

## Presidential Polling and Constitutional Law – What Happens Next - 12.13.2020

Larry Bernstein:

Larry Bernstein, another question for you. In contrast with the United States, the United Kingdom has a court system, but it doesn't have a constitution and Parliament reigns differently than Congress here. I'm wondering recently with regard to Brexit, the court for the first time really took an aggressive role as to undermining the desires of Parliament and they were quickly slapped. I'm wondering how you think about relative judicial power in the US and in the UK, particularly given that the system we created was designed with the UK in mind. Larry, can I start with you on that one? Because as I read your book this last week, you highlighted the approach that the UK has in helping to design our own system.

Larry:

Well, we weren't copying their system by any stretch. It was our background experience, so it influenced what we did. But there's a, really, it's theoretical, but it's a profound difference between the UK and the US. The notion in the UK is that sovereignty is in Parliament because of the way it represents. Whereas that was never the theory in the US, we're based on the idea of popular sovereignty, sovereignty is actually in the community at large, and that changes all of that. So the reason Parliament was supreme over any court was because it was actually the sovereign, whereas in the US the people are sovereign, and that's why the people are sovereign over any court and all of the branches of government are just our agents. And that's what's so peculiar about the idea of judicial supremacy is it basically says, we the principles have nevertheless surrendered to one of our agents final say over what is in fact the most important part of our laws.

Larry:

And that question wouldn't get framed that way. In the UK, you have the additional problem, which Brexit presumably will solve going forward. But the UK, as a member of the EU supposedly had also shifted sovereignty to EU laws that had to be enforced even over domestic laws, and that was the big controversy and who would have an interpretation over that. So you ended up with some notion that there might be a principle of judicial review in England for the first time as a result of its membership in the EU.