



WTH is going on with the Foreign Intelligence Surveillance Act? John Yoo discusses the future of the FISA Court

Episode #35 | March 11, 2020 | Danielle Pletka, Marc Thiessen, and John Yoo

Marc Thiessen: Hi, I'm Marc Thiessen.

Danielle Pletka: And I'm Danielle Pletka.

Marc Thiessen: Welcome to our podcast, What the Hell Is Going On? Dany, what the hell is going on?

Danielle Pletka: Well, Marc, what the hell is going on is that we are talking about foreign intelligence surveillance courts. But before we get to that riveting topic ... No, actually, guys, that is a really riveting topic. It's about spying on people in America ... first a word from our sponsor. If you're enjoying our podcast, please subscribe. It doesn't matter what platform you're listening on, Spotify, iHeartRadio, Apple Podcasts, whatever they are, please do subscribe. It means a lot to us to see who's interested, whether you're interested, what you're more interested in. We get to see all those statistics, so we're really grateful. Go ahead and do it.

Marc Thiessen: And also, if you have any questions for us or topics you want us to cover, just send us an email. You can write us at WhattheHell@AEI.org.

Danielle Pletka: On to spying on Americans. People should understand this because this is about your privacy, this is about your rights, and this is about your protection from the government.

Marc Thiessen: Also, it's about protecting this country from terrorists. It's also about protecting this country from a two-year Mueller probe that was chasing a conspiracy theory that Donald Trump had colluded with the Russians.

Danielle Pletka: Right. Now those of you who don't agree with Marc, and, yes, I hear from you. When you talk about Donald Trump, there but for the grace of God goes every single precedent. Do not lie to yourself in thinking that Donald Trump was special and the FBI was investigating him and Congress was investigating him, and that won't happen to the next President. No matter what party, you can bet your bottom dollar that if Bernie I-love-the-Soviet-Union Sanders becomes the next President of the United States, Republicans are going to go hell for leather into his background, into his affiliations and see whether he was ever a spy for the Soviet Union. This is the kind of circus that our nation needs to avoid.

- Marc Thiessen: Look, we had a Mueller probe for two years that started with surveillance that was done under the FISA Court. The FISA Court is the Foreign Intelligence Surveillance Court created in 1978. We're going to get a little bit more information on the history of it and what it does from our guest.
- Marc Thiessen: But after the Mueller probe finished and cleared Donald Trump of any conspiracy with Russia or anyone in the Trump campaign with conspiracy with Russia ... not so clear on the obstruction, but that's a topic for another day ... the Inspector General of the Justice Department did a report. He found that the FBI provided false information and withheld material information that was detrimental to the FBI's case in four FISA applications to surveil a Trump campaign official, Carter Page.
- Marc Thiessen: The Inspector General basically said not only did they withhold information, but they actually falsified information, took out exculpatory information that would have been detrimental to their case. This is troubling no matter what you think of Donald Trump because the FISA Court is set up in a way—because it's an intelligence court—the FBI comes in, the Justice Department comes in and makes a case to the judge, and because there's no opposing counsel there challenging them, they have, as the FISA Court judge said, a heightened responsibility for accuracy and for providing full context of information, the court's depending on them. They abused that in a way that set our country off on a more than two-year odyssey of this Mueller probe and investigations and eventually even impeachment.
- Marc Thiessen: This should be troubling to our country that the Justice Department lied to a court, provided misleading information to a court, in order to conduct surveillance on a presidential campaign. Whether it was a Democratic administration that did this to a Republican administration or a Republican administration that did it to a Democratic administration, we should all be outraged by it.
- Danielle Pletka: Again, we like to think of ourselves as a country of laws. One of the criticisms of Donald Trump is that he has blatant disregard for the rule of law. What we now know from the Department of Justice Inspector General, who by the way is an Obama appointee—
- Marc Thiessen: Yes.
- Danielle Pletka: Okay, so I want to underscore that. Is that the abuse of rule of law in this instance actually came during the Obama administration. Michael Horowitz, the Inspector General at DOJ, is absolutely blistering, caustic in his criticism. Again, it's important to take away from this that this isn't about Donald Trump. It is about the ability of unchecked police power inside the FBI and their ability to go to a classified court in which you, Marc, Dany, Alexa, and all you guys out there are not represented.
- Danielle Pletka: When you think of a court, what you have is you've got your opposing counsel. You've got your prosecutor. You've got your defense. You've got your plaintiff. You've got your defendant and you've got your judge, and sometimes you have a jury. You've got lots and lots of built-in protections. In the FISA Court there are no built-in protections. If the FBI comes in and says this happened, the only

protection you have is the judge. The judge by default, almost, doesn't think that the FBI is engaged in dirty politics.

Marc Thiessen: They were wrong in this case.

Danielle Pletka: Right.

Marc Thiessen: But now, let's keep in mind also though that the FISA Court is a really important institution because its main task is not to investigate presidential campaigns. Its main task is to give the United States and the Justice Department the ability to stop terrorist attacks and deal with foreign intelligence threats to the United States, which include possible terrorist plots.

Danielle Pletka: Not just terrorists.

Marc Thiessen: Yeah, but I mean-

Danielle Pletka: Also, Russian surveillance, Chinese surveillance, North Korean bad guys, whatever it is.

Marc Thiessen: Yes. All of that stuff. But in particular terrorist attacks because the FISA Court was reformed and harnessed after the 9/11 attacks as an instrument to rapidly give the government the ability to wiretap potential threats to this country and to create some sort of accountability for that. Can you imagine how outraged people would be if it turned out that the Bush administration and the Justice Department had provided false information to the surveillance court that had allowed it to unlawfully surveil Americans who had nothing to do with al Qaeda and were not connected in any way? That's essentially what happened in this case except it was the Obama administration doing it to people who were unconnected to the Russians.

Danielle Pletka: Now I want to be fair to the Obama administration here. Because we do talk about this and the President is the boss. But in this instance, these were DOJ decisions. This was based on the infamous Steele Dossier, which everybody's heard about. This is the dossier that was prepared at the behest of the Hillary Clinton campaign.

Marc Thiessen: The Democratic National Committee.

Danielle Pletka: And the Democratic National Committee, and it was a basically a binder full of dirty deeds done by The Donald.

Marc Thiessen: Allegedly done by The Donald, without evidence.

Danielle Pletka: Of course, it was prepared by somebody who was a known leaker, a known liar and was being paid by the opposition. The FBI kept this from the judges. I don't think Barack Obama is to blame here. There's plenty of other things I'm happy to blame on Obama.

Marc Thiessen: Well, we don't know that yet. Maybe the Durham investigation, which is being

conducted, which is going deeper into this than the Inspector General. The Inspector General only has purview over the Justice Department. Durham has purview over ... He's a career prosecutor by the way, for those who don't know about the Durham investigation, who is looking into the origins of the Mueller probe and the origins of this whole Russia collusion investigation. He can look at the White House, and he can look everywhere. We don't know what Durham will find.

Marc Thiessen: But the reality is that ... You raised the Steele Dossier. It's really important ... this was an unverified, salacious dossier. James Comey told the American people that it was not the driving force behind these FISA warrants and behind this investigation.

Danielle Pletka: That was a lie.

Marc Thiessen: It was only part of a broader mosaic of information that was presented to the court. The Obama-appointed Justice Department Inspector General found that that was not true, that it was central and essential to this whole investigation. Without the Steele Dossier there would have been no surveillance of Carter Page. Without surveillance of Carter Page, there would have been no Mueller probe, and our whole history would have unfolded very differently. I think we need to-

Danielle Pletka: I doubt it would have unfolded differently, but, yeah, we wouldn't have had to hear about the Mueller probe for two years and waste tax dollars on the Mueller probe. I mean, Donald Trump would still have been Donald Trump.

Marc Thiessen: Yeah. But so this raises a bunch of issues for us to talk about, which is, one, the FISA Court and its role and what happens now in the wake of the scandal. Then, two, what reforms should we have of this whole process?

Danielle Pletka: Does this work? Does this system work? Are people being protected? Should this power be reposed in the hands of politicals like the President? Should the President be making this decision? Should the courts be making this decision? Are there the right checks and balances? Congress is debating this right now, but we have somebody to talk to about this who knows a lot more than Marc and me and understands the details and has actually argued before the FISA Court, which is a unique qualification.

Danielle Pletka: John Yoo is joining us. He's a visiting scholar here at AEI, and he is a Professor of Law at Boalt Hall at the University of California at Berkeley School of Law. He's a prolific author, and I mean prolific. He's written about cyber attacks. "Striking Power: How Cyber, Robots and Space Weapons Change the Rules for War." Just a super-cool book that he wrote. "Point of Attack: Preventative War, International Law, and Global Welfare" and many, many more. He clerked for Justice Thomas on the Supreme Court. He's truly an expert on these issues.

Danielle Pletka: The thing I like best about John though is that he explains it in a way that isn't super-nerdy, is just easy to understand, and he's got some imagination. He's not just done the theory. He's done the practice, but he's also got some imagination about how things can be better. He's the perfect person to have on, so we're

glad to have him.

Marc Thiessen: All right, John. Welcome to the podcast.

John Yoo: Hey, Marc. Hey, Dany. How are you guys?

Marc Thiessen: We're doing great.

Danielle Pletka: Hey. Where are you now? Are you out in California?

John Yoo: Yeah, I'm in California. It was 70 degrees and sunny.

Marc Thiessen: In Berkeley.

John Yoo: I'm just looking at the ocean right now.

Marc Thiessen: In your bunker.

John Yoo: From my hot tub. As long as the bunker has a hot tub in it, we're all set.

Marc Thiessen: There you go.

Danielle Pletka: I'd watch that series, Hot Tub Bunker.

Marc Thiessen: Yeah. Hot Tub Berkeley Bunker. There you go.

Danielle Pletka: All right.

Marc Thiessen: All right. Well, John, we're here to talk about FISA, not about your hot tub. Let's start with the basics. What is the FISA Court? What does it do, and how does it work?

John Yoo: Okay. Well not to bore the listeners with too much constitutional law, but it's a way to get full surveillance on somebody without having to go through the normal requirements that apply for a normal Fourth Amendment warrant like the kinds you see on TV like on "Law & Order" and so on. The main difference is that the standard for getting one of these warrants is not the usual standard we use for criminal suspects, which is that we think someone was involved with a crime or might be about to engage in criminal activity.

John Yoo: The other difference is that it goes through this whole process that involves classified information and a secret judge and a secret court. Now the main limit on it is that it's only supposed to be used when the government is trying to surveil a foreign spy or a terrorist or some other similar threat to the national security.

Danielle Pletka: Okay. Let me get this straight. Okay, so If Marc was plotting to rob the next door Brookings Institution-

- Marc Thiessen: Blow up Brookings.
- Danielle Pletka: Let's make it even better. If Marc were plotting to blow up Brookings, that wouldn't be a matter for the FISA Court. That would be the FBI or even the police going and getting a warrant to listen into his plotting. Correct?
- John Yoo: Yes. That's right.
- Danielle Pletka: Whereas if-
- John Yoo: We would need some evidence, some, what we call, probable cause that he was actually going to engage in that criminal activity. They can't just get a warrant because they think Marc looks suspicious on Fox News, which half of America probably thinks.
- Danielle Pletka: I would bet more than half, John, I mean, honestly. Have you seen him? But let's say that Marc is working with his friends in al Qaeda and he's interested in getting them to blow up the Brookings Institution because he doesn't really know how to do this. Oh, my God. They're going to be so mad at us. Laughing out loud. They're great neighbors. In fact, they're terrific people, so, hey, guys over there at Brookings, I'm really, really sorry.
- John Yoo: No, I agree.
- Danielle Pletka: Even more ironic because General John Allen who's the head of Brookings has actually done his fair share of fighting.
- Danielle Pletka: But let's say that Marc is working with his friends in al Qaeda to do this. All of a sudden we have a different court and a different standard. Right?
- John Yoo: Yes. In fact, actually, the standard could be even lower than we think Marc might be working with al Qaeda to blow up Brookings. All it needs to be is we might think Marc has talked to someone who might be an al Qaeda member. It doesn't matter what they were talking about or what they were going to do, then you could get a warrant. At least Marc is different-
- Danielle Pletka: Does it matter that Marc is American?
- John Yoo: No. The thing that makes FISA different is that it's not about "we think you're about to do something" or "we think you're about to do something criminal." It's just "we think you might be associated with or a member or helping or just talking to." It has to do with your status, who you are, not necessarily what you're going to do. Once you're in the FISA world then, yes, then it's completely different. How you're treated, what process you get and so on.
- Danielle Pletka: Okay. Now let's get into the practical application of this.
- Marc Thiessen: What are the ways that the FISA Court has helped our national security? What are some of the kinds of cases that are brought before it that are essential to protecting the country?

- John Yoo: I'll give you an example where it failed and where we should have done it is right before 9/11. Right before 9/11, the CIA was watching some of the members of the actual hijacking plot. Some of the people who actually died hijacking those airplanes and crashing them into the Pentagon and the World Trade Center and so on. Two of them had crossed into the United States, and the CIA knew they were in the United States. But they didn't tell the FBI because they didn't think FISA applied, but FISA does apply. Even though we didn't know what they were up to, even though we didn't know whether they were going to take flying lessons or they wanted ... All we had to know was that they had met, associated with, talked with people who are members of al Qaeda, that would be enough to put FISA surveillance on them once they were in the US.
- John Yoo: Of course, let me also make clear, outside the US, you don't need any kind of warrant to surveil someone who's not an American. Everyone else in the world has no Fourth Amendment rights against the government. We don't require any FISA process or Fourth Amendment process for them. These are only for American citizens or people who are inside the country because those are the only people who have privacy rights against the government.
- Danielle Pletka: All right. Let's keep it really basic just for another moment because I do think that it's important that people understand why the FISA Court came into creation. What is the FISA Court?
- John Yoo: The FISA Court itself is made up of existing federal judges. They are chosen by the Chief Justice of the United State. There's usually one in each major city. They have to take the application from them. This is also the unusual thing is that the government goes to that judge completely in secret. Provides secret information to that judge, classified information. The target never finds out, never has a chance to challenge it although that's not unusual. Initially most warrants are like that. But in this case with FISA, if the warrants continue, the person under surveillance never finds out. Then the FISA Court issues this warrant. But again, it's not really the same kind of warrant that exists for criminal cases, which is 99.9% of all search and surveillance done in the country.
- John Yoo: The other thing that's different is that there is a FISA Court in Washington, DC, and it's actually strange, it's actually in the Justice Department building, not in the Federal Courthouse down by Third and Constitution Avenue. I've been one of the few people who've, as a lawyer, practiced before that court. It's a metal vault. It's at this top floor of the Justice Department. It's got like these three-inch steel doors. By the way, structurally, I don't think this was a good idea to put the vault at the top floor of the building. Think, if anything happened, they would just crash through the five floors right to the basement.
- John Yoo: And then you go in there, it's like a skiff. You've got to put all your electronic equipment down. You basically can only have pen and paper in there. Then the judge will sit in that vault and take the classified information, decide whether to grant the warrant. I would think most of the FISA warrants that are granted are done through Washington, DC.
- Danielle Pletka: All right. We know what the FISA Court is. When did it come into being by the way? It came into being in the late-'70s?

- John Yoo: Yes. It was passed as part of the Watergate reforms. Before FISA, presidents would just do this on their own authority. The earliest example people often cite is Abraham Lincoln during the Civil War just said, "Yeah. Go ahead. Wiretap the Confederates' telegraph wires. Intercept their Morse Code." I don't know if people know what that is. But once upon a time, before voice, people would just tap out messages. And so, between Lincoln and Nixon, Presidents would just order this in the national security interest. It was considered a species of military intelligence, which is called signals intelligence. It was just the interception of the enemy's electronic communications.
- John Yoo: Because of the Watergate abuses, as you point out, Dany, in the late-'70s the Foreign Intelligence Surveillance Act is passed as part of all of these other reforms that were intended to restrict presidential power.
- Danielle Pletka: And so, agencies have to go to the FISA Court and they have to make the case to a judge about the importance of this particular surveillance. This happens how many times a year?
- John Yoo: I think that's still classified, but easily thousands. Just to give you an example, even before 9/11, the primary use was for spies. You would think every phone number in the Russian Embassy had a FISA warrant on it. Every Russian government official. Every Chinese government official in the country you would think would have a FISA warrant on surveillance because it's about their status. They are foreign agents in the country. There are going to be thousands of people like that even before you get to 9/11. Then after 9/11, of course, it really spikes because we're worried about ongoing and future terrorist attacks in the country.
- Marc Thiessen: Let's fast-forward to 2016 when the FBI went to the FISA Court to seek surveillance of Carter Page who had been a member of the Trump campaign, which are the FISA warrants that led, ultimately snowballed into the Russia investigation. Walk us through what happened and what abuses took place because the Inspector General of the Department of Justice issued a pretty scathing critique of how the Justice Department handled this.
- John Yoo: Yeah. Good question. Also, we should keep in mind that this is all still under investigation by Mr. Durham, the US Attorney up in Connecticut, so there still might be criminal charges that come out of all of this. We don't have a full accounting of the facts. But if you look at the IG report, Congressional hearings, essentially what happened ... just to boil it down ... is that the government used evidence that it had been fed, I think, by the Clinton campaign kind of acting with people at the Justice Department who were very suspicious of Russian contacts with the Trump people to get a FISA warrant.
- John Yoo: Then that's why people are fighting so much to see the actual FISA warrant application to see what was in it. How much did it rely on the information in the Steele dossier? Was it really enough? If you could compare it to the other kinds of FISA warrant applications, was it really a reach? Was it a stretch? Or was the Steele dossier and all that information just a small part of a broader amount of evidence?

- John Yoo: Now, I've seen FISA warrant applications. Very few people have. They're heavily classified because if you think about it, they have all kinds of raw intelligence in them where they say, "Oh, Thiessen, we saw him in Berlin talking to this guy we know works for Russian intelligence." That might be enough to get a FISA warrant application started, and then you would try to get more to satisfy the court. So, we don't really know exactly how much was in there, but it doesn't look now that we know what was in the Steele dossier, a lot of people including myself would say, "That really seems weak. That doesn't seem like enough to get a FISA warrant." Because Page, for example, who is an odd fellow, I think-
- Danielle Pletka: Let's take a sidebar for everybody and just quickly remind what's the Steele dossier? This is the file that was compiled at one time, at least, at the behest of the Clinton campaign payment to an organization that brought this guy, this former British spy, Christopher Steele, he compiles a dossier on Donald Trump and Donald Trump's associates alleging a whole series of-
- Marc Thiessen: Salacious and unverified allegations.
- Danielle Pletka: Right. This is the Steele dossier. This information from this file, and perhaps more, comprises the information that is brought by the FBI to the FISA Court. Is that right, John?
- John Yoo: Yeah. Here's why it makes a difference. You could read it one of two ways. You could say, well, no, the FBI when they go to the FISA Court with the Justice Department, they're supposed to be telling the court things they believe to be true. These are the facts we have. These are the facts we think are true, and that's why it justifies this warrant. That's why we think Carter Page might be a Russian spy or working for the Russians.
- John Yoo: It's a judgment call and it's hard to recreate when you look back at it. Did the FBI agents and the Justice Department officials look at the Steele dossier and just believe it? Stick it in the warrant application, but they did a sloppy job? I think that's the best case for the Obama Justice Department. The worst case for the Justice Department is, oh, they just took it, the hand off of this information because they just were so willing and happy to believe that Trump was being influenced with the Russians that they didn't even bother, they didn't even think about checking the information in the Steele dossier. They deliberately fed misleading information to the court.
- John Yoo: In either case, that's not how it's supposed to work. You're supposed to sit there and double-check. If, for example, if we saw Thiessen talking to some al Qaeda guy in Berlin, we'd want more information. How do we know that guy was really an al Qaeda guy? Show me that there's other information that shows Thiessen was in Berlin. Here's a photograph of Thiessen meeting with the guy. You at least want, alleged... you would hopefully have lots of information to back it up. The FISA Court should ask for that. A skeptical judge, this is an awesome power he's giving to the government or she's giving to the government. A FISA judge would say, "Show me the proof behind this. I don't need to take it at face value."
- John Yoo: This is the bigger point, especially when it involves surveilling the major opposition party's presidential candidate. If you go back to Dany's first question

about how did this start? When did it start? The whole point of it was to make sure the Nixon Watergate abuses would never occur again. The idea was the reason you had FISA is so a President couldn't use national security surveillance for domestic political purposes like surveilling the other party's presidential candidate. But the statute doesn't say that because you wouldn't think you'd have to write that down again.

Marc Thiessen: We'd think it would be assumed.

John Yoo: Yeah. I mean, look, I worked on the Patriot Act. I drafted several parts of the Patriot Act regarding FISA. The big overhaul of FISA occurred in the Patriot Act. It never occurred to me that we had to stick in a sentence that said, "Oh, by the way, don't surveil the Democratic or Republican Party's presidential candidate."

Marc Thiessen: John, the Justice Department Inspector General, Michael Horowitz, issued a report. The FISA judge, Rosemary Collyer, based on that report, issued a stinging rebuke of the FBI. Basically saying that the FBI provided false information, withheld material which was detrimental to their case knowingly. In one case they falsified information about Carter Page leaving out the fact that he had been a CIA source, which strengthened their case that he was working as a foreign agent effectively. This was a pretty stinging rebuke. The Inspector General found 17 errors and omissions including that what James Comey said that the Steele dossier was just part of a broader mosaic of information presented to the court was not in fact true. That it was central and essential to their case, to the FISA Court. Walk us through what the Inspector General found and why it's so troubling.

John Yoo: Well, it's a very long report and one of a series of reports going into how all this started and all the investigations in the Trump camp. We haven't seen the end of it. But you're right. The government, what it's been saying is that this Carter Page stuff, this Steele dossier stuff, a tiny part of what we presented to the court... There's a big universe of other information. Maybe the Steele dossier is like a footnote in a 10, 15-page FISA warrant application.

John Yoo: But as you say, Marc, the Inspector General doesn't think that's the case when he's done the interviews, looked at the applications themselves. It doesn't sound like there was any other corroborating evidence, which makes sense because now we know what was in the dossier was actually false, so there couldn't be any corroborating evidence. As you also say, Carter Page is an unlikely person to pick to surveil as some kind of Russian agent because he had been approached by Russian intelligence. This is all in the Horowitz report. He had been approach by Russian intelligence. They tried to recruit him. Actually Carter Page worked with the FBI and the CIA to bust up that Russian plot years ago. If anything, Page was a cooperating CIA asset if not an actual ... I mean, he was a Navy intelligence officer in his former career.

John Yoo: But that said, Page has been very open. He's very pro, he thinks America should adopt a more pro-Russian foreign policy, and he has business interests and travel back and forth there. But you can see where the FISA Court judge's statement that you just mentioned, Marc, reinforces the IG report. Because you wouldn't expect to see the FISA Court judge say that. They rarely say anything in public

unless they think that there was some kind of misconduct. That it just wasn't negligent or forgetful, that it was something intentional.

- John Yoo: The real question, I think, boils down then to did these members of the FBI, members of the Justice Department who work on FISA, was this deliberate? Was it because they really thought they had to stop Trump? Or was it just part of this assumed mindset that, of course, there had to be Russian contacts. In their zeal to discover them, they went off the rails of normal procedure. Horowitz thinks it's the latter. He thinks that the FBI and Justice Department did ignore the rails that were put there by FISA and by past Attorney Generals to make sure the government didn't abuse this great power. I'm sorry to see it because I know the people who do this. A lot of the courts trust the FBI and the Justice Department to be truthful and to be honest. The IG report shows that they were not.
- Marc Thiessen: Well, in the case of one of the problems with the FISA warrant where they actually falsified the information and left out exculpatory information, edited out of an email, that can't be negligent. That's intentional.
- John Yoo: Yeah, the question with that guy, is a particular guy who changed the computer records as to why he did it. It's not clear from the IG report exactly why he did that. But that guy is in a lot of trouble because falsifying ... This is one of the checks that FISA tried to create is when the FBI or the Justice Department... they testified at court. They say some of the things are under oath, and so it's lying to the federal official, lying to the federal court if you deliberately did it. This guy who went back and falsified the records, it sounds like he might be in a lot of trouble. Because as you say, Marc, why would you deliberately falsify and change your computer records after the fact in order to ... It sounds like he was trying to cover up something he'd done.
- John Yoo: Now the thing is that guy is a fairly low official, so the question ... And this is, I'm sure, what Durham is looking through is how high above him it went.
- Danielle Pletka: Obviously, Donald Trump has made the case that there's a vast conspiracy here. Bill Barr, the Attorney General, has not agreed with the President, but he has gone so far as to empower not just the Inspector General investigation, which we saw the first part of in December of last year. But also this ongoing prosecutor, Durham's investigation. Now the Inspector General, Michael Horowitz, was appointed by the Obama administration, so he's not a Trump guy, so he's unbiased. But he didn't find that any of this was motivated by political bias. In other words, it wasn't an effort to defeat Donald Trump-
- Marc Thiessen: No, he didn't say that. He said that it's ... The quote from him, and he testified is: "It's unclear what the motivations were. On the one hand gross incompetence, negligence. On the other hand, intentionality." Basically-
- Danielle Pletka: Yeah, he left them both out there. You're right, Marc. Now, the other investigation is also looking at this. Again, I want to pull this out of the context of Donald Trump. Because I think that when we talk about Trump, it clouds everybody's visions. It's true. I mean, the Trump derangement syndrome is everywhere.

- Marc Thiessen: Apparently in the FBI, too.
- Danielle Pletka: Well, and, right, and we know that because we've read James Comey's book and, yeah. But what I'm wondering about is why should Marc Thiessen be worried about this? Why should average Joe Blow be worried about this? Why is the reform of the FISA Court something that is so important to average Americans, not just to the President and his vendetta against the FBI for the Russia investigation?
- John Yoo: It's a good question, Dany, because the thing that worries me is that this one misuse of FISA to surveil Trump's campaign could, I think, energize that side of the debate that wants to get rid of FISA altogether. You commonly hear people like Senator Rand Paul and people like that who want to just get rid of FISA. Want to try to get rid of surveillance of terrorists altogether and have it all just considered crime. The problem is that, I think, to protect the country's security from foreign attack, you need to have something like FISA. Although by my druthers I would just have it rather go back to the President's ordering it and then they are taking responsibility for it.
- John Yoo: Let me give you an example. Again, with FISA you are surveilling people, targets, a status. Sometimes you're not even following specific known people that you can name, which is another thing you need for a criminal warrant. You need an actual person's name and their conduct. With FISA you can try to surveil places, organizations, people you think might be potential terrorists, but you're not investigating them because they've already done something criminal. That's the main thing.
- John Yoo: FISA, like signals intelligence in the military is not designed to surveil people and events for what they might do in the future. Criminal warrants, the things that are outside FISA, you are surveilling people because they already did things in the past. They already took some criminal activity. They've already taken steps to conspire. With FISA you're not trying to catch people for crimes that have already happened. You're trying to stop people from launching future attacks on the country. It's going to be probabilities and risks and less defined.
- John Yoo: But you still need to be able to do it, so I worry that we're going to overreact to what happened with Trump and narrow FISA surveillance so much that it puts us back into the box we were in before 9/11 where the government and the FBI, Justice Department and the FISA Court were afraid to use FISA properly. That's one of the few things I can look at that would have stopped the 9/11 attacks.
- Danielle Pletka: Just to contextualize this for folks, so FISA, the original Foreign Intelligence Surveillance Act is passed in the '70s. It is then amended by the Patriot Act after 9/11 to broaden it. Those changes expired at the end of last year and they were extended just until March of this year. What are the changes? What's the debate that's going on here?
- John Yoo: It's interesting. As you say, the Patriot Act Amendments have a sunset provision on them that require their periodic renewal. I think in the last two renewals ... It's roughly about every four years or so ... there have been these big fights actually to try to narrow FISA significantly. I think, Dany, you're suggesting what I think

will happen is that this next go-around is going to be an opportunity for people to try to narrow FISA.

John Yoo: One of the main fights has been over a different program I worked on, which is what's called the Terrorist Surveillance Program. That was done outside of FISA initially and then it was brought into FISA. This is the idea, can you try to intercept streams of communications coming in from abroad by email, phone call? You know within, say, a certain stream of emails, say, right after 9/11, the government just said, "We're going to try to intercept all emails coming from Afghanistan into the United States. We're going to try to sift through it to try to detect patterns of communication that look like they're from terrorists." But you don't know any specific phone number or email address is actually Osama bin Laden's email address, so you're just searching through this huge hay stack for the needles.

John Yoo: Initially that wasn't done under FISA because you couldn't get a warrant because you had no particular target in mind. You couldn't name a specific person. You couldn't name a specific phone number or email address. One of the things that the Patriot Act Amendments did in their periodic renewals is to bring that whole program under FISA and the FISA judges authorize it. That's what people have been fighting about. It's not really part of the things we've been talking about with Trump and Carter Page and so on. But that's, I think, really what's at stake, is in this new age of communications for the FISA statute in the courts to allow that kind of surveillance to continue. Because that's, I think, maybe the most important kind of electronic surveillance that the government can undertake to stop future terrorist attacks.

John Yoo: But the whole fight about Trump and Carter Page and the Steele Dossier, that might provide people the political grounds to try to get rid of this other program, which they've been trying to get at for about eight, 10 years now.

Marc Thiessen: Or just get rid of the FISA Court entirely, which some have proposed.

John Yoo: Yeah, look. The way it was before Nixon, and maybe Nixon was a one-time only or a rare case. But before Nixon, what would happen is that presidents would order its use. But you couldn't really use it in court to prosecute anybody. The point was you would gather this intelligence. The President would order it under his own authority, and you would use it to try to stop a direct and immediate attack on the country or stop a dire threat to the national security. If it had to become public, if it had to be used in court, then the President would have to take personal responsibility for it. He could appoint ... If you think about the FISA Court, it's a great responsibility shifting mechanism. Look at what's going on now. Everyone can say, "Oh, it was the FBI. It was those FISA judges," and so it's not really President Obama and Loretta Lynch, the Attorney General under President Obama. Or, Eric Holder, the previous Attorney General, who's responsible. The FISA Court just defuses responsibility by shifting the blame to the bureaucracy and the courts.

Marc Thiessen: If the FISA Court didn't exist, Barack Obama would have to order the surveillance?

John Yoo: Right. He would have had to order the surveillance himself personally and then,

and his National Security Advisor Susan Rice and the Attorney General, they would be responsible for it. I mean, imagine what Trump would make of that.

Marc Thiessen: Yep.

John Yoo: Right? But that's how it used to work.

Marc Thiessen: Here's the thing. President Trump is always accused of doing untold damage to our democratic institutions. Right? But in this case, it's his foes who did enormous damage to our institutions. I mean, first of all, Judge Collyer, the FISA judge, said in her letter to the Justice Department that this abuse calls into question whether the information contained in other FISA applications is reliable. The result will be that the court will now be much more skeptical of the presentations that the Justice Department makes to the court not just on this but in terrorist cases and everything else. It could slow down in a case where we're trying to capture a terrorist or stop a terrorist attack on our country. That could be deadly.

Marc Thiessen: Then second, it gives ammunition to the critics of the existence of the FISA Court and the whole FISA process to try and undermine it. It seems to me like they've done a lot more damage to our institutions through this whole process than Trump ever did.

John Yoo: It might have a good long-term effect if you look at the longer constitutional picture. What happened is we give a lot of power to these bureaucracies. You can look at Comey as a good example of this. FISA and maybe what's happened with Ukraine and the National Security Council, you saw the civil service sort of rise up against Trump. It's very interesting. What Trump, you could say, is trying to do is re-exert democratic control over these bureaucracies, and they are trying to stop him. When you talked about impeachment, you hear talk about the interagency process. That's just bureaucracy versus Trump. I don't agree with his foreign policy, but he was elected to carry out this foreign policy. You see this struggle, and this is yet another example of it.

John Yoo: You're right. In the short-term what you could see is not necessarily a collapse, but a level of distrust and then a reduction in the effectiveness of FISA. But maybe that might prompt us to rely less on these bureaucracies and put more democratic control over all of this policymaking that's been going on. Sometimes it seems to run on autopilot.

John Yoo: You definitely can see in the attitude of Comey and certainly the attitude of the FISA bureaucracy that they know best how to protect the national security and the selections with politicians and the dirty politics was beneath them and even something they had to observe. But then there's this question, who guards the guardians? It's certainly the question here. In the longer term you worry that these bureaucracies are gaining so much power in the national security area that it's not ultimately responsible to anyone who's elected.

Danielle Pletka: I think you make a good point. For a lot of us the notion that a court exists and that a process exists and that law enforcement has to, in fact, prove things to that court is actually reassuring. Because when you think about a person like Donald Trump having sole authority over such warrants, you can only imagine what

Donald Trump would do. I mean, at least I could only imagine what Donald Trump could do. It could be everybody. It could be anybody. It could be Bernie. It could be anybody he doesn't like. It could be Wolf Blitzer at CNN. You never know what is passing through the President's mind, and he has certainly proved himself enormously, let's say, grandiose in his interpretation of his own authority.

Danielle Pletka: On the other hand, as you say, who's watching the watchers? That is really, really frightening. The FISA Court has attempted, and the FBI through it, to destroy the lives of two people who worked on the Trump campaign. I don't give a damn whether people don't like them. They weren't Russian agents. This is what we need to weigh in the balance. Is there any better third way? Is there some way of doing this that doesn't empower the deep state and doesn't empower capricious people like Donald Trump or even Susan Rice who used her authorities unbelievable unadvisedly when she was National Security Advisor?

John Yoo: That's a good point. One other possibility that could occur we haven't even discussed this, what if the courts, the judges just say, "We're not going to do this anymore." No matter what FISA laws we pass, no matter what amendments are added, the judges could just say, "Find somebody else to issue your window dressing after the fact. The legitimization of all this stuff you're doing." That's also something that could end up happening. That's also what this order from the FISA Court might foreshadow. You need the cooperation of the judges to make this work. They don't have to cooperate if they don't want to. They could say, "We think all this is unconstitutional. If you want to go back and do surveillance, you and the President and Congress figure it out."

John Yoo: I could see a different approach. One thing that comes to mind and a lot of people haven't thought about what could replace FISA. You have the previous Watergate system, pre-Watergate system, which does, as you're right, Dany, opens a possibility of a President misusing the power for his own personal ends. The FISA system does seem to be open to abuse by a bureaucracy.

John Yoo: One area that does seem somewhat successful that people don't talk about that much in this context is what happened after Iran-Contra where you created this system for the regulation of covert action, which really relies on cooperation between the President and Congress. Whereas you know if you or the CIA wants to carry out a covert action, they have to reduce it. The President reduces it to a finding. The President signs it, and then the top leadership of Congress is briefed on it. The Intelligence Committee is briefed on it. Doesn't call for judicial review and the implicit idea is if the President and Congress are in harmony about it, that's really the check on an out of control President. If Congress doesn't like it, they cut off the funds for it. They can make it public. They could use it to embarrass or politically attack the President.

John Yoo: But I think a lot of people think that covert action system that was agreed upon after Iran-Contra seems to work pretty well. From what I saw it seems to work pretty well. Maybe that's something they have to move to, is something not based on the courts being the check but the President and Congress checking each other.

Marc Thiessen: That's a fascinating idea.

- Danielle Pletka: Sounds like a good op-ed for you, John.
- John Yoo: One thing you could do is in this FISA process, this is not unusual, right? When the government shows up to get a warrant, even in the criminal case with the Fourth Amendment there, you don't ask the defendant to show up and oppose the warrant because he's supposed to be under surveillance and not know about it. You don't tell Vito Corleone, "Oh, will you show up so we can explain why we want to listen in on your phone calls so that you won't use a public telephone?"
- John Yoo: What you could do instead is appoint somebody whose job it is ... They could work for the government as it were and have the necessary security clearances. It would be their job to show up at every FISA warrant application just to present the other case to try to poke holes in the government's case.
- Danielle Pletka: Sort of a B Team kind of thing? Red Team, B Team.
- John Yoo: Yeah, yeah, yeah. Exactly like a B Team. Then Nunes could have given that person all of his reports and findings. Then that person could have used them. With the FISA Court ... I mean, I know those judges ... what they would say is we don't take notice of what Congressmen say against each other. That's politics. If you want to actually make a difference, you have to reduce it into a brief and submit it in a case. Now the problem is that the cases are all secret, so Nunes couldn't know how to do that. But if you had this person whose job it was to always be representing the defendant no matter who it was, then that would have given Nunes the ability to make sure the FISA Court knew about what was really going on. But you're quite right. I think Nunes has been vindicated. But he didn't give a lot of reason back then to believe he was being credible because of the way he was acting in public.
- Marc Thiessen: There you go.
- Danielle Pletka: Yeah. That's part of a broader problem, isn't it? That everybody, too many people in this entire episode have discredited themselves and the systems within which they work whether it's Comey or McCabe or the Strzok and Page woman inside the FBI, our Congressional Republicans, Congressional Democrats. It has really besmirched a lot of names and a lot of institutions.
- John Yoo: Yeah. You see a lot of people going after Barr now. There was just some letter issued by a thousand former Justice Department officials calling on Barr to resign. I think they really don't understand what's going on, which is the best thing for the Justice Department and the FBI. After all this is for Barr and Chris Wray to go in and clean house much in the way the house was cleaned after Watergate. Because that's the only way to make sure that the institution stays independent and has integrity. Because say Barr leaves, then the White House is going to do it. That could be disastrous. If you were really a liberal or you were really worried about the independence of the Justice Department, you would want Barr who was Attorney General before to be the one who engages in the reforms rather than throwing it over to Trump and for all the reasons that Dany just gave.
- Danielle Pletka: Yeah. Oh, what a tangled web we weave.

- Marc Thiessen: Well, John, you've helped us untangle a lot of it. Our listeners are grateful because we all understand the system and the situation a lot better now thanks to you.
- Danielle Pletka: Thanks a ton, John.
- John Yoo: Oh, yeah. Anytime, guys. It was fun.
- Marc Thiessen: Dany, I don't normally agree with Rand Paul. But let me read something that Rand Paul wrote that I think you will agree with which is: "People often talk about the Russians being involved in our election. I'm equally alarmed at having the intelligence community interfering with our elections and deciding winners and losers." Maybe not the intelligence community, but people in the FBI lied, misled a court, and started us down this whole path of this Russia probe. What do you think?
- Danielle Pletka: I'm actually racking my brain to think if there was ever a moment I agreed with Rand Paul about anything including the weather outside and the colors on the American flag. No. The fact is that Libertarians ... I won't go after him specifically ... in general believe that our government is just as bad as the Russian government and just as bad as the Chinese government. They believe that all governments are equally on the same plane, and I think that's garbage. I guess if I had to choose between somebody interfering in my elections, yes, I'd rather have the FBI interfere.
- Marc Thiessen: Well, I'd rather have nobody interfere.
- Danielle Pletka: Well, obviously. I mean, obviously. But the reality is the Russians are bad guys. I want to say something else, actually, in defense of those who worried about this. Part of the problem with the Trump campaign was that because we had so many candidates, what, like 4,000 candidates, kind of like the Democrats had until recently. 4,000 candidates running for the presidential nomination. The experts were spread far and wide, and Donald Trump was the runt of the litter. He was out there, you remember, he was the joke candidate. He was never going to win, and we were certainly all going to lose once he became the nominee until we realized at ten o'clock that night that he was going to win.
- Danielle Pletka: But as a result, he ended up with this hodgepodge of people working for him who were motivated by a whole variety of things. Among them, Obama haters like Michael Flynn and Jim Mattis, but people who had very serious military careers behind them. But also people who were grifters and hangers-on and I put people like Carter Page and others in that category. Let's be real about this. Part of the challenge here is that Carter Page is very pro-Russia, does make excuses for Russia and a lot of the people-
- Marc Thiessen: That's not a crime.
- Danielle Pletka: No, no, of course, not. I would defend somebody's right to be stupid about Russia to the hilt.

- Marc Thiessen: Exactly.
- Danielle Pletka: The problem is that Donald Trump did a lot of things that exacerbated this situation. Does that excuse the Russia probe? Absolutely not.
- Marc Thiessen: Absolutely not.
- Danielle Pletka: Does that excuse the FBI lying to the FISA Court? Absolutely not. Does that excuse the unmaskings that Susan Rice did of intelligence in the National Security Council? Absolutely not. None of the above. On the other hand, I just want to underscore that we were all very worried about who was going to be advising Donald Trump and what his position was going to be on Russia. As with every single freaking thing over the last three years, Donald Trump has made everything worse.
- Marc Thiessen: Oh, stop that.
- Danielle Pletka: It's so true.
- Marc Thiessen: I'm sorry, you can't blame him for this. I'm sorry. No, you can't.
- Danielle Pletka: Yes, he made it worse.
- Marc Thiessen: No. You know what? Dany, I'm sorry. But you know what? I wrote a column about this early on in the process. I said, "It's entirely possible that Donald Trump is just wrong about Russia." That there's no nefarious-
- Danielle Pletka: He was not being paid off.
- Marc Thiessen: That he was not being paid off. That he was not collaborating with Vladimir Putin. He just doesn't have the right view of Russia. That is wrong. That is a problem for our national security. Ironically, the Mueller probe has probably pushed him into a position where he has probably the best Russia policy of any President in recent times since Ronald Reagan because he has been tougher than anyone on Russia. Because it was great evidence to show that he wasn't colluding with Russia, so that in a way our Russia policy has benefited from this. But it is not a crime to be wrong on Russia. It's not a crime to think that Vladimir Putin is your partner.
- Danielle Pletka: But everything he said, he made it harder.
- Marc Thiessen: Stop blaming the victim. I'm sorry. No.
- Danielle Pletka: I'm not blaming the victim.
- Marc Thiessen: No. No. You are. You are. That's not fair. What our country just went through with this probe is unacceptable. To have the FBI mislead a court, get warrants, two of which now the Justice Department has said were invalid. We did invalid surveillance of an American citizen for no good reason, which led directly to two years of investigations into a conspiracy theory. A conspiracy theory, which is that Donald Trump colluded and conspired with the Russian government to steal

our democracy. His presidency had this cloud hanging over it. I grant you that he made it worse.

Danielle Pletka: See, you do agree.

Marc Thiessen: Oh, no. No. But he's not to blame for it.

Danielle Pletka: I didn't say he was to blame. I said he made it worse.

Marc Thiessen: But I will tell you that I understand why he was so frustrated during the whole Mueller probe, because he knew he didn't do it.

Danielle Pletka: Yeah, I get it. I get it.

Marc Thiessen: And, you know?

Danielle Pletka: Okay. You're right he didn't do it, and there's plenty not to like about Donald Trump without the Russia probe. Believe me. Again, I want to underscore, I don't like the FBI being in Americans' shorts any more than you or Rand Paul to be perfectly frank about this. The whole episode is appalling and outrageous. All I'm saying is that Donald Trump, who was a victim of this, of the illicit witch hunt that he likes to call it.

Marc Thiessen: It was a witch hunt.

Danielle Pletka: It was a witch hunt, but he made it worse. He made it worse with the way he acted. He made it worse with how he responded. He made it worse with almost everything that he did in response. Because he was going to be exonerated. In the end he was exonerated and at what cost? What cost has this imposed?

Marc Thiessen: Yeah.

Danielle Pletka: Did he make it worse? He did.

Marc Thiessen: I don't disagree with you that he made it worse, but he's not to blame. He's the victim here of this whole saga. But I will tell that the-

Danielle Pletka: We've gotten off the FISA topic, too.

Marc Thiessen: No, we're not because I'm going to bring it right back to the FISA topic.

Danielle Pletka: You're so good.

Marc Thiessen: Which is that not only did these people at the Obama Justice Department mistreat American citizens, set us off on this whole course with the Mueller investigation, they also undermined the FISA Court, which is an important institution for our national security.

Danielle Pletka: That I agree with wholeheartedly. I think we made that case pretty well with John

Yoo. By the way, just to end on this, I really liked John's suggestion. I agree that the system of notifications on covert operations works pretty well. I also would note, we don't see a lot of leaking about covert operations even though it's done in consultation with Congress. There's actually a lot of maturity in Congress about it as bizarre as that may seem to everybody who's listening. I just think that's a worthy thing to think about.

Marc Thiessen: Yeah. Absolutely. I agree. Well, let's end on that moment of agreement.

Danielle Pletka: On that beautiful congenial note. Hey, if you guys have ideas, comments, whatever it is, let us know. Don't hesitate, and don't forget to subscribe and review us. Thanks for listening. See you next week.

Marc Thiessen: Take care.