Welcome to What Happens Next – 1.10.2021

Islamic Fanaticism, Presidential Power, the Electoral College, and the Myth of the Entrepreneurial State – Michael McConnell and Jack Rakove QA

Larry Bernstein:

In reading your book, Michael, I was a little bit in shock when you started discussing the Steel Seizure Cases. In particular, I had been taught when I was in school that the Steel Seizure Case, and particularly Jackson's opinion where he stated that the president's powers are strongest when the President also gets approval from the Congress and when the two branches work together, yet you suggest that Jackson's opinion was wrongly decided. Could you just spend a second and give the background for the Steel Seizure Case and what you think Jackson got right and maybe what the other justices, who were in dissent in that case, probably were right about? And maybe finally, why it's important.

Michael McConnell:

Jackson gets the answer right. So, this is a case where President Harry Truman during the Korean War issued an executive order seizing the steel mills at a time of a labor dispute in order to keep the steel mills open to produce armaments to keep the war effort going. And the court held, and I think correctly... And Justice Jackson, I think, correctly held that President Truman did not have authority to issue that executive order.

My problem with Justice Jackson's opinion is its analysis, its reasoning, not where it comes out. And so basically what Jackson says is that you look to whether Congress and the president are in agreement. And if Congress has agreed with the president, he exercises essentially the entire power of the national government. If Congress and the president are in disagreement, that is if Congress has indicated its disagreement with the president, the president has very little power. And then in cases where Congress has been silent or ambiguous, which is a very large number of cases. In fact, most of the separation of powers cases in modern history fall into this category. Jackson calls it a "zone of twilight" and he says it can only be decided by the courts in light of what he calls "contemporary imponderables".

Well, I think that all three of those ideas are wrong. The first one's almost right. It is true that when Congress and the president are in agreement, that the president's action is usually going to be upheld, if we mean by agreement that Congress has actually passed a law authorizing the president to do what he did. I do think that Jackson is wrong when he talks about congressional implied agreement or implied powers. Congress actually has to pass laws through bicameralism and presentment if it's going to empower the president.

And then in the next category, he just ignores the entire existence of prerogative powers. And when the president is exercising one of those, the president is going to prevail.
And then in this middle category, which is so important and so large, his analysis is completely useless. "Contemporary imponderables." Well, if they're imponderable, how are the judges supposed to ponder them? And I think "contemporary imponderables" just invites the judges to second-guess the decisions and decide them on the basis of how they judge the policy implications of the moment. I do not think that any cases fall into this intermediate category. I think that every single separation of powers case involves one of the three kinds of power that the president has and congressional silence doesn't change the result in any of them.

Jack Rakove:

What was the dynamic of President Roosevelt's executive order putting a hundred thousand Americans in sort of detention or concentration camps? I don't think, as I recall, that was not approved by Congress. Do you know what the dynamic of that was?

Michael McConnell:

Yes. this is an action taken under military authority, and it's not... I mean, that decision, which was upheld by the Supreme Court at the time, and recently has been... The Supreme Court recently specifically overruled the decision upholding that. Is not really a matter of separation of powers so much as it was that the decision both violated the due process rights of the Japanese internees and also because of its being based upon their racial and ethnic categories, rather than any specific actions undertaken by the individuals involved, violated the equal protection clause.

Larry Bernstein:

Just to follow up on that a second. We had another speaker on one of the calls, Peter Irons, he spoke about it, and he mentioned... In one of his books, he defended an appeal of that case recently. And I guess some information had not been given to the defense and that case, it was then thrown out. One of the famous cases was thrown out for prosecutorial malfeasance under... How did this happen to reappear in front of the Supreme Court for them to make this decision? So, was one of the parties still involved? Or is it a practice of the Supreme Court to look at cases back in history and say that they may have made a mistake?

Michael McConnell:

There are things going on at three different levels. In the US Supreme Court, the issue simply came up as a matter of precedent in a case that had nothing to do with internment camps but in which the same sort of issue appeared. The court said that it wasn't going to follow the logic of the Korematsu case because it was wrongly decided. But the other two forums in which this is occurring are that there are some people still around who were the victims of this internment policy, and they've been able to go to trial court and get their actual cases reversed. And then finally Congress has acted, recognized the injustice of the situation and has voted compensation for these individuals.
Larry Bernstein:

Just following up on Jack's question. If I recall as the facts, Earl Warren was Governor of California and Earl Warren was the one that went to the West Coast military authority and made a request to intern the Japanese. So, what role did the state authorities play? If you know the history why did the medical authority go ahead and pursue that decision?

Michael McConnell:

I teach this case and I'm interested in it. Earl Warren did do this. He was in large part responsible for this terrible event, but only in an advisory and requesting capacity. It was actually a federal order by President Roosevelt. And in the Supreme Court, the Supreme Court was told and actually given affidavits that there were serious national security interests that were being achieved. And what we now know is that the Supreme Court was actually misled and that there was a substantial countervailing evidence that was not presented to the Court on that point.

Jack Rakove:

Michael, I wonder how do you read, if I remember correctly, Jackson's dissenting opinion in Korematsu? And again, his concurring opinion in Youngstown. Do you see Jackson growing? I guess, off the top of my head I wonder whether Jackson in the Youngstown case was attempting to kind of formulate some of the misgivings and some of the reservations he's expressed earlier about having the judicial power sign on to a bold executive move.

Michael McConnell:

Well, Jack, I think that's very plausible. I don't know enough about Jackson's psychology to be sure, but it certainly does seem logical that he may have regretted some of the excesses of the earlier time and that the Youngstown decision may be cutting back from that. Jackson also, in his opinion, in the Youngstown, in the Steel Seizure Case, there's a very amusing little aside in which he quotes an opinion of the attorney general approving an earlier order that's very similar to that Jackson wrote. And Jackson, now in his capacity as Supreme Court Justice, says that the Court needs to be skeptical of executive branch legal opinions, even when the author is himself.

Larry Bernstein:

I want to go to a different case that you discuss in your book and that's, I may pronounce the names wrong here, Zivotofsky v. Kerry. And this was a case where Congress had passed a law saying that if you were born in Jerusalem that the US passport would say Jerusalem, Israel. And this was something that, for example, the Obama administration refused to comply with because they did not recognize Jerusalem as the capital of Israel. And I think the question is what are the president's powers as it relates to foreign affairs and who gets to make that decision? Does Congress have that authority or not? Michael, how do you think about foreign affairs being a classification of powers for the president?
Michael McConnell:

Yeah, so the Zivotofsky case may seem trivial in a way, because it's just about one word on a passport, but it was probably the most important foreign affairs-related separation of powers case we've had in the last several decades. And, again, the result of the case may or may not have been correct, but the analysis of the majority opinion, which was written by Anthony Kennedy, seems extremely dubious because the Court... And it's related really to the way you put the question. I hope you don't mind a little critique of the question itself.

Larry Bernstein:

Go right ahead.

Michael McConnell:

There is a foreign affairs clause to the Constitution, and there are a number of foreign affairs powers and they are not all given to the president. There's this, I think, a sense that the president has nearly prerogative power over the whole field of foreign affairs but when you look carefully at the Constitution, in fact, Congress is given very significant, maybe not as much power as the president, but very significant power in the foreign affairs arena.

And the Supreme Court held that this decision as to whether to put the word Jerusalem on the passports was part of the recognition power, that is the power of the president to recognize what foreign government there is and what the extent of their territory is. And the Court held that that is a, they didn't use the word prerogative, but they effectively held that that is a prerogative power of the president. It's something that the president gets to decide absolutely and Congress doesn't have the right to speak to it. I think that that's quite wrong. The recognition power is an important power, but it was not given to the president as a prerogative. I think that this falls...

But I believe that this is a power which is one of those residual powers under the executive vesting clause and therefore is subject to the Congress's override. And Congress had passed a statute that allowed people to choose to put the word Israel on their passport when they were born in Jerusalem. And the real question in the case, I think, wasn't, "Is this a power of the president?" The real question is, "Did Congress have an enumerated power to pass that statute?" I think the answer to that is yes, but it's interesting that only one Justice seemed to think that that was even an important part of the case.

I think that points to a larger point here which is that the powers of the president and of the Congress are reciprocal. And in most of these separation of powers conflicts, it isn't good enough just to look at what Article II says about the powers of the president. You also have to look at Article I and see what are the powers of Congress over the matter. This is a particularly important point.
Another example I talk about in the book is the so-called torture memos under George W. Bush, where, completely putting aside all the moral and international law questions having to do with the particular interrogation techniques involved, Congress had passed a statute, in fact, two statutes that governed this matter. And Bush's lawyers said that his powers, which are prerogative powers under the Commander in Chief clause, were superior to anything Congress might have said. And I think the problem with that is that Congress is actually given an explicit Article I Section 8 power to regulate the conduct of American armed forces. And I think those statutes fall absolutely clearly within the core of the historical meaning of that power. And to say that the Commander in Chief clause trumps the explicitly enumerated power of Congress to pass rules for the regulation of the conduct of the armed forces, I think was a real mistake.

Larry Bernstein:

I wanted to follow up with one of your points listed under the prerogative powers. And that was the right to pardon. I just received a question from one of our listeners, Irwin Warren. He has a couple of questions. One is what are any limitations on the president's right to pardon? You usually, see pardons in the last week of presidential administrations so we're probably going to see a bunch. And for example, are the limitations... Does someone have to be charged with a crime before there's a pardon or can the president just issue some sort of a blanket pardon for any crime committed? Can you do it for anyone in the administration, anyone outside the administration? Are there any limitations, including himself, on the right to pardon?

Michael McConnell:

That's a great question. There are some limitations. The pardon cannot extend to impeachment. And most importantly, it only extends to federal crimes. Cyrus Vance looking into the affairs of the Trump operation under New York law is completely unaffected by the pardon power.

So that's explicit, but it also historically can be seen, it's limited to acts that took place prior to the pardon, but it can extend to acts that have not yet been prosecuted. And that actually has to be so for the pardon power to serve its most important purpose and its most important purpose was actually in case of insurrection as a really means of reconciliation after the insurrection has been put down. So, the whiskey rebellion under the Washington administration is the best example of this, Washington marches an army, an army larger than ever was put into the field during the entire revolutionary war against the rebels, against the whiskey tax, mostly in Western Pennsylvania. And after putting down the insurrection, a couple of people were tried and then Washington issued a pardon of all the other participants for what they did.

And this was a gracious gesture, but also a very shrewd gesture because it basically put an end to the rebellion and enabled people to come together. If he had been prosecuting all those hundreds, maybe even thousands of participants, he would have been creating martyrs, it would have festered for a long time. A similar example is Jimmy Carter's-

How about in the civil war, didn't Lincoln say, "You can take your gun and head home?"
Michael McConnell:

Yes, Lincoln pardoned the participants, the Confederate soldiers in the Confederate army. The only people who weren't fully pardoned after the civil war, were people who had previously sworn an oath of allegiance to the United States and then took up arms against the country. And ultimately there was only one person, Jefferson Davis, who never received any kind of pardon. And Jimmy Carter did it for draft resistors in the Vietnam war.

So yes, people can be pardoned, even though they haven't yet been charged with a crime. Now, there is an open question about sort of open-ended pardons, where the crimes were not referring to specific acts, but for example, your pardon for anything you may have done over the preceding number of years, that's an open question, but there is a precedent, modern precedent, which is Gerald Ford pardoned Richard Nixon for any acts that he might have done when he was president. So, if that precedent holds, then the pardon does not have to be for any one specific crime.