Welcome to What Happens Next – 1.10.2021

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

Our first speaker today is Stanford Law Professor Michael McConnell, please go ahead.

Michael McConnell:

So, we've been riveted this week with the terrible events in Washington, and that has led many members of the press and public to be deluging me and others who study the presidency with questions about the 25th amendment, which I think has never been in the headlines before, and also impeachment again. And I'd be happy to talk about those things during Q&A.

But what I really want to do is look forward to issues that are going to arise in the new Biden administration. And I have to say that I am not looking forward to the case of whiplash that I expect to get, because every time the presidency changes party hands, many people's opinions about the nature of the presidency and the powers that pertain to the presidency shift overnight. So those who were very critical of President Obama's unilateral policies, for the most part became quite pleased with President Trump's aggressive use of executive orders. And those who've been criticizing President Trump's executive unilateralism, I suspect many of them will be praising the same kinds of assertions of power by new President Biden.

And yet the Constitution gives the same set of powers to presidents that we like and presidents that we don't like. It is a prescription for both an empowerment of the president and also constraint of that power, and it stays the same. And it's my conviction that if we paid more close attention to what the Constitution has to say for presidents on both sides, that we would have a more stable republic and maybe a calmer attitude toward presidents and presidential power.

My book is actually a good deal of history, but it's, I hope, more than just history because what I've tried to do is use that history to provide explanations and interpretations of presidential power using the close examination of the text itself, but also in light of the British constitutional experience that the framers looked back to, and to early disputes over presidential powers that helped frame and develop and construe the Constitution. What I do is I show that there are actually three different kinds of executive power that need to be distinguished.

There are prerogative powers. These are powers that are vested in the president by virtue of his office, or previously in the King by virtue of the King's office. They are not given to the executive by the legislative branch, and the legislative branch cannot regulate them, override them, or diminish them. Among these, most obvious are such powers as the veto power, the pardon power, whether we like it or not, Commander in Chief and others. The president's prerogative powers are specifically laid out in the Constitution. They're not implied. And in most cases, they're actually matched the corresponding prerogative power as it existed for the King under the British constitution.
The second category of powers are delegated powers. These are things that the president cannot do without advance authorization from Congress. So, for example, the president cannot spend a dime of public money without an appropriation passed by Congress. He can't tax. He can't borrow. He cannot enforce the law, that is restrict people's life, liberty, or property, without there being a law which he is enforcing.

And then the third type of power, which I think has generally gone unrecognized but is quite important, I call residual executive powers. These are powers that the president exercises under the rubric of the executive power. The first sentence of Article II being that the president is vested with the executive power. And I try to show in the book what the character of those powers are, and especially their limitations, that they are limited to powers of an executive nature and may not entrench upon either legislative or judicial powers. And perhaps more importantly, they are subject to being overwritten or regulated or diminished by Congress, so long as Congress is operating within the scope of its enumerated powers. It basically can trump the president. But the president doesn't have to wait for Congress. Until Congress is active, the president has this kind of authority.

Well, I think when you look at the presidential powers in light of these three different categories, that many of the separation of powers controversies that have gone to the United States Supreme Court in the last century are much clearer. The court has actually thrown a lot of smoke in the air and has not provided a very clear way of distinguishing between what powers a president can exercise and what powers he cannot. This comes up especially often these days in connection with executive orders.

A lot of people don't even know what executive orders are. They're not mentioned in the Constitution, but there seems to be this belief. There was by supporters of Mr. Trump and I think already we can see that supporters of Mr. Biden are taking the same position. They think that executive orders are a way the president can do almost anything, that he really doesn't have to go to Congress, he can just exercise... He could just issue an executive order and make the world conform to what policies he wants. And this is a misunderstanding. An executive order does not gain any additional authority merely by virtue of being called an executive order. Executive orders are authoritative only in so far as they are putting into effect powers that the president has either directly under the Constitution or from the statutes. And that leads us then back to the various categories of power and where the president gets that.

Michael McConnell:

Thanks very much. I look forward to the questions.