



From David French: Elizabeth Warren's Looming Legal Embarrassment

October 29, 2019

One of the goals of this newsletter is to elevate important stories that the news cycle has simply missed. Yes, I'll comment on the headline news, but there's more news out there, and some of it demands more attention. And so it is today. You may not realize this, but days ago the Supreme Court took a case that has a chance to influence the 2020 presidential election. The underlying issue perfectly sums up the political flaws of a presidential frontrunner and the case has a chance to help restore balance to America's separation of powers.

In other words, to paraphrase Joe Biden, this case is a big frickin' deal.

That's just the beginning of this Tuesday edition of my as-yet-unnamed newsletter (thank you for the more than 100 suggestions so far). We'll also talk about the welcome demise of Abu Bakr al-Baghdadi, Kanye West and the power of the new convert, and why we should have great humility before we confidently assert that our chosen public policies will benefit humanity.

But first a brief word about the prepared testimony of Lt. Col. Alexander Vindman. It's becoming increasingly clear that the accumulating evidence and testimony are demonstrating that Donald Trump not only meant what he said in his phone call with Ukrainian President Volodymyr Zelensky, but also that his demand for investigations into the Bidens and into nonsensical 2016 conspiracy theories were part and parcel of American diplomacy for months. Trump's demands weren't just impulsive, stream-of-consciousness musings (the "Trump being Trump" defense). They were American policy, and that policy represented a blatant abuse of presidential power.

Now, on to the Supreme Court and a presidential frontrunner named Elizabeth Warren ...

1. The Case that Sums Up Elizabeth Warren's Flaws

For years I've been telling anyone who will listen that Warren's political biography is littered with landmines. Yes, she's known for inflating claims of Native American heritage, but did you also know that she (strangely enough) claimed to be the "first nursing mother to take a bar exam in the state of New Jersey"? A *Boston Herald* writer spoke to a New Jersey Judiciary official who said there was no way to verify her claim. Women had been taking the New Jersey bar since 1895, and the official was "not aware their nursing habits were ever tracked."

But her academic career isn't even quite as glittering as you might think. In 2010, Megan McArdle wrote a fascinating analysis of Warren's scholarship and found a "persistent tendency to choose odd metrics" that inflated the case for her leftist causes. McArdle said Warren's famous scholarship on medical bankruptcies "isn't Harvard caliber material—not even Harvard undergraduate." McArdle is hardly the only serious critic of Warren's academic work, and the theme of the criticism is much the same—that she had a history of "overstating her findings to make ideological points."

Now, I know that these critiques can feel like nit-picking when she's running to take on a Republican president who is one of the most extraordinary (and ignorant) fabulists in the history of American politics, but sloppiness in her biography and sloppiness in her scholarship extend to sloppiness in her public policy positions, and this cuts directly against the core of her political image—as the person who has the "plan for everything." What if her plans are illegal or unconstitutional? What if the veneer of wonkiness is hiding the unworkable substance?

And this brings us to the Supreme Court. Earlier this month SCOTUS granted certiorari in a case called *Seila Law LLC v. Consumer Financial Protection Bureau*. The court will decide two issues:

- (1) Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers; and (2) whether, if the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, 12 U.S.C. §5491(c)(3) [it] can be severed from the Dodd-Frank Act.

Let's put this in plain English. The CFPB is quite fairly described as Warren's signature public policy achievement. She proposed, she built it, and she initially hoped to run it. Now the nation's highest court is set to decide whether it's structurally unconstitutional. The governing statute places substantial restrictions on the president's ability to remove the CFPB director, and the smart money is betting that the Supreme Court will rule against the bureau.

SCOTUSblog's Amy Howe describes the stakes:

If the justices agree that the restrictions violate the doctrine known as the separation of powers – the idea that the Constitution divides the different functions of government among the executive, judicial and legislative branches – their ruling could potentially unravel all the CFPB's decisions in the nine years since its creation.

And what is the precise constitutional problem? Here's a nice summary from a CATO Institute *amicus* brief:

The Consumer Financial Protection Bureau is the most independent of independent agencies in the federal government. Despite its significant power, it is essentially accountable to no one. A single director heads the CFPB, this director serves a five-year term, and the director can be removed only for cause. The CFPB does not need Congress to approve its budgets because its funding requests must be rubber-stamped by another independent agency—the Federal Reserve. The CFPB has regulatory authority over 19 federal consumer protection laws, for which it is empowered to write regulations, investigate potential violations, and bring enforcement actions in its own administrative proceedings. This concentration of power in the hands of a single, unelected, unaccountable official is unprecedented and cannot be squared with the Constitution's structure or its purpose of protecting individual liberty from government overreach.

In other words, the Obama administration created in essence a fourth branch of government. The CFPB exists almost outside our constitutional system of checks and balances. It's an executive agency not truly run by the president. It's a statutory creation not truly funded by Congress.

It is true that the Ninth Circuit and the D.C. Circuit have upheld the CFPB's structure, but there is one very notable dissenter from the D.C. Circuit's *en banc* opinion—then-Judge (now Justice) Brett Kavanaugh. This was his assessment of the CFPB director in January, 2018:

Because the Director acts alone and without Presidential supervision or direction, and because the CFPB wields broad authority over the U.S. economy, the Director enjoys significantly more unilateral power than any single member of any other independent agency. By “unilateral power,” I mean power that is not checked by the President or by other commissioners or board members. Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power.

There is no such thing as a foregone conclusion at the Supreme Court, but given the number of justices who've signaled a willingness to rein in the administrative state, Warren's political creation is likely in for a rough ride.

To uphold the structure of the agency, the court would have to extend the present understanding of the ability of Congress to create independent bureaucracies— and that's exactly the opposite way that the Supreme Court has been trending. So, look for the court to rebuke Warren in the middle of a presidential campaign.

It would be one thing if the CFPB was simply one constitutional swing and miss, but Warren has a habit of making policy proposals that cross legal lines.

Can she keep her promise to “ban fracking everywhere”? No, she cannot. Her plan plainly conflicts with the Energy Policy Act, passed by Congress in 2005.

Can she pass a wealth tax and raise hundreds of billions of dollars to pay for an explosion of progressive policies? No, she cannot. Her tax likely violates the 16th Amendment, which holds that any “direct tax” must be “in Proportion to the Census or Enumeration.”

She wants to create a national statutory right to abortion that overrides restrictive state laws. But once again she has proposed a plan that contradicts relevant Supreme Court authority limiting congressional authority under the commerce clause.

Elizabeth Warren makes promises she can’t lawfully keep, and when those flawed promises become unconstitutional laws, they impose real economic and legal costs on American citizens.

2. Abu Bakr al-Baghdadi and the Necessity of Relentless Self-Defense

There are few political phrases I’ve grown to hate more than “endless war.” Critics of American deployments invoke it in the midst of debates about American policy, almost always casting themselves as the people who can actually end the “endless war.” Stop fighting, they say. Get out, they demand. Or this conflict will continue forever.

Hidden within this argument is a dangerous presumption—that if we stop fighting, so will our enemies. In other words, *we* are sustaining the conflict by fighting the conflict. Our presence doesn’t suppress jihad so much as it fuels jihad. Remove our presence, and the justification for jihad will wither. Withdrawal is thus a no-lose proposition. Our troops come home, and our nation grows safer.

Baghdadi’s death represents a useful opportunity to pause and reflect as to how, exactly, he became the world’s most dangerous terrorist. Viewed through one prism, he’s Exhibit A for critics of American deployments. He’s a creature of the Iraq war, they argue—an heir to the monstrous jihadist army known first as AQI (al-Qaeda in Iraq) that later became the Islamic State.

This argument isn’t without foundation. The Iraq invasion triggered an insurgency, and that insurgency was fed in part by early American mistakes. Our war made more war, and ISIS was the result.

But it’s also true that ISIS fed off American withdrawal, and if America had retained meaningful combat power in Iraq, it almost certainly wouldn’t have become the terrifying caliphate that shocked the world with its power and atrocities in 2014. Our presence fueled conflict. Our absence fueled conflict. But the difference is that our presence allows us to combat terrorists close to their homes, not ours.

There’s nothing particularly new about this dynamic. Osama bin Laden used American deployments to justify jihad, and he used American withdrawals to taunt American leaders. Remember these words, from 1996?

Where was this false courage of yours when the explosion in Beirut took place on 1983 AD (1403 A.H). You were turned into scattered pits [sic] and pieces at that time; 241 mainly marines soldiers [sic] were killed. And where was this courage of yours when two

explosions made you to leave Aden in less than twenty four hours! But your most disgraceful case was in Somalia; where- after vigorous propaganda about the power of the USA and its post cold war leadership of the new world order- you moved tens of thousands of international force, including twenty eight thousands American solders into Somalia. However, when tens of your solders [sic] were killed in minor battles and one American Pilot was dragged in the streets of Mogadishu you left the area carrying disappointment, humiliation, defeat and your dead with you.

And don't forget that the 9/11 attacks were plotted even as Bill Clinton was exerting Herculean efforts to seek a peace agreement between Israelis and Palestinians. He met with Palestinian leader Yasser Arafat at the White House more than any other world leader.

There is a completely natural war-weariness that sets in when any nation fights for this long, and there is a sense of futility that sets in when that fight continues without the kind of decisive victories we've seen in previous American wars. So, there's a temptation to find a reason to essentially declare victory and leave. We declared victory and left Iraq. After American troops killed Osama bin Laden, President Obama minimized the continuing threat of Islamic jihad, declared al-Qaeda "decimated" and dismissed ISIS as the "J.V. team."

Donald Trump has long been tempted to leave Syria and Iraq. Thousands of ISIS fighters remain at large, but the caliphate is rubble, and the ISIS leader is dead. The temptation to declare victory may well prove overwhelming.

But declaring victory isn't the same thing as achieving victory, and while we are all weary of "endless war," it's plain that many of our enemies are not. And if we pull back when they still seek to fight, they rush to fill the void. I'd encourage anyone who doubts the increased risk of American withdrawal to ponder once again the terrible scourge of ISIS attacks worldwide in 2014, 2015, and 2016. Here at home, the Heritage Foundation has tracked a total of 114 domestic jihadist terror attacks and plots in the 18 years since 9/11. Almost half have occurred since the rise of ISIS, along with the vast majority of domestic post-9/11 fatalities.

When advocates of withdrawal accuse critics of seeking to fight an "endless war," it's important to remind them that the obligation of self-defense is permanent, and one reason why Abu Bakr al-Baghdadi became the world's most feared terrorist is that our withdrawals gave him a chance to thrive.

3. Kanye West and the Power of the New Believer

I listened to *Jesus Is King* this weekend. Then I listened to it again. And then again. I started to listen out of curiosity, I stayed for the inspiration, and now I can't stop thinking about it—and to judge from sales and streams, the avalanche of hot takes, and the incredible enthusiasm in Christian Twitter—I'm hardly alone.

You can breathe easy. I'm not going to review the album. I'm not going to do the unthinkable and try to act like I know anything at all meaningful about the rest of Kanye's

music. I am going to do my best to describe one reason why it has unquestionably connected with so many Christian listeners: It represents the power of the new believer, unleashed.

If you're not from an Evangelical background, you might miss the vital importance of the new believer in the life of the church. And by "new believer," I don't mean the son or daughter who grew up in the pews and becomes a member of the church through a kind of natural progression. I mean the person who comes from the outside, the new convert who lives with a distinctive and infectious zeal.

While we rarely look to new believers for theological instruction (they're typically just exploring the nuances of their new faith), they function as living testimonies in multiple, critical ways.

First, new believers demonstrate the power of God over the human heart. When I first listened to Kanye's new album, the thought popped in my head that *this* is why we pray so earnestly for a person's salvation. *This* is why you never give up on a person. I've been a Christian all my life, and I've been involved in multiple, evangelistic ministries, yet it still takes me by joyful surprise when I see the sheer extent of the transformation when a man or woman truly gives his life to Christ. It's typically not an evolutionary step in a person's life, but rather a revolutionary leap. Human beings can persuade, but God remakes.

Second, new believers remind us that the Gospel is totalizing; it should make us rethink everything. The revolution isn't just spiritual. It should touch every aspect of our lives. I loved this tweet yesterday from my friend, Southern Seminary professor Andrew Walker:



What's going on is a man accurately realizing that Jesus can't be compartmentalized. If he's king, he's *king*, and that means fundamentally reassessing our lives.

Third, new believers expose the church's flaws. There's nothing like watching a man rejoice in the Lord and rethink every aspect of his life to convict a person of their own joylessness and spiritual compartmentalization. From the moment of conversion, worldly forces attempt to claw the person back into the darkness, and even if your soul is ultimately beyond the enemy's reach, he'll still attack your faith, your hope, and your joy. While the sheer exuberance of new belief is difficult to sustain in a fallen world, we should remain

fundamentally hopeful and faithful even in the face of immense adversity. The presence of a new believer can remind us of the joy that we too-easily lose.

But the flaws in the church go even deeper. In *Jesus Is King*, Kanye notes the opposition he's gotten from fellow believers. This is sadly no surprise. On one side, Christian scolds never fail to point out all the things new Christians get wrong about theology, politics, culture, or the church. They seem to work overtime to drain the joy out of a new life, neglecting the fact that the process of sanctification occurs over a lifetime. On the other side, heretics and grifters see a meal ticket. They'll see a celebrity they can use to elevate themselves.

Once again, my friend Andrew puts it well:



I have absolutely no idea what the future holds for Kanye. But as we watch this story unfold, it's important for Christians to remember that the true joy of this conversion doesn't rest in what Kanye can do for Christ, rather it's in what Christ has done for Kanye.

4. Helping Can Hurt

I'm not a libertarian, but I'm skeptical of the government's ability to reliably, consistently, *and* positively affect complex cultural problems. Or, put another way, government "help" can often hurt.

A [brief entry](#) at Tyler Cowen's excellent blog, *Marginal Revolution*, helped remind me of this important reality. He highlighted a [new paper](#) (pay-walled) from the National Bureau of Economic Research that reached a surprising conclusion about the effect of the California Paid Family Leave Act. Here's the abstract:

This paper uses IRS tax data to evaluate the short- and long-term effects of California's 2004 Paid Family Leave Act (PFLA) on women's careers. Our research design exploits the increased availability of paid leave for women giving birth in the third quarter of 2004 (just after PFLA was implemented). These mothers were 18 percentage points more likely to use paid leave but otherwise identical to multiple comparison groups in pre-birth demographic, marital, and work characteristics. We find little evidence that PFLA increased women's employment, wage earnings, or attachment to employers. For new mothers, taking up PFLA reduced employment by 7 percent and lowered annual wages by

8 percent six to ten years after giving birth. *Overall, PFLA tended to reduce the number of children born and, by decreasing mothers' time at work, increase time spent with children.* (Emphasis added.)

In his post, Cowen highlighted the apparent negative impact on “women’s labor market opportunities.” That’s interesting and important, but I’m more alarmed by the finding that a classic “family friendly” policy seems to have reduced childbearing. Later in the paper, the authors offer an explanation:

If the Act increased investments in children, then standard economic models posit the number of children should fall, because increases in child “quality” (i.e., investment in children) increases the shadow price of child quantity (Becker and Lewis 1973). Table 5A.2 shows this was the case, with the number of children falling by 2 percent for all mothers (-0.06/2.31, col. 2) and 5 percent for new mothers (-0.10/1.81, col. 4) over the next decade.

I don’t share this paper to argue that it presents the definitive analysis of the effect of family leave on childbearing. An enormous amount of ink has been spilled studying whether family-friendly policies can boost dangerously declining birth rates. Yet the study does provide another data point suggesting that the answer is exceedingly complicated, and a policy that promotes one virtue (more time with kids!) could perhaps hurt other priorities, like creating incentives for parents to have more children.

Politicians should demonstrate less confidence that they can fix the broken parts of our culture and more concern that their efforts may violate one of their most important obligations, to first do no additional harm to the nation they serve and the culture they seek to correct.

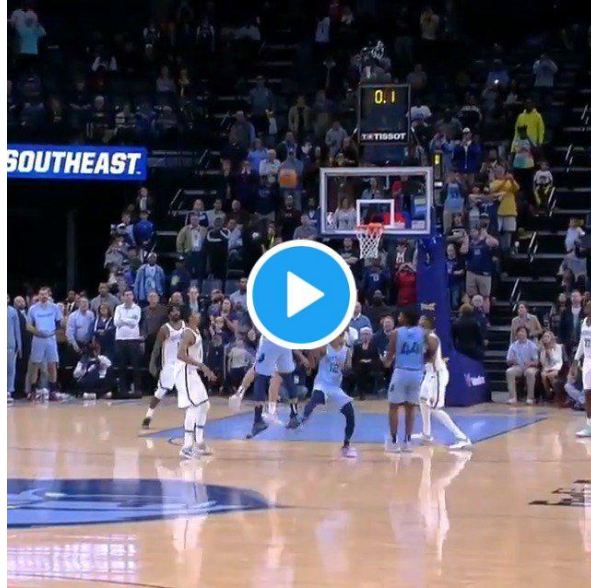
One last thing ...

If you follow me on Twitter or read me at all during my *National Review* days, you know that I love the NBA, and I love the Memphis Grizzlies. Bringing both threads together, I leave you with this thrilling moment from Monday night. NBA action, it’s fantastic:



[NBA@NBA](#)

"CROWDER, FOR THE WIN..." 66 all the angles from @CJC9BOSS' overtime
#TissotBuzzerBeater for the @memgrizz! #ThisIsYourTime #GrindCity9



October 28th 2019

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I'll be back on Thursday, hopefully with more NBA highlights and a newsletter name that makes you want to subscribe.