

MMITM Ep 010 - Ed Warren - Part 2: The Supreme Court, Climate Change, Executive Privilege, and Guns

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

Bill Curtis: Hello, everyone, and welcome to an interesting episode of Politics, Meet Me in the Middle. We continue with part two of our discussion on some pivotal cases that the Supreme Court will likely rule on during its 2020 term, starting with defining executive privilege. A touchy subject these days. We'll move on to global warming and the environment and we'll finish up with the hot button topic, guns. This week, in particular, we're in danger of learning something. We have an amazing group joining us today. And I'm pleased to welcome Laurie Dhue. If that name sounds familiar to you, it's because she's been anchor on CNN, MSNBC and Fox News. Welcome, Laurie.

Laurie Dhue: Thank you, Bill, it's great to be here.

Bill Curtis: We've also brought back Ed Warren, who was among Washington D.C.'s most influential Supreme Court attorneys with decades of experience as one of Washington's most insider, influential Supreme Court litigators with Kirkland and Ellis, where he has been of counsel since 2005. Now, of course, our co-host, Pulitzer Prize winning author, historian, international lecturer in our human sourcebook of historical expertise, Professor Ed Larson. How are you doing Ed?

Ed Larson: Great to see you again.

Bill Curtis: So, Ed Larson, what is executive privilege and was that really first tested by Nixon?

Ed Larson: Executive privilege is a certain sort of right that if there is a conversation or work within the executive branch, that we can keep this privileged and other people don't have to know about it. And the question is how far it extends. What does it cover? Does it cover if Congress, which has a legitimate duty and right to oversee the executive branch, do they have a right to know this information that was tested mightily,

of course, in Nixon, who was President Nixon, who wanted to keep, of course, some of his very inflammatory comments private.

Bill Curtis: Was that the first time that executive privilege was tested with Nixon?

Ed Larson: Executive privilege goes all the way back to the Washington administration. Washington, when they were soliciting information about Jay's treaty, Jay's treaty, involved the treaty with Great Britain, that seemed like a turnover of all American rights, the British as opposed to the French. When America was torn between support for the French and the British, the Congress asked for a variety of information and George Washington said, no, you can't have certain internal information. And that started the issue. It's continued ever since. So it's a balancing test in every individual situation and Supreme Court has had to deal with it.

Ed Warren: First of all, I think Ed is saying the same thing that I would say, which is the executive branch under Article 2 has the responsibility for implementing the laws and carrying them out. And in order to do that, you want to have an open discussion pro-and-con of considerations which bear on taking one direction rather than another. So it's a privilege that has grown up in a kind of common law fashion. Another example would be grand jury secrecy, which has a historical predicate that which, which is to say, you don't want the prosecutors maligning persons based upon evidence if they're not going to prosecute. And consequently, all that takes place in the grand jury is of that nature. And so we don't want to do that.

Bill Curtis: Well, that's interesting. So it should Congress be investigating Trump if they're not going to prosecute?

Ed Warren: They are on stronger ground where they have an impeachment inquiry, where they are carrying out their own responsibilities to impeach. Now, if what they are doing is asking for Trump's tax returns based upon some.

Bill Curtis: Fishing expedition,.

Ed Warren: Fishing expedition, I think they might lose. On the other hand, if they have a genuine inquiry, then they are in stronger ground to seek pretty much anything.

Bill Curtis: So Ed you mentioned a little while ago that you are capable of litigating on either side of a question. So we're going to test that model for just a second and have some fun. This is Curtco vs. the United States government.

Ed Warren: All right.

Bill Curtis: I'm asking you to be our attorney. Here's a dollar. I would like you to try for us the case where Trump is countering Congress's budget powers by declaring an emergency and shifting funds to his wall. I would like you to try the case or at least give us the summation on the case against him being able to call, that being able to create an emergency.

Ed Warren: It's hard to do without it without a statute in front of me, because that's what the issue would turn on. But for example, let's take something that's a little further afield, but you're talking about imposing tariffs on Canadian steel on the theory that that's a national emergency. I mean, not you know, it's the same kind of idea because I understand the statute a little bit better. I think what you would be saying, really? I mean, national emergency was not intended to cover putting tariffs on our longest and most important traditional ally. You have to have a statute that gives you a jumping off point.

Bill Curtis: And sometimes you can use that as an example of an abuse of power.

Ed Warren: Yeah right you might be able to use that

Bill Curtis: So couldn't that be used in the case, in your summation.

Ed Warren: Right. You might be able to say, depending on what the statute says, you know, I mean, those are the kinds of arguments that people can make. Yes. They make the look for analogies to say this statute surely can't mean what the administration is saying because A, B and C, that's.

Bill Curtis: Is it possible that you would be less likely to win the case you just tried in the court a year from now than five years ago?

Ed Warren: It's very hard to say. I mean, it really is hard to say. It is a statutory question. There is going to be skepticism at, of wildly expansive interpretations. There is this, there is a skepticism on both sides of the court, I think, about executive overreach. We have a crisis in government. That is that the Congress, who ought to be deciding so many of these important issues is seemingly unwilling or unable to do it and feels comfortable passing the authority on to somebody else, namely agencies or the executive branch.

Ed Larson: And on this issue, more than any other, if you look at the founding documents, if you look at the original intent of the Constitution, if you look at the ratification arguments, if you look at Philadelphia, they thought the most important, the most crucial defense of individual liberty was separation of powers. That's why they didn't even include a bill of rights in the original constitution. 'Cause separation of powers- and the core of separation of powers was that Congress legislates. Congress appropriates. And the president merely, merely executes. The logic of President Trump taking funds appropriated for one purpose and using them for the wall, especially after Congress bipartisan, both houses of Congress said no. That's so flies in the face of any originalist intent of the Constitution. And so it's going to be very curious whether these justices, people like Gorsuch and Alito, will use their true originalist principles or instead subvert them for ideological or partisan grounds.

Bill Curtis: Ok Ed, one more point.

Ed Warren: Yeah. First of all, Ed, I think, says it quite correctly. I mean, we always say, oh, we have a tripartite government. Well, the founders, I think, had the assumption, worked on the assumption that we have a legislative branch and the other two are secondary. And so we have one branch of government that is predominant and two, that are supportive or secondary. Congress can't just pass all this authority to the executive branch, that there's constitutional limits on how much Congress can give away of its legislative authority. But we've gotten to the point where what Congress does is they don't want to take the responsibility. They want to do things that sound good. And then they pass the authority to implement them to the agencies. And then the agencies get all the blame when things don't turn out the way the public wants it to turn out.

Bill Curtis: Laurie, you had something you wanted to mention.

Laurie Dhue: So it's a big year coming up for the Supreme Court. And it's been said that justices are more prone to agreement with other justices when they are in their first term. Brett Kavanaugh was in his first term. And interestingly enough, he had the highest frequency in the voting with the majority at 88 percent in his first term. Now that he's starting his second term, is he more likely to be less conciliatory as he now is beginning to establish himself more?

Ed Warren: Let me answer that, because I think there's a misperception of Gorsuch and Kavanaugh with the assumption that they're just two peas in a pod. I think that's not true. I think Brett Kavanaugh is an institutionalist. If anybody on the court thinks like John Roberts about the reputation of the court, it's Brett Kavanaugh.

Bill Curtis: So we've got to travel down Ed Warren's expertise here and talk to him about how some things are going to change on the Supreme Court. Ed, you've spent a lot of time adjudicating cases and trying cases in the environmental world. Now, it's been said that when Justice Anthony Kennedy was on the Supreme Court, that generally they ran at about a 4-4 split between justices that were sympathetic toward environmental regulation versus those that oppose it. Well, it's all changed now and it could change a lot more over the next year. How do you think that's going to affect cases like that?

Ed Warren: This administration has backed away from some very aggressive environmental regulations under the Obama administration. I mean, EPA has really changed. as an example.

Bill Curtis: For the sole purpose of bolstering the economy?

Ed Warren: Well, I think it's what Trump campaigned on. And I think he's been pretty successful in doing this, is lifting regulations on business and making business more profitable and more willing to hire and all. It's an economic.

Bill Curtis: Can I talk to you about your opinion of some of these rollbacks. Well, let's talk about a few of them for a minute.

Ed Warren: Sure.

Bill Curtis: Here we are meeting in the middle. And for a minute I'm going to have to help defend our listener. The Trump administration has decided to weaken the standard. This is all throughout the Midwest, as you know, weaken the standards on methane emissions from landfills.

Ed Warren: Yeah,.

Bill Curtis: Help me understand that one.

Ed Warren: Methane emissions, and this is the longer term concern from greenhouse gas emissions, is the tundra in Alaska and in the Arctic has embedded in it a lot of methane. And if it melts and if it warms up, you're going to have substantial methane emissions into the air. The issue is the methane emissions get into the atmosphere and that's the global warming concern.

Bill Curtis: I actually shortened the question because it was not just methane emissions from landfills. It's a lot of other emissions from landfills that are being basically the rules are being weakened.

Ed Warren: I don't know, I don't know the. And these are factual questions and will be brought before the court in turn.

Bill Curtis: One would hope that they would adjudicate. Right, based on the facts.

Ed Warren: But I think they will adjudicate based upon number one, what does the statute say? What is the authority of the EPA administrator? And number two, they'll be influenced by the facts. They'll be influenced by the facts if this is a big deal or not a big deal.

Ed Larson: The question on global warming is a tipping point issue. What pushes over the top? And while it's true that methane doesn't stay in the atmosphere as long as CO₂, while it's there, it actually has a bigger impact. And if you get across that tipping point and start melting the tundra or melting the sea ice in the Arctic. You have a profound and truly irreversible impact on the global temperature and global environment going forward. And unfortunately, because of campaign contributions by the Koch brothers and a variety of different partisan issues, we haven't been able to address them, such as a lot of other countries in the world have.

Ed Warren: You know, there I disagree on the facts, which is to say, while it is true that the Trump administration backed out of the Paris Accords, and I think I have some pretty good reasons, pretty understandable reasons why they did that.

The US help us out here. Go great toe, let me say.

Ed Warren: The US has continued to reduce CO₂ emissions and probably at a rate higher than most European countries and certainly Asia.

Bill Curtis: Shouldn't we be leading the world in this kind of thinking?

Ed Warren: Well, I think we are leading the world in this kind of thinking and important.

Bill Curtis: We're leading the world by...We've just rescinded water pollution regs for fracking on federal lands, we've loosened offshore drilling safety regulations, which came in after the Deepwater Horizon explosion. They've even reversed an executive order that cut federal government's own greenhouse gas emissions by 40 percent over the next 10 years.

Ed Warren: I don't think any of those issues are going to be very significant. But let me let me tell you what I think was behind the administrations...

Bill Curtis: I'm sorry?.

Ed Warren: Well, I don't, I don't. I don't think that they are, I think they are an immeasurable effect.,

Bill Curtis: Cutting the federal greenhouse gas emissions by 40 percent over 10 years?

Ed Warren: I mean, is it practical or is it economically feasible or not? Is it what is it going to cost?

Bill Curtis: So we are back to that balancing act before with the dollar on one side, and the environment is on the other.

Ed Larson: While I agree with you that the bigger problem comes from various developing countries, the way the current administration, the Trump administration has shifted the balance on coal to placate the West Virginia electoral vote, four electoral votes or whatever it is from West Virginia, we are cutting back on any regulation of the use of coal in electric power, which frankly makes absolutely no sense.

Ed Warren: It makes no sense. And but it's also a phony proposition. You know, to just take a headline saying oh the administration is doing this administration is doing that, it may be that it's a terrible thing. It may be that you're talking about things that cost millions and millions and millions of dollars and do almost nothing.

Bill Curtis: But that is what the conservatives like to say when they want to shelve it as a conversation.

Ed Warren: That doesn't mean they're wrong.

Bill Curtis: So I am not going to let you get away with it when we've just delayed for the next two years, and apparently it may get delayed longer, an EPA rule regulating toxic discharge, including mercury, by the way, from power plants into public waterways. That's a zero.

Laurie Dhue: And the mercury ends up in our fish and our food where children can be poisoned by it, adults - we can all be poisoned by it.

Ed Warren: Look, I don't know the facts, again. But I agree that mercury is a heavy metal that bio-accumulates in fish. And it is a danger, no doubt. No question about that.

But you know, what you always have to ask the question is, so what are the benefits? Are they really measurable? Or is this just an emotional issue? And what are the costs?

Bill Curtis: I'm going to let you off the hook for a few minutes on the environmental side, because we're going to move away for about 30 seconds. And when we come back, I'd like to talk to you about a very sensitive issue and how you think the Supreme Court will rule on guns.

Promo - Proud Source: Hi, my name is Chris Porter from When last I Left. The show you've been listening to is sponsored by Proud Source Water. Not only do they distribute their water in these stylish and recyclable aluminum bottles, but the water itself is sustainably sourced to naturally filter. Proud Source Water believes in the ripple effects that one person's actions can impact the world for the better. You do your part and I do mine, and maybe we come out better than we started. So go to Proudsourcewater.com to learn more about the company, their vision and their water. Leave the world better than you found. Drink Proud Source water.

Announcer: What are you gonna do about.

Laurie Dhue: Welcome back to meet me in the middle. I'm Laurie Dhue hanging out today in the studio along with our hosts, Bill Curtis and Ed Larson and our guest Ed Warren. So, fellows, the first major gun related case to be heard by the Supreme Court in almost ten years is New York State Rifle and Pistol Association v. City of New York. So the city of New York law forbids license handgun owners from possessing or carrying or transporting their weapons outside of their homes, except when unloaded, locked and in a container to and from a gun range. We know there is a lot of public support for gun control these days. Ed Warren, question for you. How would you try it and what do you think should happen here?

Ed Warren: Well, I mean, which side you want me to fight? But let me say this. First of all, the Heller decision, which is the Supreme Court's decision on gun rights, actually argued by Ted Cruz, I think, in the Supreme Court 10 years ago was a 5 to 4 decision written by Scalia. And it was controversial in its own right. For example, Judge Posner on the 7th Circuit, who is one of the leading legal intellects of the 20th century, the early 21st century, said from an originalist standpoint, Heller is wrong. Having said that,

Heller makes clear that it's not a ban on all legislation regarding guns. It's a tradeoff. It's what we've been talking about between what are the pros and what are the cons. Now, if I were arguing the case for the state of New York, or city of New York, whichever it is, I'd say, well, this falls within the permissible range of regulations by states and localities. Arguing on the other side, I would say, wow, you know, this this really goes far because it regulates not just assault type weapons or very dangerous weapons, but it also regulates handguns. And not only does it regulate handguns, but it regulates them in public areas or even across state lines. And it therefore is an infringement on personal rights. And consequently, this statute goes too far. And even though it is true that Heller permitted regulation, didn't shut down regulation, This one goes too far. That's what I think you'd probably argue on both sides.

Ed Larson: The issue in Heller and I appreciate the way Ed brought up Judge Posner, Judge Posner was a Nixon appointee, I believe, to the to the circuit court and in the Midwest and a leading intellectual libertarian / conservative, a very brilliant judge. I totally agree with your conception of him and he said that Heller was totally unsupported on originalist grounds in that particular case. It was a very rational decision because the right of a militia is so important.

Bill Curtis: Isn't this one of those times where you have to not redefine but add to the detail about what was meant when the Bill of Rights was written? Because back then, as you mentioned before, you were talking about a rifle that you had to load. You had to pack. You had to fire. You had to reload. You had to pack. Now, if technology brings us to the point where the Smith and Wesson company creates some kind of a nuclear weapon that's shot out of a handgun, then are we saying that we should have the right to carry such a thing? Or should we re-write the law?

Ed Warren: I mean, Yeah. You know, first of all, Heller is the law. It is Stare decisis. Now, can we overturn it? Look, there's pretty doggone good arguments that Posner, I think probably did the best job of putting together that it was not meant to be an individual right. Okay. Now, what does that mean in practical terms? We have an individual right to bear arms. Okay. The Supreme Court has assiduously and carefully stayed away from any further decisions since Heller.

Bill Curtis: But shouldn't they at this point be defining what bearing arms means?

Ed Warren: Well, I think that's what they're being asked to do now. I think what you're going to end up with if there are a lot of cases litigated on this issue, and there will be, given time, is a kind of a compromise situation like you have with Roe versus Wade. They're not going to overturn Heller. I don't think. I mean, that's more possible than it is with Roe versus Wade because it's a more recent decision and hasn't been revisited the same way that Roe vs. Wade has been revisited. But assuming for a minute that it's not overturned, which would be my assumption, especially with today's court, because I think the added members are going to be on Scalia's side of this case, especially as Stare decisis. So what are we going to end up with? Well, I think there's nothing in Heller that prevents any of the legislation we hear talked about assault weapons or and or any of these background checks. All that stuff is perfectly okay under Heller, I think. And so the question is only.

Bill Curtis: But is it perfectly okay for today's society? Have we learned a lesson or two and do we need to change the amendment?

Ed Warren: But the answer, to that is a legislative amendment, not overturning the amendments, because that's not possible. It's a practical matter to get a constitutional amendment on the subject like this.

Bill Curtis: But I don't think anybody at this point in this whole fear about we're trying to take away guns.

Ed Warren: It seems to me clear that on a number of moderate forms of gun regulation, there is 90 percent support. I mean, background checks and you know, look, I got nothing. I mean, I've dealt with these guys from the National Rifle Association. They're a narrow partisan group. And that has influence on elections, no doubt about it. But look, I mean, this is just another example of Congress is supposed to legislate. Congress's is the most powerful constitutional part of our government. The courts and the executive branch are secondary, as Ed outlined the structure. And I agree with that. So that means this is for Congress to decide and for the state legislature.

Bill Curtis: You know, it's going to go to the court.

Ed Warren: Well, it'll go to the court, but the court is gonna end up with a middle ground. The court, if the court had 10 different.,

Bill Curtis: Even if there's another appointment from the conservative side to the court?.

Ed Warren: I don't think it's gonna make much difference myself. I mean, that's because I think there are good arguments on both sides. And, you know, you don't want to, they're not going to overturn Heller. I don't think. Especially this court is not going to overturn it. So then the question is going to be, well, what can we regulate? How can we regulate? And I think if there's, the court is not going to overturn anything that has 90 percent, 80 percent, 75 percent public support.

Laurie Dhue: So I'm looking at an article right now, a recent article on CNN. It says Brett Kavanaugh, now that he's on the court, with him being on the court, and now that he is going into his second term, the court might be ready to take a more expansive view of the Second Amendment.

Ed Warren: I don't believe that.

Laurie Dhue: What say you?

Ed Warren: I don't believe that for a minute. I think possibly Gorsuch might be a little more sympathetic.

Ed Larson: There's been a political use of the Second Amendment. And so you get politicians like President Trump and certain Republican politicians and certain ideologues and certainly the NRA who have used the Second Amendment to say, well, you can't do any restrictions. And so then the question becomes, how has the Second Amendment been used in a political sense? I think abused in a political sense to browbeat the opposition and to try to give a constitutional wrap to their arguments that people can have assault weapons and people can have do all sorts of things that the Second Amendment was never intended to cover.

Bill Curtis: So, Ed Warren, can you tell us, this is your opinion I'm asking for. I want your opinion on the argument. You're trying to take away our Second Amendment rights.

Ed Warren: That means to Trump supporters any regulation of guns whatsoever. And with the question is, what does that mean in terms of the Supreme Court? I think it means even though there is, through Heller, a constitutional right individually to bear arms, that does not preclude any kinds of any reasonable regulation of guns.

Bill Curtis: There you go.

Ed Warren: And so that you know, that's why I think this issue, given a world enough and time, is going to end up supporting what the majority of people want to do. And that's the way we ought to make these decisions anyway. The Congress ought to be making these decisions and the state legislatures and the city councils should be making these decisions on their own. And I think most everything they want to do is going to end up being upheld by the Supreme Court, notwithstanding Heller.

Bill Curtis: But should they be following public opinion?

Ed Warren: The public has only a superficial understanding of specific kinds of issues like this, and they vote kind of seat of the pants. That's what happened with Brexit, where you have, you put the put to the public a simple minded kind of proposition.

Bill Curtis: And you get a simple minded public, so there you go

Ed Warren: You would be a lot better off with people who can understand the complexities of stripping away EU membership and all the problems economically and socially that would attend that kind of decision. Those are the people that should be making the decision, not the public, based on one line referendum.

Laurie Dhue: Question about continuing this thought about the the NRA and the Second Amendment. Jeffrey Toobin wrote an article for The New Yorker a few weeks ago. And I want to read this sentence and I want to get your reaction to it. The power of the NRA extends beyond its control of the legislative and executive branches of the

federal government. It is less well known that the NRA has also transformed the judiciary and in the process rewritten our understanding of the Second Amendment to the Constitution.

Ed Warren: All I can say is if the public feels strongly about these issues, though, the Congress and the state legislatures and the city councils should be imposing regulations that they think are proper and necessary. And I think the Supreme Court will uphold them. Now, if you mean does the appointments that Trump has made to the lower courts and to the Supreme Court make it less likely that the Heller decision will be overturned? Let's say marginally. I think that's probably true.

Bill Curtis: Well, that was a great way to end our show. Laurie Dhue, I hope you'll come back and help us host once again. Ed Larson, as always, you're a veritable compendium of constitutional knowledge.

Bill Curtis: And Ed Warren this has been a truly dynamic discussion and I hope you'll come back and continue it. Thanks very much for joining. And we'll see you right here in the middle. If you like what you heard, please help us by telling your friends. And, of course, subscribe to Politics. Meet me in the Middle. And if you have time, please leave a review. It really matters to us. You can also check us out at Curtco.com, Curtco.com code This episode of Meet Me in the Middle was recorded at Curtco Medias Malibu Podcast Studios and it was produced and edited by Mike Thomas. Audio engineering was by Michael Kennedy and our theme music was composed and performed by Celeste and Eric Dick.

Announcer: From Curtco Media. Media for your mind.