



WTH can we do to make China pay for the coronavirus? Debating the pros and cons of suing Beijing

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Danielle Pletka: Hi, I'm Danielle Pletka.

Marc Thiessen: I'm Marc Thiessen.

Danielle Pletka: Welcome to our podcast, What the Hell Is Going On? Marc, what the hell's going on today?

Marc Thiessen: Well, what the hell is going on is we've got a topic we disagree on.

Danielle Pletka: Finally! I know you've all really been missing that.

Marc Thiessen: We are talking about how to hold China accountable. Now, Dany doesn't disagree with holding China accountable.

Danielle Pletka: Thank you, Marc.

Marc Thiessen: We all want to hold China accountable. But the question is how? I wrote a column in The Washington Post a few weeks ago advocating that we do similarly to what we did in Congress when they passed the Justice for Victims of Terrorism Act, which is ...

Danielle Pletka: Also known as JASTA.

Marc Thiessen: JASTA, which stripped Saudi Arabia of its sovereign immunity and allowed people to sue Saudi Arabia for its role and complicity in the 9/11 attacks. And I argued that China's complicity in this pandemic is far worse than Saudi Arabia's complicity in the 9/11 attack; direct complicity. They lied about this. They punished doctors. They tried to hide evidence. They intentionally misled the world about the fact that human transmission was taking place. They impeded our efforts to prepare for the virus, to prevent it from spreading into the United States. And so they need to be held accountable for this. And the way to do that is to use our legal system, to strip them of their sovereign immunity in the case of this pandemic and allow the people who have been unemployed and the businesses that have been devastated to sue China for damages. What do you say, Dany?

Danielle Pletka: Well, first of all, I think this is going to be enormously popular. We've seen legislation introduced in the House and in the Senate. When we were talking about doing this, I went and looked at whether there was popular support for suing the government of China for the coronavirus. Again, we can refine it to talk about what exactly we sue

for, but those are the rough outlines. And there's huge support. I just happened to come across a poll done in the UK, and nearly three-quarters of the people polled thought that the Chinese Communist Party should be sued for compensation. Remember, it's not just justice that people are looking for. It's also money.

Marc Thiessen: Because they've lost a lot of money.

Danielle Pletka: Right. The number who thought that people should be allowed to sue was 71%. The number of people who thought that there should be an international inquiry, which I do think is a good idea, was 83%. These are pretty overwhelming numbers, and I think the numbers are very similar in Australia and certainly in the United States, where lawsuits have already been filed.

Danielle Pletka: Why do I not think this is a good idea? It's pretty straightforward. I think this is a Pandora's box. It's not that I want to defend the Chinese Communist Party ever, any more than I wanted to defend the Saudi government for what happened on 9/11. First, I abhor this culture of litigation, and I think you do, too, Marc. This-

Marc Thiessen: Frivolous litigation. But this isn't frivolous.

Danielle Pletka: Okay. No, hang on a second.

Marc Thiessen: This is not like ambulance chasing.

Danielle Pletka: It's not frivolous when somebody sues a college because they're angry that they didn't get in. Lots and lots of this lawsuit culture... Yes, of course, there are frivolous ones, but lots of them aren't frivolous. The notion that all problems can be resolved through the courts and that they can be remediated by the payment of penalties, which benefits trial lawyers more than anything else, parenthetically, so I expect the Democratic Party to get fully behind this, that is a notion that is incorrect. And it has done huge damage here in the United States, this unbelievable sort of trial lawyerization of everything. It's one of the reasons why we can't get the medicines we need fast enough because of the regulatory environment. It's an enormous problem, and the notion that we should take this and internationalize it to resolve disputes is, I think, fraught with risk.

Marc Thiessen: Oh, I think you've gone off the rails here, Dany, and I will tell you why. Because I agree with you that we have a problem with over-litigation, but the problem is frivolous lawsuits. The problem is lawsuits that don't have merit, people suing doctors for malpractice when there's no malpractice involved because they know that it's easier for them to settle rather than fight it out, and the insurance will cover it.

Danielle Pletka: Just hang on a second. When someone sued McDonald's because their coffee was too hot-

Marc Thiessen: Yeah, I know.

Danielle Pletka: Was that frivolous?

Marc Thiessen: Yeah, that's frivolous.

- Danielle Pletka: And do you know how much money they got out of it?
- Marc Thiessen: I know. That's my point.
- Danielle Pletka: Right.
- Marc Thiessen: We're both agreeing on frivolous lawsuits. This is not a frivolous lawsuit. China is responsible for the world's worst global pandemic in the history of the world. Of course, they should be held accountable for that.
- Danielle Pletka: So do you think that the Ba'ath Party should be... Do you think that members of the Ba'ath Party in Iraq should be allowed to sue the US government? We were definitely responsible for the overthrow of Saddam Hussein.
- Marc Thiessen: It is a very different, qualitatively different thing. It is a qualitatively different thing to have been responsible for a global health pandemic. This is not a policy-
- Danielle Pletka: No one is alleging that the Chinese government is actually responsible for this. People are alleging-
- Marc Thiessen: No, we are.
- Danielle Pletka: We just talked about this with Josh Rogin. We agree. The Chinese government didn't engineer this in a lab. There was negligence probably, probably in a lab, and it got out into others.
- Marc Thiessen: No. No, no. First of all, gross negligence is a legal standard, but I'll leave that to the lawyers to argue. But I'm not even arguing negligence. I'm arguing that they intentionally lied to the world and prevented us from knowing that there was human-to-human transmission, that they intentionally impeded America's ability, through their lies and through their cover-up, to prepare for the pandemic coming to our shores, to prevent it from coming to our shores. They refused to share samples with us because they were afraid of that, and so we couldn't prepare testing sooner. So a lot of the problems we're having with testing stem from the fact that for six weeks the Chinese wouldn't, and still to this day won't give us samples. We got them another way.
- Marc Thiessen: Look, if this was just a natural outbreak that just, "Oh, sorry, our system's inefficient. We screwed up. We couldn't get it done," there's no legal case there. There's a legal case for intentionally impeding the ability of the world to contain and stop this virus.
- Danielle Pletka: Look, I don't like being put in a position of defending the Communist Party of China, and I'm not defending the Communist Party of China. You and I, I think, have pretty much established our bona fides on that question repeatedly. My view is that there are better ways to deal with this than lawsuits. My argument, and I've made this repeatedly in various op-eds, including a bunch in which I said that US pension funds should morally and legally be forced to divest from companies that are Chinese companies that are oppressing Uighurs, for example, or complicit in what's going on in Hong Kong. I've said that we need to build a supply chain that isolates China and that ensures that the United States is never again dependent upon the Chinese market for any of our medication, technology, things like that.

- Danielle Pletka: Those, to my mind, are the right way to approach this, just even practically speaking. Okay, let's go ahead with your idea. Let's sue, okay? Let's allow a right of action to sue the Chinese government in this narrow way that you described for lying to the world, which we agree they did. How are those trillion-dollar lawsuits going to be settled in your view?
- Marc Thiessen: Well, so very simple.
- Danielle Pletka: Oh, good.
- Marc Thiessen: No, it is. One thing you said earlier is that we need an inquiry to find out the facts, right? There's no teeth behind an international inquiry. It's like the United Nations will send a strongly worded letter to Beijing.
- Danielle Pletka: Well, you've got me there. I'm not much for international inquiries.
- Marc Thiessen: The best way to have an inquiry is through the legal system, through the system of discovery, where there's teeth behind the demand that you produce the witnesses and produce the documents and produce the information. And if you don't...
- Danielle Pletka: And if you don't, what? If you don't, then what?
- Marc Thiessen: Then you lose the case. And if you lose the case-
- Danielle Pletka: Okay. Then what? What happens if you lose the case?
- Marc Thiessen: And if you lose the case, then there's a summary judgment against you and-
- Danielle Pletka: And? And where does that money come from?
- Marc Thiessen: The Chinese government assets can be seized.
- Danielle Pletka: Okay, so we're going to be seizing Chinese government assets in the United States?
- Marc Thiessen: Absolutely, absolutely.
- Danielle Pletka: And what do you think is going to happen to American assets in China?
- Marc Thiessen: But here's the thing. That the Chinese government cannot legally retaliate in that way because-
- Danielle Pletka: What?
- Marc Thiessen: ... because... No, they're-
- Danielle Pletka: They're not supposed to put people in concentration camps either, and I haven't noticed any laws stopping them from doing that.
- Marc Thiessen: Unlike, so if-

- Danielle Pletka: Are we going to go with war with China in order to enforce this judgment? Is that what your recommendation would be?
- Marc Thiessen: No, I'm not suggesting that we go to war. We're not going to go to war over this. The reality is that the Chinese government... One of the big differences between the United States and China is that they're all state-owned industries. Not all of it, but a lot of it. And so you can only seize state assets, so they can't go-
- Danielle Pletka: That's our rule, not their rule. They can seize whatever the hell they want.
- Marc Thiessen: That's international law.
- Danielle Pletka: No, it isn't.
- Marc Thiessen: Of course, it is.
- Danielle Pletka: There's no international law that says that you can expropriate state-owned industries, but you can't expropriate private industries. That's just not the way it works.
- Marc Thiessen: It is.
- Danielle Pletka: It isn't. All right, well, Marc and I are going to go till the end of time about this, but for those of you who have missed Marc and I being at each other's throats, here we were at each other's throats. But we've got somebody to actually help us try and sort out these questions. We're really lucky to have him on the podcast, David Rivkin. I'm sure most of you have seen, really a prolific writer. He writes for-
- Marc Thiessen: The Wall Street Journal regularly.
- Danielle Pletka: ... regularly for The Wall Street Journal on international matters and on constitutional legal matters. He's a visiting fellow at the Center for the National Interest. He's a fellow at the Foundation for Defense of Democracies. But most importantly, he is actually an American constitutional and international law lawyer.
- Marc Thiessen: And a litigator.
- Danielle Pletka: And a litigator, a practicing one at that. So I'm hoping... Marc's really hoping he's going to defend him after I sue Marc for having assaulted me in this conversation.
- Marc Thiessen: You deserved it.
- Danielle Pletka: Here's our interview.
- Marc Thiessen: All right, David, welcome to the podcast.
- David Rivkin: A pleasure to be with you.
- Marc Thiessen: So the costs of this pandemic keep piling up for the US. We've got 20 million unemployed, hundreds of millions of people locked down in their homes, businesses going out of business, and trillions of dollars in economic relief going

out. Somebody's got to pay for that damage. Who should it be?

David Rivkin: Well, I think that compelling evidence has emerged, not entirely definitive evidence... I'm being a careful lawyer here, but compelling evidence has emerged that China is responsible in a variety of ways, particularly if this pathogen originated in the Wuhan government-run biolab. But even if it did not, if it originated, let's say, in the wet markets, which is less plausible these days, still there's been plenty of lying and obfuscation by the Chinese government that really transformed what could have been a Chinese-only or China-only epidemic into a global pandemic. The one thing I would point out, in particular, is you did have, if I'm not mistaken, on January 13th no-fly travel restrictions for Wuhan residents traveling to the rest of China, but, Marc, not the rest of the world, which looks really bad, to put it mildly.

David Rivkin: So I think the Chinese have to be held accountable for it, but I want to emphasize an important point. It is not just financial recovery. One of the important key things is how do we make sure it does not happen again? So how do we hold the Chinese accountable in a way that both punishes them for the wrong they've done and makes sure or at least mitigates the prospects that it would not happen again?

Danielle Pletka: So David, let me ask you a little bit about this. The notion of trying to lay responsibility and then seek remuneration in this kind of a situation is... It's never been done before, unless my research betrays me. It certainly wasn't done over Ebola, and it hasn't been done over MERS. It wasn't even done over SARS. So what would you, as a lawyer, focus on that will enable claimants in the United States but also elsewhere to suddenly bring this home and force payment from China?

David Rivkin: Right. Well, let me say a couple of things. As is often the case in life, one transgression does not necessarily lead to a particular remedial course of action, and the next one doesn't, and the third one doesn't, but eventually you say, "Enough is enough." So in my view, precisely because of past Chinese culpability in regard to SARS and other epidemics that you mentioned, the avian flu and et cetera, et cetera, this is just not something we can tolerate in the 21st century. The risks are too high. I mean, this is self-interest. We're not talking about transforming China into a democracy, and we're not talking about helping the dissidents there or taking care of Hong Kong, all of which are meritorious goals. But I mean, this one really is about protecting us and protecting the rest of the world, number one.

David Rivkin: Number two, the real problem with the lawsuits here that would have to be addressed is sovereign immunity. Sovereign immunity is a principle that basically states are immune from litigation in almost all circumstances in courts of another sovereign. But that is a matter of comity, and sovereign immunity has a number of exceptions. There's a statute in the United States called Foreign Sovereign Immunity Act that has a number of exceptions. None of them would apply here. Therefore, a new exception would need to be created. But you'd say to me, "Well, has it ever been done?" Yes, I will give you a perfect example.

David Rivkin: It was done the last time in 2016, where Congress, in the waning days of the Obama administration, amended FSIA as a part of a statute called JASTA, Justice Against Sponsors of Terrorism. And it broadened FSIA terrorism exceptions to allow suits essentially... It didn't mention Saudi Arabia by name, but it essentially allowed lawsuits against Saudi Arabia because of 9/11. And because of JASTA, the lawsuits against Saudi Arabia have been brought in this country. Prior to the passage of JASTA, all of them failed because of sovereign immunity. Once JASTA was enacted,

those lawsuits went forward. So here is a perfect example. 9/11 was a terrible awakening moment, the new Pearl Harbor, if you will, and it prompted a change in the Statute of Regime and Government Sovereign Immunity in the United States.

- David Rivkin: I would submit to you that what has been happening here and now is a perfect justification for a similar remedial action. Let me emphasize, look, we're not talking about imposing tariffs on China or trying to seize Chinese property in extra-judicial fashion, not that we could. We're talking about opening the opportunity for litigation. At the risk of sounding like a typical lawyer, and I am a lawyer and a litigator, litigation in US courts is probably the world's best avenue for truth-finding. If we're wrong, if things look bad for Beijing, but they really didn't do anything wrong, then they'll prevail. Okay? I mean, this is nothing more than an avenue for ascertaining accountability, imposing a punishment if appropriate, and coming up with remedial measures to ensure it doesn't happen again. I mean, that's about as American as apple pie.
- Marc Thiessen: We just had Josh Rogin on the podcast, and he was talking about the investigation into whether it came out of a lab or not. And one of the things he was saying is it's going to be really hard to find out because China has destroyed a lot of the evidence, and a lot of the people who were involved have disappeared. And the wet market, they've bleached it and scrubbed it down. So there are challenges to finding the truth about China's culpability in this. How would litigation allow us to get closer to the truth?
- David Rivkin: Well, I would say two things. First of all, American style litigation with ample discovery opportunities is the best way for fact development. I mean, it's slightly legalistic now. I understand that the Chinese may have scrubbed, no pun intended, the various services and facilities, but what happens is the lawsuits are brought, but once the sovereign immunity issue has been resolved, the new exception is created. The Chinese decide not to play ball at all, which would be very foolish on their part. There would be default judgments against China, and then it would be a matter of enforcing them.
- David Rivkin: If the Chinese decide to participate, they will engage in what we call, in the legal world, motion practice, where we're trying to knock it out on jurisdictional grounds, in particular, trying to knock it out, saying, "Well, you have not really alleged anything that justifies a lawsuit." They will fail. Discovery will be authorized. And if they don't participate in discovery, things would go badly for them because courts typically draw negative inferences. Kind of made of common sense, right? If I sued you and you refused to produce evidence, it pretty much attests to your guilt.
- David Rivkin: So the Chinese would be put in the horns of a dilemma, either producing the evidence or not producing and suffering the consequences. Now, of course, they can try to lie about their available evidence, and they can try to forge evidence, but modern forensic techniques make forging not easy. And if you get caught forging, you're in big trouble, again as far as the disposition of a lawsuit but also additional penalties for, using fancy legal terms like evidence spoliation and whatnot.
- David Rivkin: And again, the problem that Josh was talking about, and I respect his views, are endemic to any kind of investigation. But again, I think that there's nothing on this planet that has as fulsome opportunities, the best opportunities for getting at the truth as American-style discovery and American-style litigation. It's better than any other court in the world and, frankly, better than Congress. I mean, the other thing

here is, look, there are too many people, I would say. If the Chinese really have done what we suspect, the Chinese government of what we suspect them of doing, it would not be easy for them to lie about it. It's not like 10 people know about it, and they can kill them all. I mean, hundreds of people know. Thousands of people know throughout the Communist Party circles. Scientists know. Doctors know. All of them are going to... And it's not just discovery, Marc. It's not just about seeking documents. You can seek to depose people and obtain, of course, permission to depose. So they will produce evidence.

Danielle Pletka: David, can I sort of cut you off and ask a couple questions about the practicalities of this?

David Rivkin: Sure.

Danielle Pletka: You're kind of talking about the People's Republic of China, the largest country in the world, a place where they decided that they didn't like their Muslim Uighur population and just put a million people in concentration camps. So I'm not too doubtful of their ability to kill off a few hundred witnesses if need be. But I guess one of my doubts about your discovery theory is this is a foreign country. This is a country that doesn't want us to discover the truth.

Danielle Pletka: When I think about situations like the Iranian nuclear weapons program, the Pakistani nuclear weapons program, Saddam Hussein's biological and chemical and nuclear weapons program, there is still argument about whether or not we know the truth. Why do you have this sort of confidence that this information is, one, obtainable, and two, is going to be dispositive in people's minds?

David Rivkin: Well, look, there are many impediments precisely because of the reasons described. The Chinese government is oppressive, repressive, lies routinely, but those problems impede any kind of an investigation, be it an investigation by Congress, be it an investigation by some commission, similar to the 9/11 Commission. All I'm saying to you, after spending most of my adult life practicing litigation at the highest level, is that litigation offers better opportunities for fact development than anything else. Now, I think that it also provides, unlike some of the inconclusive debates as to whether IAEA, the Vienna-based International Atomic Energy Agency, people are still debating what evidence existed to support the proposition that Saddam pursued... actually had operational weapons of mass destruction.

David Rivkin: But there's no such thing as inconclusive debates in the context of litigation. If there's a discovery order, and again, if Beijing chooses not to participate, then none of it matters. There will be default judgments against them, trillions of dollars' worth of default judgments, and it would go very badly for them certainly. Were you to ask any American lawyer, his advice would be if you did not knock it out on jurisdictional grounds, you have to play ball. So the evidence would be produced. If there's any evidence of falsification... Look, yes, the Chinese are perfectly capable of killing any number of people. What, are they going to kill everybody who knows the truth in China and everybody they told it to? It's just not easy. And if nobody can be produced as witnesses, everybody who's been involved in Wuhan and in the medical facilities and the biolab and elsewhere, what are they going to say? We don't have anybody? I mean, judges are very good about drawing inferences based upon incomplete and falsified discovery.

David Rivkin: At the end of the day, when the discovery phase is over, the law... I think, look, if the

facts turn out to be what we suspect them to be, the evidence of Chinese culpability is utterly clear, then the district court is not going to throw their hands up in the air and say, "Well, geez, we just don't know." They would reach a conclusion. And if the evidence is what it appears to be, the Chinese government is going to lose.

Marc Thiessen: So basically what you're saying is that by opening up litigation, we put China in a vise essentially because if they ignore the case, then they lose and have default judgments. And if they can't ignore the case, which you're arguing they probably can't, then they have to play ball, and then they have to start producing witnesses. So for example, one of the things that's happened is some of the doctors who sent warnings about this have disappeared. Well, call them as witnesses, right?

David Rivkin: Call them as witnesses. Call their colleagues.

Marc Thiessen: And then China has to repeatedly say, "I'm sorry. We can't find the head of the Wuhan Institute of Virology, and we can't find the doctor who tried to warn the world and all these other people." So eventually, if they don't produce the witnesses, then they lose, right?

David Rivkin: Right. Yes.

Marc Thiessen: So the hammer is the judgment that they either have to produce something and make a case to defend themselves or they have their assets all over the world at risk.

David Rivkin: They would have to be China government-owned commercial assets. So if you have a private Chinese company, you don't need to worry about that. But most of the Chinese assets overseas are, in fact, owned by Chinese state-owned companies. But it's more than just that. Look, if there are outstanding multi-trillion-dollar judgments against Beijing, to collect on them you just don't go after their commercial properties. You go after the proceeds of sales of every Chinese good and service by Chinese state-owned companies. In fact, you put their entire income from exports, which is the engine of the Chinese economy, at risk.

David Rivkin: This is serious stuff. I mean, if immunity is withdrawn, you really cannot play with the US legal system. It's well-armed, it's well-practiced to deal with recalcitrant defendants, be they governments, be they private companies, be they individuals. It is an enormously consequential exercise. But again, it has to be done in the right way.

Danielle Pletka: So David, let's talk about the practicalities of this because, of course, sitting here on our podcast in our studios and living rooms, it doesn't quite jump over the bar of how we actually do this. In the case of JASTA, the Justice Against Victims of Terrorism Act, which basically gave Americans a right of action against the Kingdom of Saudi Arabia and waived their sovereign immunity, we actually do have pending cases, and we've seen those.

David Rivkin: Which are in discovery, by the way, certainly.

Danielle Pletka: Right, which are in discovery and which I'm sure the Saudis will be even less cooperative maybe even than the Chinese, but that's another story and another podcast. But of course, the Foreign Sovereign Immunities Act exists for a reason, and it's not to protect maligned governments like the Communist Party in China or

the Kingdom of Saudi Arabia or the government of Iran or any others. It's mainly to protest us. It's to protect our assets in China.

- Danielle Pletka: So let's say we go ahead and we do a JASTA for China. Legislation has already been introduced by Chris Smith, who's a New Jersey Republican in the House. Let's say we do that. What do the Chinese do? Do they then open a right of action against the United States? And by the way, don't others then too?
- David Rivkin: It's interesting you ask. Okay, so a couple points. First, I am fully aware about the importance of sovereign immunity, the US being the world's, aside from China, the largest global trading nation, a global presence. Lots of US property and assets and personnel in much of the rest of the world. I am not suggesting abrogating FSIA. I'm suggesting a narrowly tailored exemption just like the one was done for JASTA. Prior to JASTA, the only way you could sue foreign countries for terrorism was if you designate them as state sponsors of terrorism. Okay? And of course, countries like Iran were designated. Countries like Saudi Arabia were not because you have to bite a big diplomatic bullet.
- David Rivkin: So the JASTA exception said that if you're a foreign country and your officials are believed to have provided material support to a terrorist attack in the United States, like 9/11, they could be reached here jurisdictionally. The exception we're talking about here would be only... Again, it would not need to even name China by name, just like JASTA did not name Saudi Arabia. It would be for conduct of foreign states that has created a global pandemic, or fostered, caused, whatever verb you want to use, a global pandemic. Let's say it's a limited exception. I don't think the United States would ever behave in this fashion. I can't think of any circumstance where it's likely. I mean, there are people criticizing, unfairly in my opinion, the Trump administration for not moving fast enough on the testing and everything, but nobody believes that the United States can ever be in that position. So what exactly are other countries going to do?
- Danielle Pletka: We're not talking necessarily about reciprocity here. I mean, we can open a right of action for narrowly tailored, as you describe, and that makes a lot of sense, I'm sure, to a lot of people. But that doesn't stop the Chinese from opening a right of action that isn't narrowly tailored or anybody else.
- Marc Thiessen: Or even narrowly tailored, David. Couldn't they just say, "Okay, we think that the US government created the... the US Army sent this out and infected China, and so we're going to create a right of action in Chinese courts to sue the United States"? And unlike our legal system, they know what the verdict will be, and they'll just start seizing US assets in China.
- David Rivkin: Well, two things. Actually, ironically enough, Marc, the Chinese have already done that. There's sort of a... let's call it the litigation signaling. There have been reports, I have not read the filings because they're in Chinese, but I've read the reports in the last three weeks that there are two lawsuits that have been brought in China by Chinese nationals that are predicated upon exactly this theory, which is insane, that the US military created this horrible virus, and then we infected a member or members of a US Armed Forces team that participated in some international competition in Wuhan. I think you're probably referring to the same story, right?
- Marc Thiessen: Probably, yeah.

- David Rivkin: They supposedly went there and infected everybody in October or November of last year. Okay, so they've already done it. Okay? I don't know if they had to... If they amended the Chinese version of Foreign Sovereign Immunities Act. But look, we can win the competition of two judicial systems, because the American judicial system would handle this type of litigation in an open and fair way that everybody can look at and objectively conclude that everything is right and fair. Do you really think the Chinese legal system would pass that muster?
- Marc Thiessen: But what difference does it make because-
- David Rivkin: Well, what difference it makes is so the Chinese are going to have a Mickey Mouse judgment that the United States has created this virus and deliberately infected Wuhan. We would have a judgment based upon the absolutely, unimpeachably fair, procedurally and substantively, US legal proceedings. Who wins in terms of a court of public opinion, in terms of who the international community is going to believe? Now, there are some people, including the current head of WHO, that may support the Chinese line. But I'm a firm believer... Thank you. I'm a firm believer that in this kind of competition we win.
- David Rivkin: Now, you're going to say to me, "David, who cares about truth and openness and fairness and perceptions? They can seize US property." Sure they can, but they're far more exposed commercially than we are, because among other things... I mean, I'm not an economist, but I'll bet you there's a lot more assets and global sales of Chinese companies, state-owned companies. For one thing, again, unless you just assume they're going to throw even the pretense of law to the side, they can't seize assets of AT&T or Amazon because they have a judgment against the US government. I mean, how many US government-owned companies operate in China? I would venture to guess none. There's no such thing. They'd lose this game.
- Marc Thiessen: So one of their weaknesses, David, is that they have a state-run system, and so that there you can... Even Huawei, for example, is answerable to the Communist Party, and a lot of the entities that they have around the world are. So because we have a free-enterprise system and they have sort of an authoritarian, state-subsidized system, they're financially more vulnerable than we are. Is that your point?
- David Rivkin: Well, not just financially. My point again is legally you can only go after the assets of commercial enterprises owned by the defendant. The defendant would be the state. So even if they have a Mickey Mouse legal proceeding that does say the US military created this virus, they cannot seize assets of private US companies in China.
- Danielle Pletka: But David, that presumes that they're going to do exactly what we do. They can pass whatever law they want to pass, and I gather it's pretty easy for the Communist Party to pass the laws they want to pass.
- David Rivkin: Oh.
- Danielle Pletka: They could seize anything they-
- Marc Thiessen: They don't have a Nancy Pelosi to deal with.
- Danielle Pletka: Right. They don't have a Congress.

- David Rivkin: I understand, but may I respectfully ask us briefly to ponder the consequences of this kind of confrontation. We basically have two choices. We can either suck it up and let the Chinese get away with it. I think it's unthinkable. Leaving the matter of justice and compensating the victims, this behavior is just too dangerous in the 21st century. Then we have... The other alternative is trying to hold the Chinese accountable. Now there are basically two paths in implementing the second alternative. One is to have government investigations either driven by Congress or a 9/11 style commission backed up by government-imposed punishments like tariffs and whatnot.
- David Rivkin: The second is litigation. Of the two, which one do you think would be more palatable? Because the US government can say with a straight face, "Hey, look, we didn't hold you liable. We just withdrew the immunity. We don't tell the courts in this country what to do." My point is, unless you're prepared to let the Chinese get away with it and run the risk of another even more horrible pandemic, although this one is pretty horrible, litigation is the best of all the imperfect options. And that's the kind of option where we have all the strengths and they have all the vulnerabilities, because our actions would be covered, cloaked, infused with all the majesty of the law and all of the majesty of good public diplomacy. And their responses would be totally illegitimate and arbitrary.
- Marc Thiessen: That is exactly the right place to end. David, Tom Cotton has a bill to do exactly what you're proposing, so this is a live option, and it happened in the case of Saudi Arabia over Obama's veto. So I think this is a really realistic possibility, and I hope you're litigating on behalf of some of these people when it happens.
- Danielle Pletka: Thank you for being so generous with your time and expertise. This was great.
- David Rivkin: A pleasure.
- Marc Thiessen: So here's where we stand. I want to hold China accountable, and Dany wants to let them go scot-free.
- Danielle Pletka: That's right.
- Marc Thiessen: Dany, why are you defending Beijing?
- Danielle Pletka: And you wonder why people hate Marc, me in particular. Look, my problem with the argument that David makes is, A, the discovery argument, I think, is specious. And the second part of this that I think is really misleading... I don't want to say that it's wrong, but is misleading, is that there aren't other options. Yes, it's true, there probably aren't other options for individuals to actually get restitution from the Chinese government.
- Marc Thiessen: So there aren't other options.
- Danielle Pletka: But let me promise you, no individual is going to get restitution from the Chinese government, not at least the Chinese government that I know. So what I think is wrong is this kind of straw-man argument that you're either a defender of the Chinese Communist Party, Obama style-
- Marc Thiessen: I didn't-

- Danielle Pletka: Or that you are going to allow lawsuits to go forward. I think there are other ways of isolating the Chinese, of marginalizing them, of what I've said in previous podcasts, is building guardrails around them. I think the notion that trillions of dollars are going to be extracted somehow from the People's Republic of China, as nice as that might be because I believe they are culpable in so many ways, I think that's just a fantasy.
- Marc Thiessen: Let's put the money aside for a second and just get the question of culpability on the record, right? So this is not the first exception to the Sovereign Immunities Act, right?
- Danielle Pletka: It's the second.
- Marc Thiessen: Well, no, it's not, because we also except terrorist states. If you're a designated state sponsor of terror, then you're excepted from it. So that means Iran has been sued for its culpability and acts of terror. Libya has been sued for its culpability and acts of terror. Lots of these countries. Do you think-
- Danielle Pletka: And how many of these countries have paid?
- Marc Thiessen: That's not necessarily the point. Do you think that those countries should be immune from lawsuits for acts of terrorism?
- Danielle Pletka: I think that when a government directs an act of terrorism against the United States that that government is a state sponsor and that they should be indeed held liable. First of all, while I agree with you that the Chinese government tried to cover this up, that they were culpable in misleading the World Health Organization in order to protect themselves, I don't think that the situation is exactly analogous, and I don't think any court of law would either. It is one thing to-
- Marc Thiessen: Oh, so you think they could prevail in a court of law?
- Danielle Pletka: I'm not sure that they could prevail. It would depend on how it was structured. But misleading, while the US Congress has certainly, in the past, tried to legislate that it is illegal to mislead on a variety of issues, the Supreme Court actually threw that out.
- Marc Thiessen: I think that's a very generous way of describing what they did.
- Danielle Pletka: Again, don't put me in the position of having to defend the-
- Marc Thiessen: Don't put yourself in that position, Dany.
- Danielle Pletka: What I don't want to see is the notion that all of our international relations can somehow be addressed through courts of law. This is why we have a State Department. This is why we have a Defense Department. This is why we have AID. It is not why we have the appeals court for the District of Columbia.
- Marc Thiessen: Yeah. So there was a lawsuit against Iran for culpability in the 1998 embassy bombings, because it turns out that Iran, through Hezbollah, trained al Qaeda in how to bring down buildings, and they were actually held liable for that. The benefit of that was not necessarily that money changed hands, though it probably should have, and we probably should have given some of that money to the victims of the

1998 bombings instead of sending it on pallets of cash from the Obama administration as part of the nuclear deal. I would rather see that in the hands of American victims of those bombings and Kenyan victims of those bombings.

Danielle Pletka: Sure.

Marc Thiessen: But it put for the first time on record the fact that the Iranians were involved in that bombing and were responsible for it, and it becomes a data point in the world's case against them for their sponsorship of terror and for their nefarious activities. In the same way, a lawsuit, even if we don't get to the point where there's Chinese assets being seized and there's some diplomatic solution-

Danielle Pletka: So you would argue that, in fact, the expectation that people have of restitution in this regard is absolutely peripheral to the question.

Marc Thiessen: No, I don't say it's peripheral. I say that there are benefits even if we don't get to that point. Look, how much money are we spending? We've just passed \$2.3 trillion, and we're spending another half a trillion dollars soon to replenish the program for the small businesses. We're spending billions of dollars to support hospitals. We're borrowing this money from our grandchildren, and it's because of China. Why should we not recoup some of that money? Why should those businesses not recoup some of that money? I'm in favor of that.

Danielle Pletka: All I'm trying to say, Marc, is that when you open up a Pandora's box like that... I'll give you a perfect analysis.

Marc Thiessen: The box is already open.

Danielle Pletka: Okay. I'm sorry. At the end of World War I, the Versailles Treaty sought to punish the Germans for starting World War I. Were the people at Versailles right? You bet they were. Did they think they were doing the right thing in disarming the Germans? You bet they were. What did Versailles result in? Oh, yes, World War II. All I'm trying to say is-

Marc Thiessen: You're saying this is going to start World War III?

Danielle Pletka: All I'm saying is that this is a Pandora's box and that China is not the same as Saudi Arabia when we talk about adversaries and that the way that China responds to this could very well be quite dangerous. We are not dealing with the McDonald's Corporation in terms of lawsuits. We are dealing with the Communist Party of China. This is a dangerous road to go on, and I think that we need to understand that the consequences won't necessarily be that those trillions of dollars that we've lost are gotten back.

Marc Thiessen: But you know what some of the consequences could be? Number one, that China is held on the record by an objective forum as having been legally responsible for this. Another thing that might happen is that it might speed up something that we both agree should happen, which is divestment from China by a lot of American companies who should be coming and producing these goods that are strategically important to us somewhere else in order to protect their assets from the threat that you raise. We might have American companies coming home, who might not otherwise come home, because we're holding China accountable for its actions,

and they might... that's another reason for American business to divest, and China doesn't want that. So I think we have, in this process, China in more of a vice than you think we do.

Danielle Pletka: That's right. I don't think that we have them in a vice, and I think that this may well redound to our discredit, as much as I would love the idea of getting that money back from somewhere. And on that note, like our late boss used to say, we are going to have to agree to disagree agreeably.

Marc Thiessen: I like finally having one of these podcasts where we disagree agreeably because it's always nice to be right.

Danielle Pletka: Not that agreeably. Thank you guys for listening. Hope everybody is safe and sound. Thank you for joining us, and let us know of any big ideas you have or how you think that Marc is wrong; let me count the ways. See you soon.

Marc Thiessen: Bye.

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