 264.a, the one that we were focused on, it discusses ways in which we might regulate the handling of property, um, cleaning it, fumigating it, um, destroying animals, and so on. Uh, the next three sub paragraphs focus pretty squarely on people, what you can do with, what the government can do with people in these context.

**[00:10:55]** That's I think a subtle but important difference, all of understand that the government in position are physical bodies and, and our own personal conduct. It's a little bit different than what the government does with our property. And so I think the judge was right to point that, the fact that this first paragraph, the one that the government was relying on, really was focused on property, not people. We ought to take that seriously. And, and I think it was good that the judge did that. Second, I mean to her credit, the word sanitation, when I think of the word, sanitation, I tend to think of, uh, cleaning things up, my first job in high school was with a mop bucket, so I, I know sanitation pretty well.

**[00:11:32]** And, you know, there is, this feels a little bit different, um, we're talking about cleaning up surfaces, versus putting a mask on us, uh, so that our, our, the droplets and, and, and our breath can't cause the spread of germs. It feels a little bit of attenuative from sanitation. But like Michael says, oftentimes the courts give a lot of leeway to administrative agencies, to interpret words that are a little bit ambiguous. Now the other thing operating in the background, or maybe the foreground of all this, is the trend in the supreme court and lower courts aren't judicial deference.

**[00:12:05]** We've seen, not just in the last couple of years, but the last decade, the justices, the conservative justices, reconsidering doctrines like chevron deference, pointing out that when there's an issue of, of the utmost political or economic consequence, the court ought to give less or no deference on interpretations related to that, that's why we were calling the major questions

doctrine. And that's not just, say Justice Thomas or others, Chief Justice Roberts, has really been at the forefront of that as well.

[00:12:34] And so, this decision it, in its limiting of Chevron deference, it's very much of a piece with the broader trend of jurors prudence on Chevron on the last, uh, decade or so, at least in the trend line. But I do agree with Michael that, I don't think the judge, I, I don't think this was a slam dunk opinion, uh, a slam dunk issue, and I think that the judge saying the statute was unambiguous, was probably a bridge too far. So I, I don't think she necessarily got it right or got it wrong. I don't think she totally approved it though.

[00:13:05] **Jeffrey Rosen:** Well, let's take a beat on this important question of Chevron deference. The court is considering it squarely in the American hospital versus [Becara 00:13:15] case this term, whether deference under Chevron permits the department of health and human services to set reimbursement rates. And as you say, Adam, this is, uh, had a conservative liberal avallance, with Chevron being hotly criticized with Justice [Gorsuch 00:13:31], when he was on the 10th circuit, and by other conservative justices today. Mike, what are your thoughts about this debate? I, I'll just tee it up by saying, Justice [Ginsburg 00:13:41] reminded me years ago, that she wrote the original lower court decision that Justice Stephens reversed in Chevron, suggesting that at least back then, in the '70s or early '80s, this was not viewed as a liberal conservative split. So help our listeners understand the terms of the debate, and how you think it should come out?

[00:14:00] **Michael Dorf:** Sure. So it isn't inherently conservative versus liberal. As you can imagine, deference to a democratic administration, will likely skew liberal. Deference to a republican administrative will skew conservative, and in that regard it's worth recalling that the original case, Chevron, which didn't invent the doctrine, but is the case that everybody cites, uh, involved the policy by the Reagan Administration. There is a provision of the Clean Air Act, that refers to regulation of a stationary source of air pollution. And the Carter Administration, basically treated every smoke stack as its own stationary source.

[00:14:41] The Reagan Administration came in, and their EPA was a little bit more industry friendly, and they said, as long as we, uh, a plant as a whole is within acceptable limits, we can treat the entire plant as a stationary source. So you can basically make up for a very dirty smoke stack with a very clean one. Uh, and the net effect was to have a lighter touch in regulation. This was challenged by the NRDC, which is a, you know, an environmental organization saying hey they can't do this, the statute means, stationary source, each smoke stack has its own stationary source, and the supreme court as you say, an opinion by Justice Stephens, then Judge Ginsberg, uh, said, "No, we think the term, stationary source, is sufficiently ambiguous, that an administration exercising what is admittedly political judgment, can decide, uh, how to go there.

[00:15:35] So absolutely, it is not inherently liberal, uh, to have Chevron deference. It's going to depend on whether you're deferring to a deregulatory administration, as the republican administration tend to be, versus a more, uh, interventionist administration, as democratic ones tend to be. That said, however, I think that over the long run, the parties and the justices rightly perceive that Chevron deference has a sort of on average liberal avallance, because more often than not, uh, industry groups will be challenging regulation, as opposed to, uh, environmental or

other, uh, NGO groups, challenging deregulation. Not always, but on average. And so I regard the challenge to Chevron, as of a piece of kind of a conservative effort to roll back the administrative state. Again, on average, though not necessarily in every case.

**[00:16:37] Jeffrey Rosen:** Adam, you heard Michael's argument, that on balance Chevron deference may favor regulation and reversing it, is a sort of anti regulatory effort, do you agree or not, and what do you think the correct constitutional answer is about whether or not judges should exercise Chevron deference?

**[00:16:56] Adam White:** The politics of this are all, have long been strange, or maybe over time they've been strange. The original advocate for Chevron deference was Justice Scalia, of back when he was lowly think tank scholar Scalia, he's a law professor and a think tank over at AEI. Um, what he pointed out is really what deference in these sorts of doctrines, what they, what they allow is change, right, it, I agree with Michael that sure, to the extent that say, a democrat administration is more energetically regulatory, than a republican one. Chevron favors a democratic administration.

**[00:17:27]** Um, of course, republic administrations try very energetically to roll back regulations, and those rollbacks are also governed by Chevron deference. So what Chevron really allows is change, and that's why Scalia liked it, the thoughts that courts were micro managing the Nix and Ford and Reagan Administrations. Um, but you can have too much of a good thing, you can have too much change, and I think in an era, for the last 15, 20 years, we've have wild swings in policy, from one administration to the next, in rule makings and judications and guidance, and so on. I think that, that sort of unpredictability or instability in regulation, has also informed the move from Chevron.

**[00:18:05]** And so I'd say things like the major questions doctrine, um, which is an issue also this term in the supreme court, in the big case involving climate policy, the West Virginia ZPA case. I think these, these rollbacks with Chevron are informed by sort of two trends in the supreme court. One is curiosity about the non delegation doctrine. The, the breadth of powers that congress can lawfully - can constitutionally give to agencies. But also the Roberts court has been particularly concerned about instability in rule making.

**[00:18:34]** Reliance interests, we've saw that in cases involving DOCA. Uh, the citizenship question of the census. And that I think is kind of undertone of this, although my guess is that most of the justices will disagree with me on that last point. But Chief Justice Roberts, I think very much, uh, sees it all of being of a piece. And so it'll, it came of a plan in this opinion. And I, I just wanna add, one of the reasons I'm a little relieved that the Biden Administration appeared in the 11 circuit, is that I think the 11th circuit can do a very good job on this issue. The substantive statutory interpretation issues, how this fits into deference. And I'd very much like to see the 11th circuit at least have an opportunity to weigh in on that.

**[00:19:12] Jeffrey Rosen:** Well, Judge Mizelle had a second reason for questioning the regulation, and that was that the CDC did not follow notice and comment process. Michael, tell us about that part of her opinion, and whether or not you agree with it.

**[00:19:25] Michael Dorf:** Yeah. So there are actually two other parts, there are two procedural challenges under the administrative procedure after APA. One is the one you said, right, that, uh, ordinarily when a federal agency adopts a rule, uh, or something that is effectively a rule, it has provide the public with notice, and an opportunity to comment on, uh, the proposed rule. And then in the final rule that it promulgates, take into account, the comments that the public has provided, by providing reasons why they've gone forward with the rule, notwithstanding the particular objections.

**[00:20:02]** However, there is a kind of emergency exception to the requirement to give notice in comment, and that was what the, uh, CDC invoked here. Uh, the judge said though, that if you're going to invoke the emergency exception, you need to explain what your reasons for doing so are, and here the CDC gave only a conclusory statement that, you know, it was necessary because of the public health emergency. She said something that was I think fairly disingenuous as well, I don't want to attribute motives. But she said, look, you know, this pandemic has been going on for about a year now, this was back in February of 2021, when the CDC didn't think we needed masks until now, and for much of that time, we didn't even have vaccines.

**[00:20:53]** And of course the, the reason the CDC didn't require masks earlier, was that the Trump Administration wouldn't allow it to do so, because they had a different policy. Now again, administrative law allows administrations to have different policies, but the passage of time, I don't think meant that there was no emergency. What she said in addition was, well, you could have taken 30 days, that's the sort of minimum for noticing comment, and you could have gotten that started while you proposed your initial rule. And I did the math and I thought that even under her calculation, it would have delayed things by at least two weeks.

**[00:21:27]** And given, uh, where the, the numbers of COVID cases where at that time, that would've been probably several hundred preventable deaths. And so my view is that, that does count as an emergency, uh, that justifies dispensive with notice and comment. Although it's not entirely clear why the administration couldn't go back and proceed with a further, uh, hearing and have notice and comment on an updated rule. The APA does not require that, if you allow it to dispense with notice and comment, you never have to go back, but you might have taken a belt and suspenders approach, and in fact, had they don't that, I think they would have escaped her second procedural objection as well, that was that they didn't adequately explain the rule, because in responding to the comments they would've gotten, they necessarily would have given more details.

**[00:22:16]** So these aspects of the opinion, I think are, are more like the administration didn't sort of show its work, uh, if you think about a sort of high school math teacher, and that she wanted to show its work. So they're less important in that, if the administration really wanted to reimpose the mask mandate, it could satisfy them, by now going through a notice and comment, and responding adequately. But the fact that they haven't done so, and they don't appear to wanna do so, means that they don't take these aspects of the ruling as nearly as threatening as the substance of interpretation of the statute.

**[00:22:49] Jeffrey Rosen:** Thanks very much for that, and for explaining the two aspects of the procedural holding, first, was there an emergency necessary to waive notice and comment, and secondly, did the administration adequately explain the rule. Adam, what are your thoughts on the judge's conclusions on both of those points?

**[00:23:05] Adam White:** I think this part of her opinion was absolutely correct. And I'll just say, my bottom line is that, the best belt and suspenders approach for the administration would have been to sort a cert- you know, invoke this, the good cause exception, and just issue a final rule without notice and comment, but do what we can an interim final rule. Make that emergency rule right off the bat, but in the same document kick off the notice and comment process, for the real final rule. Um, that way even if a court would intervene and strike down the rule, initial interim rule that hadn't gone through notice and comment.

**[00:23:40]** You already have your notice and comment process up and running. I think that's the right way to approach a situation like this, because the information the, the administration would have received through the notice and comment process, would have been incredibly important. Obviously masks were controversial, I, I don't think they should have been as controversial as they were, but they were controversial. And I think that those questions about what kind of masks are useful and not, um, what circumstances should they be worn in, what are good reasons to not require them. All of that could have been aired, no pun intended, through the notice and commented process.

**[00:24:11]** And I think actually probably would have improved the administration's rule by the end, or at least would have improved the public credibility of the administration going through the process. Again, they could have done all of that, even while having on the books an emergency rule that hadn't gone through notice and comment. So I, I think it was an unnecessary failure on their part. I d- I wasn't, I think the judge also just got it right, that the good cause requirement in Section 553 in the administrative procedure act, didn't cause exception. It's a very, very narrow exception, and it's always been construed, no, precisely, because we don't want the exception to swallow the rule.

**[00:24:48]** Uh, it requires a substantial explanation from the administration on why they're not going to notice and comment. Not necessarily a 100 pages, and the statute itself in 553 just says, a finding and a brief statement of reasons for the rule. So maybe they could have gotten away with just a dozen pages or a couple of dozen pages of explanation, but they needed something, and they really fell short here. I, I would just add, Michael point out the procedural aspect of this is complicated by the fact that, by reporting from the New York Times and others, the Trump administration had prohibited the CDC form doing this in 2020.

**[00:25:24]** So President Biden came on, his first day in office, signed that executive order, directing the agency to move forward. It's just one of the challenging aspects of administration where we try the law and, and policy. Tries to do justice, both to the role of expertise in the agencies, but also the importance of accountability of the agencies through the people of the president, who oversees, generally speaking, the agencies. And so I, I wish that the judge had not



included that line in her opinion, sort of faulting the CDC for waiting a year to put out this emergency rule, because things were much more complicated than that.

**[00:26:00]** Um, I wish she had put that in there, because I think it does, it gives the wrong impression of what was happening, although by the same token, I think it's important for the CDC to recognize, that with a year behind it, uh, it, you know, the CDC, on the last day of the Trump Administration, is the same CDC, technically speaking, as the first day of the Biden Administration. So they did need to take seriously the fact that there was a year under the bridge at that point, and that the courts would, would take that seriously.

**[00:26:26] Jeffrey Rosen:** Michael, we've walked through the major parts of the opinion, and as usual there are good arguments on both sides, of both the statutory and procedural questions. Stepping back, what does this decision tell us, about whether or not it will harder to issue regulations, given a new, more testulous, less deferential supreme court.

**[00:26:50] Michael Dorf:** So I agree with the statement Adam made a little while ago, which is that, even though, uh, I think this case is wrongly decided on the Chevron deference point, it is in keeping with the general trend, we see, uh, in the supreme court, that is I think, between the major questions doctrine, between flirtation with reviving the non delegation doctrine, which limits the ability of Congress to delegate power to agencies, and the rollback of Chevron, coupled with efforts in Congress, by republican members to, uh, overrule Chevron statutorily, right, that this is absolutely part of a, a larger trend. Um, but there are actually multiple trends going one here.

**[00:27:10]** One is less deference to administrative agencies, and as I said earlier, I think that on average will mean, uh, less activist government, although not always. But there's another trend, which is also something Adam touched upon, and that is the use of procedural law, to make it difficult for one administration to change policies, uh, from the previous administration. We saw this during the Trump Administration, uh, a number of times. DOCA is the clearest example, right, where DOCA was not adopted by notice and comment rule making, but it's essentially stuck throughout the Trump Administration, because the efforts to rescind it by the administration, were partially, uh, ambivalent, I think because of the politics of it, but also just, they didn't dot all their I's and cross all of their T's.

**[00:28:35]** Uh, and so it stayed in effect through four years of administration, that was very, uh, hostile to it, at least at some level. Um, you see the same thing happening now, with the so-called remain in Mexico policy, which was argued in the supreme court, that just this week, right, where the Trump Administration adopted a policy of, uh, sending asylum seekers back to Mexico, and then the Biden Administration tried to rescind that policy, but was told by the lower federal courts that it couldn't, and now the supreme court is going to consider whether it can do that.

**[00:29:10]** Uh, so in DOCA, you had a Obama Administration policy that Trump tried to reverse, but stayed in effect. Here you have a Trump Administration policy, that the Biden Administration tried to reverse, but so far has been unable to do so. You can think about the census case, also for the Trump Administration, where they tried to add a citizenship question,

and they failed procedurally. So this other trend is less about difficulty in regulating, uh, than it is as Adam said about difficulty in changing policy. And I'm so sure that I think that, that's a positive move. I agree stability is an important value, but I also think that we wanna have administrations able to pursue their particular sense of the common good.

**[00:29:50] Jeffrey Rosen:** Adam, what are your, uh, broader thoughts on both of those points, why is it a good idea under the constitution to make it more difficult for administrations to change policy and also to make regulation, uh, more difficult?

**[00:30:04] Adam White:** Well, on our last point, as a conservative, I smile just a little bit at when you say, uh, make regulation more difficult. But I mean, I'm not an analyst here, I understand that, uh, we need the government, government is elected to, to make laws and execute them. A- and so we shouldn't turn judicial review of agency and action, like a procedural clerk meyer, that prevent agencies from doing the rules, which have space for agencies to make rules under the statute, ideally statutes that are pretty narrowly written, so that the agency isn't the real, the main policy maker.

**[00:30:35]** Uh, and then have judicial review of what the agency did. In terms of why I think, well I'm very favorable towards the court's trend towards more stability and administration. I like it because I'm a fan of Al General Hamilton, and my favorite part of the federal list, they're not even, so a federal 78 on judicial review or federal 70 on energetic execution. It's what he wrote after federal 70 on, on the executive. When he, he warned about the dangers of what he called mutable administration, about an instability from one administration to the next, and we should remind listeners that in famous federal 70, where Hamilton talks about energy and the execute, he said we needed it for the steady administration of a laws, right.

**[00:31:17]** And in our system of government, steadiness isn't writing everything in stone once, uh, not even the, the first amendment in the national constitution center. But it's, it's writing things in legislation and having a process for changing legislation. And I'd say, the more nimble and energetic that agencies have gotten in making rules, under broad statutes, the less and less incentive there is for congress to legislate, presidents often say, Congress won't act, therefor I will. And that's true of course, but I think the opposite is true, um, presidents will act, and therefore Congress won't.

**[00:31:51]** And so, I like this trend in the supreme court towards more stability for a few reasons, but one of them is, I think it's a a way to help, uh, redirect political energy away from the agencies and towards Congress. Um, we haven't talked about Congress at all in this conversation, because there's never really been a serious legislative effort on, in either party to, to legislate these kinds of standards that the CDC imposed.

**[00:32:16]** And of course, it was an emergency at the very outset, and our government is well geared for the executive to take the lead in emergencies, but at some point he rest of the government needs to reconstitute itself, even in a pandemic, a- and I'd say that, that hopefully one of the benefits of, of a ruling like this, out of the, out of the district court, and we'll see happens in the 11th circuit, but one benefit might be, that future Congresses and future

administrations will know that they'll have to try at least a little harder to legislate substitutive standards in, in the later months of an emergency.

**[00:32:46] Jeffrey Rosen:** Michael, Adam's argument is one that the conservative justices as well as other scholars have made. Uh, if Congress wants to regulate, it can respond to these rulings by making it will clear. Is that realistic in today's polarized environment or not?

**[00:33:03] Michael Dorf:** So there are two obstacles to that kind of a solution, which I think everyone agrees would be in some sense, better, right. One is the one you just referred to, right, political gridlock. We have polarization due to highly gerrymandered districts in the house. Um, the spread of that polarization, even to the senate, which ought to be, um, uh, less polarized, because you can't gerrymander a whole state, but with geographical sorting and the nationalization of politics, it's just very, very hard for, uh, Congress to legislate on consensus matters.

**[00:33:39]** Ba- basically what they can do is, they can spend money, because there you can find something that, you know, everybody's gonna like, although even then, things can get tied up. But there is a longer standing reason why the administrative state emerged, even in a period that predates polarization, right. If you go back to 1950s political science, people at the time, thought the parties looked too much like one another, that there wasn't enough separation of the parties, and nonetheless, that was still a period of essentially the same administrative law we have now, uh, with broad delegations.

**[00:34:16]** It followed the end of the new deal, when the non delegation doctrine was essentially rendered toothless, and that was because of a recognition that Congress lacks the expertise to write the fine details of statutes sufficiently to keep up with all the sorts of technological scientific developments, right. I talked a little bit earlier about Chevron deference rooted partly in politics, right, one administration can weigh costs and benefits of environmental regulation versus economic growth differently. But the core justification for delegation has always been about expertise, that Congress simply lacks the ability to keep up with everything it needs to do, and so we generate these expert agencies in various areas.

**[00:35:06]** Uh, you can give them broad outlines, you can even give them some specific details, I mean, that statute we read, uh, that's pretty specific, but it's not going to cover everything, and the reason it doesn't cover everything, is because of just the nature of the enterprise. Life is extremely complicated, uh, you know, I, I saw yesterday that Elon Musk Tweeted that, you know, his policy on the free speech for Twitter is going to be, I'm just gonna allow it, just whatever's legal, representaly. Uh, this is the few of many non-lawyers, right, that is, that law could just be simple, just, you know, do the right thing, or something like that. But the law is extremely complicated, especially in the areas where we have, uh, an alphabet soup of agencies, to deal of all of the different complexities.

**[00:35:52] Jeffrey Rosen:** Adam, you heard Michael's two arguments against the idea that Congress can take the lead on regulation. The first is polarization, and the second is that it lacks expertise, what's your response?

**[00:36:04] Adam White:** Oh, those are great points. Just last year we celebrated the 75th anniversary of the administrative procedure act. And between that law and another law that Congress passed in 1946, the reorganized Congress itself, um, in that area Congress was very much sort of regearing itself towards, uh, more of an oversight posture, in its own activities with respect to the agencies, and also empowering courts to, uh, do more oversight of sort of a judicial review of the agencies' actions. But they clearly were recognizing that agencies were, were becoming front and center, and as Michael says, there, there are good reasons why that happened.

**[00:36:39]** Um, but again, you can always have too much of a good thing. And I think that, in an era where congress really is at its low ebb in so many ways, substantively, rhetorically and so, anything we can do to bring Congress back to the scene more, is a good thing, if only to challenge it to become a better version of itself. And so with the context of complicated issues that agencies focus on, uh, my ideal world will one in which the agencies, in addition to making their own rules, would channel more of their energy into being advisors to Congress, for actually drafting up, proposing legislation.

**[00:37:12]** I mentioned Hamilton earlier, uh, what did he do all through the Washington Administration, but justify and, and, and propose, uh, legislative reforms for, for the first and second Congress and to, to move through. So I think getting agencies to move in that direction would be a good thing, and I think that the kind of judicial doctrines that we've talked about would help to better align that agencies and centives in that direction.

**[00:37:35]** Now again, I just wanna be really clear, that in our system we have an energetic executive to deal with emergencies, and in the very first week, sort of months of an emergency, um, it is good that presidents have a little running room, and governors too, to, to act proactively. Um, and again, the challenge though is, sorry, the system is well geared for presidents who act in emergencies. It's not well geared for the rest of government to reassert itself.

**[00:38:04]** And I'd say, especially with the court, the supreme court and the lower courts, throughout COVID-19, we saw over time courts becoming more confident, I think people would agree or disagree on whether they, they did it the right way and at the right pace. I think the court did go in, in the right way and at the right pace. But it's, there's no easy roadmap for when courts should begin to reassert themselves more aggressively or energetically in a emergency, nor with Congress, and I think that's one of the great constitutional challenges of our time.

**[00:38:33] Jeffrey Rosen:** Well, you mentioned judges asserting themselves, and there's one final aspect of decision we need to talk about, and that's that it was a nationwide injunction. In recent years it's been, conservatives who have been criticizing nationwide injunctions, and Justices Thomas and Gorsuch, have called it a, and abrogation of too much judicial power. We had [Jeff Seccions 00:26:46] and [Bill Barr 00:26:46] and the Trump Administration saying, nationwide injunctions must end. Michael, how did the judge in this case distinguish those, Gorsuch and Thomas opinions which expressed skepticism in nationwide conjunctions, and why did she think that one was justified here, and were you persuaded by her arguments?

**[00:39:17] Michael Dorf:** Well, let me step back a little bit to talk first about the context of nationwide injunctions. So the term, nationwide injunction, is a little bit misleading, in so far it suggest that the key question is the geographic of scope of the injunction, as opposed to the who question, right, who can benefit from the ruling. The critique that Justices Thomas and Gorsuch and various academics have offered against nationwide injunctions, is that as a general matter, the courts when they decide cases, resolve disputes between the parties.

**[00:39:58]** And so if a case is not brought as a class action, as this case was not, then technically the only people get to benefit are the particular plaintiffs to the lawsuit, and here that's not a lot, not a whole lot of people. Um, and so the question then is, on what authority can a court bind the government with respect to everybody, right, not just the particular parties. Uh, there are two theories that tend to justify nationwide injunctions, right. One is a fairly narrow view, and you saw this in some of the rulings invalidating the, uh, initial versions of the, uh, travel ban under the Trump Administration.

**[00:40:45]** And that is, it sometimes said that in order to grant full relief to the existing parties, it's necessary to grant relief against everybody. So, to give you an example there, a federal district judge in the state of Washington said, in order to ensure that people coming from the Muslim majority countries who were targeted by the travel ban, are able to get to Washington. I have to have my injunction against the travel ban apply throughout the country, because someone who's headed for Seattle, could be flying here from, uh, you know, North Africa, or wherever they're coming, and enter in, uh, Kennedy Airport in New York City. We don't know where they're going to enter.

**[00:41:30]** And so just to grant relief to Washingtonians, we have to extent it, uh, to, to the whole world. That is the narrow version. There's a broader view of, uh, nationwide injunctions that says, no, no, no, sometimes public policy, uh, requires that the injunction be nationwide. Judge Mizelle relied on the first version. She said that in order to grant complete relief to the parties, we have to have this apply to everybody. Now, Justices Thomas and Gorsuch and other critics, haven't always drawn this distinction between the two theories, the one that says, you know, you just have this very, very broad authority, and the others that says, it's only available if it's necessary to grant complete relief to the parties.

**[00:42:11]** But I think that thoughtful critics of nationwide injunctions, recognize the possibility, that you could have where necessary to grant complete relief to the parties. That's the principle on which Judge Mizelle relied, but I should say, I'm not sure that's very persuasive, because she could have simply given them, you know, a kind of get out of jail free card, uh, that said they don't have to wear their masks. Um, she had an account of why she needed to do this in order to give them relief. Uh, but you know, when we think of religious exception cases, you don't invalidate an entire policy, you give people religious exceptions. It's not clear to me that she couldn't have done that here.

**[00:42:50] Jeffrey Rosen:** Adam, as Michael says, the Judge did have an account for why she couldn't grant relief only to the parties, she said it'd be hard to tell who is a party to the case when you were traveling, and therefore it would be difficult to administer. Were you persuaded

by her ruling or not, and what d- y- how do you think that this fits into the broader debate about nationwide injunctions?

**[00:43:13] Adam White:** For me, I think the most important part of this part of her decision, was an administrative law issue. Um, in addition to the broader debates about nationwide injunctions, the fact is that this was a rule, I was under the APA, it wasn't a rule that went through notice and comment, but it was a rule. And under the APA judicial review provision 5USC706, um, Congress instructed the courts to hold unlawful and set aside the, it's a quote, a, a rule that doesn't pass muster under administrative law.

**[00:43:44]** And so, I think and foremost, that's why the Judge got it right here, that setting aside the broader debate of national and nationwide injunctions, if this rule was unlawful, either substantively or procedurally, I think the best reading of the APA, the Administrative Procedure Act, is that it requires the court to vacate the rule altogether. Um, if that's not a slam dunk, talking about this, people, some people read the APA the other way, and they say, "Well, when the APA says, set aside the rule, it means just set it aside for these litigants." I think the better reading is, is vacate the rule altogether.

**[00:44:20]** But the nationwide injunction issue more broadly, is complicated, and it's an important one. I, I served last year on President Biden's commission on the supreme court, and one of the most controversial issues, before the commission was at the spring [inaudible 00:44:33] called the shadow docket. Um, it's, of course it's the supreme court, not just a federal district judge. So it's a lightly different issue. But the real questions about what happens when a court comes on a preliminary posture, uh, and, and offers sweeping broad relief before the full sort of course of judicial review.

**[00:44:53]** And throughout my service on the commission, time and time again, tried to tie that issue back to, uh, the nationwide injunctions issue in the lower courts, 'cause I think they're, they're very tightly related, both in spirit and in just the process of, of how the federal courts hear judicial review. On these days, the most energetic part of government seems to be actual federal district judges, then and not just in, during the Biden Administration but during the, the Trump administration as, as Michael said earlier.

**[00:45:20]** We saw throughout the Trump Administration a lot of rulings against the Trump Administration, um, oftentimes coming out of district courts. And so I think this is a very important constitutional issue of, of what role district judges should be playing in national governance and at what pace should they play that role. And, and this I think, this decision, it's an a- it's an example of that debate, but again, I think it's a slightly different example because of the specific rule making process and judicial review process at issue in the administrative procedure act.

**[00:45:51] Jeffrey Rosen:** Michael, Adam just helpfully connected the debate about nationwide injunctions, with the debate about the supreme court shadow docket, suggesting that the combination of lower court judges making decisions that apply across the country and the court reviewing them with a lot, without a lot of briefing and argument, challenges the transparency and accountability that we ordinarily expect in judicial decisions.

[00:46:13] The number of nationwide injunctions has increased recently, in 2020 according to justice depart of statistics, there were 12 injunctions. In eight years out of George W. Bush and at least 55 under President Trump. I think they're increasing now too. I, I'll ask you what you think about this b- just asking the obvious question, given the fact that there are often good arguments on all sides of these legal issues, should a lower court Judge have the power to stop something like the mask mandate for the whole country, or not?

[00:46:41] **Michael Dorf:** So, the, there's a technical question there and then there's a broader sort of policy question, right. So the technical question is, is it justified under what we think of as the ordinary rules of litigation. And I should say that I am sympathetic to this general principle that a nationwide injunction is permissible where necessary to grant full relief to the parties. I don't think that Judge Mizelle applied it correctly in this case, although as Adam says, that was one basis for, uh, ensuring that the other was this idea that it, a vacator is the required remedy under the APA.

[00:47:15] Um, but as a, as a policy matter, um, you know, we have a system of what is sometimes called, decentralized judicial review. That's not true of all constitutional democracies. Um, in the so-called European model, if somebody thinks that a law, a policy is unconstitutional, usually you go almost directly in many cases, to the constitutional court. It is a separate body that is designed to hear constitutional cases.

[00:47:49] For better or worse, we don't have that system. In our system, as Justice Scalia wrote in a case, he was in [inaudible 00:47:58], but I think he's right as a general matter, uh, that judicial review is a kind of side effect of the federal courts and state courts' ability to decide concrete cases, in which somebody relies on a statute, and then somebody else says, that statute is unconstitutional. So it's in the course of deciding concrete cases, that courts get to say that laws are unconstitutional.

[00:48:23] Now, there are good prudential reasons I think why a federal district judge, uh, who finds that a law is unconstitutional might wanna stay their judgment, pending appeal. That I think would, uh, eliminate a lot of the worry that people have about a single federal district judge setting policy for the whole country. But I think it is a kind of baked in feature of our system of decentralized judicial review, that a single federal judge is gonna be able to say that in the first instance.

[00:48:54] **Jeffrey Rosen:** Adam, you slag the connection between the debate about nationwide injunction or not about the shadow docket, broadly are you skeptical of nationwide injunctions or not, and what do you think is the best solution to the criticisms that the combination of the rise of nationwide injunctions and the rise of the shadow docket has led to a lack of kind of dependency and accountability?

[00:49:18] **Adam White:** I haven't made up my mind yet, but I am, I'm increasingly wary of them. And, and not just be- because of who happens to be in office at a particular time, um, let me just say, as a real quick footnote, one difference between Judge Mizelle's decision and other nationwide injunctions that I was just criticizing, is she actually did it on motions for some rejudgement, so that really is the full merits of the case. Not say a motion for a preliminary

injunction, which is where I tend to get more worried. W- what worries me about a lot of nationwide injunctions in, in our era, again, it's not, it, it's probably transparency and so on, but it's about pace, right, it's, it's that a Judge, a single Judge comes in and so quickly, and if it's a preliminary injunction, it's not even really a final authoritative reading of the law, it's, it's a likelihood of success on the merits.

**[00:50:08]** I'm wary of Judges asserting national power on the preliminary basis. As Michael said, though, we live in a system of, of decentralized power generally, and including decentralized judicial review until it reaches the supreme court. And I think in our system it's a good thing, the more that multiple Judges and multiple courts have an opportunity to really grapple with and chew on the most consequential legal issues of our time. Um, and that process, by the way, can help to inform the supreme courts judicial review. And so I think the pace is important.

**[00:50:42]** And, and I'm wary of anything that short circuits that. It was complicated in this case, another reason why is, is because, uh, it, we're talking about national transportation, right, and to the extent of a Judge tried to issue a decision, that even just covered her district, beyond the immediate parties, even just a, a decision limited to her district, would have been difficult to administer, because then the question is, well, when are you governed by when you leave, uh, the airport in Tampa, and when you land in Kansas City or Seattle, right, does th- how does the mass goal work there? This case is complicated for a number of reasons, um, but in general I'm, I'm, I'm increasingly wary of swift preliminary injunctive relief on a national basis.

**[00:51:28] Jeffrey Rosen:** Thanks so much for that. Well, it's time for closing arguments in this excellent discussion. Mike, the first one to you. What will the lasting impact of the CDC decision be, and what should our, we, the people listeners think about it?

**[00:51:40] Michael Dorf:** You know, as **[Joanne Lie 00:51:42]** reportedly said about the French Revolution, it's too soon too tell. Um, the CDC is a agency of the federal government, it has experts but it also has political considerations. Um, in an ideal world, I think I completely agree that Congress, uh, would weigh in more frequently and more substantively than it does. But we don't live an ideal world, we have political polarization, we have, um, people who are active trying to undermine the democracy in all sorts of ways. And so, what we have seen in recent administrations, is that agencies play a larger role.

**[00:52:25]** I think for the most part they've done a pretty good job, that's not to say that I agree with every rule, uh, of even a democratic administration, I've obviously gonna be more sympathetic to them than to the republic administrations, given that, uh, I share their values. Uh, but it is to say that we tend in this society to demonize bureaucrats. Um, I think the bureaucrats are in some sense our best hope, given the difficulties we have in a, with, with our democratic processes.

**[00:52:58]** Um, I also would like to say a word for bureaucrats, my, both of my parents were bureaucrats. Um, they were dedicated, right, if you, uh, people who work, uh, in government are often trying to do the right thing. It doesn't mean they shouldn't be held accountable, it doesn't



meant they should be given unlimited power. But it does mean that the attack on the administrative state is in some sense an attack on the only functioning government we have.

**[00:53:23] Jeffrey Rosen:** Adam, the last word is to you. What will the lasting significance of the CDC decision be, and what should we, the people, listeners think about it?

**[00:53:31] Adam White:** In the early years of the global war [inaudible 00:53:33], there was a run of cases involving Guantanamo, and it's hard to remember the individual cases, but remember it sort of a sweep of, of what those cases meant together, and what they meant for the relationship between courts and agents, and the presidency. And I suppose this case, wherever it winds up, the 11th circuit, the supreme court, who knows? Um, it will be remembered alongside some of the other cases, uh, that we've seen decided in recent years, some involving COVID and religious liberty.

**[00:54:00]** Uh, cases involving the, the vaccine mandate out of [inaudible 00:54:04], and so on. I think we'll remember them together, and we'll remember them as a, as a piece with the broader trajectory of the supreme court's rethinking of the administrative law. At the end of the day, I think the two key issues, and I touched on them along the way, are how do we bring Congress back into the, to be the center of gravity of federal government in normal times. And in emergencies, where we want the president to take the lead of the outset, how do we find a way for Congress to reconstitute itself at the right time and the right ways.

**[00:54:34]** And I'm hopeful that cases like this, and the other ones I mentioned, will help nudge Congress in, in that direction, help nudge agencies, to see themselves, not just as, as making law and administering law, but also informing the next generation of law. I hope that the CDC as it thinks about what to do in the aftermath's decision, also thinks about how to advise Congress on updating the statutes that we're talking about. As Michael said at the very outset, this is the statute from 1944, it's long overdue for a rethink. And so, I hope at the end of the day, these decisions point us towards that kind of future, but it's too soon to tell.

**[00:55:10] Jeffrey Rosen:** Thank so much, Michael Dorf and Adam White, for, uh, substantive, civil and really informative discussion about the future of the mask mandate, and the administrative state. Michael, Adam, thank you so much for joining.

**[00:55:22] Michael Dorf:** Thank you.

**[00:55:23] Adam White:** Thank you.

**[00:55:27] Jeffrey Rosen:** Today's show is produced by **Melody [Rowell 00:55:29]**, and engineered by Dave **[Stotz 00:55:31]**. Research was provided **Kevin [Kloss 00:55:33]**, **[Sam Desai 00:55:33]** and **[Lana Ulrich 00:55:34]**. Please rate, review and subscribe to We the People on Apple, so more people can learn about all of the light and learning that we're doing together, which is so meaningful. And on May 2nd, the National Constitution Center is unveiling our first amendment tablet. If by chance you are hearing this in time to come to Philadelphia for the unveiling, email me, Jeff Rosen at [constitutioncenter.org](mailto:constitutioncenter.org) and say you wanna join in person, and I will make sure that you can, because it's gonna be so moving.

**[00:56:06]** And if, this is more likely you're, you're hearing this, um, on audio, uh, please know that for next week's, We the People will share the great panel discussion on why the first amendment matters today, that we are going to have to unveil the tablet. So tune in next week for a wonderful discussion of the central meaning of the first amendment. And on behalf of the National Constitution Center, I'm Jeffrey Rosen.