



WTH is going on with the Supreme Court? John Yoo on the DACA decision and the dangerous implications for executive power

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Danielle Pletka: Hi, I'm Danielle Pletka.

Marc Thiessen: And I'm Marc Thiessen.

Danielle Pletka: Welcome to our podcast, "What the Hell Is Going On?" Marc, what the hell is going on this week?

Marc Thiessen: What the hell's going on in the Supreme Court is what we're trying to figure out.

Danielle Pletka: So, let me back out and do a Cliff Notes version for everybody on what happened. For those of you who are not obsessively following what's going on in the Supreme Court — and I completely understand if you're not. So, lo these many years ago in the halcyon days, the Garden of Eden-like days when Barack Obama was the president of the United States, he did something pretty unusual. So what he did was he said, "You know what? I am the chief law enforcement officer of the United States." Now, for those of you who say, "What the heck is that?" Yeah. Well, I never heard of it either and neither had people who are actual lawyers. Obama said, "I'm the chief law enforcement officer of the United States and I don't like these immigration laws."

Danielle Pletka: And so even though immigration law says that if you come into the country illegally, whether you're six months old, or you're 60 years old, you can't stay in the country and you're subject to deportation, "I'm going to decide in my capacity as chief law enforcement officer that we're not going to enforce that law. That law is less important than other laws and we're busy guys. Our immigration people, they're busy. We have other important things to do. And so, I'm not saying don't enforce the law, I'm saying that I'm not prioritizing this law." And then two years later he said, "Not only that, but these guys are so busy, that actually your parents can all stay too." And that, I don't think any of my liberal friends would disagree with how this ended up going down.

Danielle Pletka: So, the Trump administration, in the weird position of constitutional defender came in and said, "That sounds very weird; we're going to take this to court; we're going to reverse this." And the court basically said, "No, no, what Obama did was fine, you Donald Trump, you can't reverse what Barack Obama did unless you go through a whole series of administrative procedures including publishing this in the Federal Register and seeking opinions." And that's what's called the Administrative Procedures Act that required — that can take two to

three years. And everybody applauded this as a great blow to Donald Trump's efforts to be Caesar and it's a great moment for our nation's DREAMers. Sorry for taking so long to explain this, but I think it's important that everybody understand exactly what this meant, because that's what we're talking about here today.

Marc Thiessen: So, our friend John Yoo, has caused a little bit of a ruckus in the media establishment in Washington because the Supreme Court recently had a ruling that basically said that Donald Trump cannot undo President Obama's decision on DACA because he didn't follow the Administrative Procedures Act properly. They didn't rule on the constitutionality of Obama's decision not to enforce our immigration laws entirely. But they did say that Trump didn't go through the proper process and so he has to start over again if he wants to undo DACA. I think you and I both support DACA in principle or the idea — not DACA but the idea that DREAMers — we should find a way properly through Congress and through legislation and the normal constitutional channels to come to an agreement there where DREAMers can stay here.

Marc Thiessen: We don't want to kick the DREAMers out. But the way Obama did it was completely unconstitutional. And John has basically argued that, "Okay, let's take that logic and apply it to other places. Let's apply it to the tax code. Well, maybe the President can just cut taxes because, well, he's just going to order the IRS not to enforce — use his discretion as executive to not enforce tax law or we could do it on environment or any number of other things."

Marc Thiessen: And so what John said is, "Okay, well, what's good for the goose is good for the gander." If it's okay for Barack Obama, not to enforce the laws that he doesn't like as chief law enforcement officer — and I don't think there's much controversy that the president is chief law enforcement officer, but he's supposed to faithfully uphold the laws according to the Constitution. And Obama used his discretion to not faithfully uphold the laws as chief law enforcement officer which is a violation of his constitutional oath, but okay, if it's good for Obama, it should be good for Trump. And then John said, "Don't enforce the tax laws, don't enforce regulations. We need an emergency stimulus to the economy because of COVID, okay, everybody can not pay 50% of their taxes and I'm going to order the IRS not to pursue you for it." And then, if Joe Biden wins in the fall, well, you know what, he can't just reverse that on day one, you've got to go through the Administrative Procedures Act.

Marc Thiessen: You have to go through all these careful things and it could take two or three years for you to reverse that. So the Trump tax cuts, unilaterally imposed through executive action, would stay in place for most of Biden's first term.

Danielle Pletka: First of all, I think this was an insane decision on the Court's part and I don't get this. But I want everybody who's listening to us to set aside your partisanship for a second about any of this stuff and just recognize that this is the further descent of our nation into these ridiculous fiefdoms in which the President — whether it's President Biden, President Trump, or President Donald Duck — behaves like the emperor. Congress sits by and twiddle its thumbs and argues about what statues should be in Statuary Hall and whether they should wear a particular scarf or not wear a particular scarf when they go out. And every single decision that gets made goes to court. This seems to me to be the future of our country. And what I

don't understand, whether you're a Democrat or a Republican or a communist or a fascist, is why you think any of that is a good outcome for our democracy.

- Marc Thiessen: It's not a good outcome for democracy, no doubt, but as a conservative, what bothers me second to the bad outcome from a constitutional standpoint, is that the guy who gave us that outcome is John Roberts. John Roberts voted with the liberal block to make this decision. Every other conservative on the Court voted the other way. And, by the way, it's not the first time he's done that in this term, he did it on religious liberty cases, he's done it on a bunch of different things. And of course, he famously did it in the case of Obamacare, where the guy who said he's only going to call balls and strikes decided to rewrite the legislation on the individual mandate and declared a tax even though the Obama administration said it wasn't a tax. So-
- Danielle Pletka: Wait, wait, wait. Not just declare a tax, but then decide that it was perfectly okay that a tax originates in the Senate.
- Marc Thiessen: Look, apparently the tax didn't even originate in the Senate, it originated in the Supreme Court. Well, who cares what branch it is.
- Danielle Pletka: I don't get John Roberts, I'll be honest with you.
- Marc Thiessen: But also, what I don't get is why are we — I did this column like four years ago in *The Washington Post* and I still don't have a good answer. Why are republicans so bad at picking Supreme Court justices? John Yoo, points out that Republican presidents have picked two thirds of the Supreme Court justices since the 1960s. Doesn't look like it when it comes to the decisions coming out of it. Our justices always grow in office, theirs never do. Why is that? Because they're activists. They start with the preferred outcome and then find the legal reasoning going back to it, whereas our guys are constantly under pressure from the establishment, from the media, from everybody in Washington to move to the left and they do. And this is just... It's so frustrating from a conservative standpoint to have picked so many justices and to have picked so poorly.
- Danielle Pletka: Well, I've got to say, Republicans don't just have bad taste in justices. That would be a whole 'nother podcast about Republican bad taste from soup to nuts. But the real issue here is, I think, that we need to understand better the implications of reposing vast amounts of executive power in the hands of whoever is sitting in the West Wing, whoever's sitting in the Oval Office, because there's going to be a backlash here and I shudder for the nation to think what it's going to look like. So we've got somebody perfect, a recidivist guest with us, to talk about this. One of our very good friends, the author of a new book called *Defender In Chief: Donald Trump's Fight for Presidential Power*, which is a pretty interesting and in some ways, I think a pretty surprising book about the role that Donald Trump has played as defender of the Constitution.
- Danielle Pletka: John Yoo is a visiting scholar at the American Enterprise Institute. He is a professor at Boalt Hall, the University of California at Berkeley's eminent School of Law. But apart from all of those other things, John Yoo is just a great guy and a really good friend and a really, really good explainer. So we're lucky to have him back with us today.

- Marc Thiessen: John, welcome back to the podcast.
- John Yoo: Hey, thanks Marc. It's great to be back.
- Marc Thiessen: Well, it's great to have you. So, you've caused some controversy recently because you had [a couple of excellent pieces](#) about the Supreme Court DACA decision, which you said, is based on that rationale President Trump could create a right to carry guns openly and no one could challenge him and his successor couldn't undo it and all sorts of other things. First of all, talk to us a little bit about the DACA decision, what was wrong with it, and why you draw that conclusion?
- John Yoo: So, the DACA decision is, if you remember, President Obama's decision to not enforce the immigration laws against roughly two million aliens in the country here in violation of law, but they were brought here as children. And then he expanded it two years later in 2014 to include parents who were here illegally but have children in the US. So estimates range, it could be as many as six million aliens benefited from President Obama's program. The problem was — and this was the question in the Supreme Court — was that Congress never added this new category to the immigration laws. There's a lot of support for it in Congress and in polling, but Congress never passed the bill. So, President Obama said, "Well, I'll just create the program by using my prosecutorial discretion, my choice over where to spend resources to enforce the law, and I'm just not going to bring any cases. I'm going to bring enforcement to zero."
- John Yoo: So I think President Trump, who himself like me, I think, like a lot of people, support some kind of DACA fix, but he said, "That's unconstitutional." President Obama can't just say, "I'm not going to enforce any law at all." Because it gives him effectively a veto, a second veto on a bill. So he came in and said, "I'm ending the DACA program." Now, the remarkable thing, this is the remarkable thing, I think. And this is why I think the DACA decision really tears at the fabric of constitutional law, is the Supreme Court said "No, President Trump still has to keep enforcing DACA, even though President Trump thinks it's unconstitutional, even though there's no authority for it in the statute." And so I wrote this piece, which I guess is causing all the controversy. I don't know why I keep getting into these controversies, I didn't do anything.
- John Yoo: I was actually trying to point out how perverse the decision is because it means that President Trump then could say, "Well, I'm not going to enforce the gun laws, I'm not going to enforce the tax laws, I'm not going to force the immigration laws. I'm going to create my own immigration system based on merit and skills and assets." And, according to the Supreme Court, the next president would have to take one, two, even three years to undo it. In fact, think about President Trump, he has not been able to undo President Obama's DACA program for the entire four years of his presidency. So I said, "If you really believe this, if the Supreme Court really believes this and what's good for one president, is good for the other president, there's not some kind of constitutional law that only applies to President Obama and then a kind that only applies to President Trump. Then the Supreme Court, while it looked like it gave Trump a short term political loss, just handed him off an enormous amount of power to reshape policy."

- Danielle Pletka: So John, let me just take you out a little bit because there are two things I want to talk about at a higher altitude. The first is this really weird reaction on the part of people to your coverage of this. What you said seemed to me to be exactly the kind of thing that people should understand was a sort of, a good for the goose good for the gander problem. Which is that sure, it was fine for Barack Obama, but then it's also fine for Donald Trump. It was weird to me that so many people who observe this didn't understand that. And the second thing I want you to tell us about, and this will take us out even a little further, is your new book. You've got a book coming out shortly, *Defender In Chief*. He's going to love that. It's got a picture of Donald Trump on the cover and he looks serious and handsome in the Oval Office. And it's *Donald Trump's Fight for Presidential Power*. So, both. Talk about your ideological adversaries here and what they don't get, and two, tell us more about your new book.
- John Yoo: Dany, I think you must have read the book already, or you could have just written it for me, because both of your questions have the same answer. The actual answer to your first question is really the point of the book, which is the reaction of people to Trump. I was, like many of you, I was very wary of Donald Trump in 2016. I didn't sign any of these Never Trump letters, but I wrote an op-ed or two saying this may not be such a good idea. And so, the thing that strikes me though, is that in the reaction to Trump, people have been willing to throw out basic constitutional norms, long held understandings of the Constitution and strangely, Trump, even I think unexpectedly, maybe even unintentionally, Trump has become... He has the field to himself to defend the normal Constitution.
- John Yoo: It's the people who are after him who, say, want to get rid of the electoral college or who want to add new states and unbalance the Senate or who want to nationalize the economy for a Green New Deal, who want to limit the president's ability to fire people who conduct law enforcement. He could go on and on-
- John Yoo: And Trump is the one again, I think he's really the first populist president, maybe other than Reagan. He's a populist, but in the end, they've left in the field to say, "No, I'm actually going to stay within normal constitutional boundaries." As you said Dany, he in fact said, I believe in the campaign, "I don't think the President should have this power of non-enforcement or enforcing laws at zero cases." And instead, if the Court's going to give this great power to Obama, why shouldn't it be applied to President Trump?
- Marc Thiessen: So, John, this is in so many areas that Trump derrangement has turned his critics into caricatures of him, but you proposed a number of things that he could do. For example, you said he could unilaterally cut income taxes by 50% or accelerate infrastructure products, or cut red tape that would normally take a lot longer. Those are all potential things that he could do using this new power. But are there things that he has done as president that Biden is going to have a hard time reversing? Because he has taken a lot of executive actions.
- John Yoo: This is the interesting thing. He hasn't used this power yet, because no one thought it existed until the Supreme Court decision a few weeks ago. So, I think this is why the controversy started, because according to *The Washington Post* and *Axios*, and all these outlets, President Trump apparently has these articles of mine sitting on his desk and so they're apparently thinking of rolling out

executive orders that are more based on this. He hasn't done it yet, but I'll give you examples of what he could do. I suppose, the Trump administration... Not suppose, they've wanted to change immigration law away from the DACA/DAPA model, which is really just based on family relationships, to a system that will be based on skills and assets.

John Yoo: So, suppose you have a system where you're going to say, "Everybody who graduates with a PhD in computer science from American University gets a visa. Or, someone who brings and invests a million dollars in American businesses gets a visa." That's not in immigration law really either, not in any large sense. Suppose President Trump just says, "Well, if you have those degrees, or you bring in that money, well, then I'm not going to enforce the immigration laws against you and remove you from the country." That is identical to the DACA and DAPA program. You just change the criteria. So I think they are studying that because, just like Obama, they've been frustrated in Congress from getting new legislation to bring about these reforms.

Danielle Pletka: So, John, dumb it down for me, please. Because I don't think that a lot of Americans have understood sort of the breadth of the power that Obama arrogated to himself as president, something that by the transitive property goes to any president sitting in the White House. And that is as the chief law enforcement officer of the nation. I want to follow up, but first of all, what the hell is the chief law enforcement officer of the nation? It sounds to me like something out of Blazing Saddles.

John Yoo: Sometimes the whole Trump administration has been like something out of Blazing Saddles.

Danielle Pletka: So true.

John Yoo: It's a really great question because the Constitution's article that describes the presidency is actually really short compared to the list of powers that sit in Congress. Article One is extremely long, detailed, enumerated. Article Two, which has the presidency is very narrow and short. But the two main functions of the presidency that are in the constitution and are discussed at the founding are protecting the nation from foreign attack and conducting foreign affairs. And then second is enforcing the law. And in the Constitution itself, it says, "The president shall take care that the laws are faithfully executed." And that was extremely important because what the founders thought had been a problem in European systems at that time, was actually the combination of the power to legislate and the power to execute. In fact, Montesquieu says that was the very definition of tyranny. And so they wanted to divide the power so that Congress would only pass laws and they wanted to make clear that only the president would be in charge of executing them.

John Yoo: So, that's the law enforcement officer part. The chief law enforcement officer part now, is that if you look at the Constitution, it doesn't mention anybody else than the president. So from Washington on, people said, "Well, if the president can't enforce all the laws himself or herself, so how does it work?" So the president has to be the chief law enforcement officer, because he's the only one that has that constitutional responsibility to enforce the laws. Everyone else in the executive

branch is effectively the president's assistant or subordinate and they help him carry out those laws. So, the remarkable thing about what Obama did is that he said, effectively, "I'm not going to enforce the law. I just choose not to enforce the immigration laws." This was actually something that was seen as a big problem at the time of the founding, because English kings had claimed the right not to enforce laws, they claimed the right to suspend laws.

John Yoo: And so a lot of scholars say with that phrase, "Take care that the laws are faithfully executed" is not just a power of the president, it's also a duty, the president has to enforce the law. So think about it, if you're the president, if you're a king, if you can go around and say, "Well, I'm going to enforce this law some, but not this one at all." It effectively gives a president something like a line-item veto, where he can just cross out different parts. And if you know about the states and line-item veto, it effectively gives the president this creative power to rewrite laws into completely new programs than what Congress intended. I think that's something most people would think the president shouldn't be able to do.

John Yoo: But then the Supreme Court said, I think because of the popularity of DACA, "Well, we're going to let President Obama do it." Again, then people come out and criticize President Trump for saying, "I'm just going to do the same thing." What you said Dany, is good for the goose is good for the gander. I didn't see all these people attacking Trump for it now complain about President Obama's DACA program or complain just a few weeks ago when the Supreme Court blessed it.

Danielle Pletka: Okay, so wait. So, my follow up is this. So, let's just apply this for a second, because you said it gives the president effectively a line-item veto. But let's just put it even in a couple of different areas. The president doesn't want to enforce a ban on AR-15s, so he just says, "We've got other stuff to prosecute. We are just not going to prosecute people who are arrested for having AR-15s." The president decides that the estate tax is stupid. It's going to be bad for him because he wants to pass on his billions to Ivanka and Jared so that they can run-

John Yoo: It'll be a mosh pit fight to see who gets to keep Trump International Hotel in the old Post Office Building.

Danielle Pletka: God help us. That should be its own podcast, but okay. So, that's what Trump decides to do. If we put in those terms and not in terms of the DACA issue, where I think we all see things as there being a reasonable argument to be made here on one side or the other, but let's just say it's the AR-15 thing or the inheritance tax thing. What the heck is wrong with Chief Justice Roberts? Why doesn't he see things the way that we just described them?

John Yoo: I think you're right, Dany. I think that one thing people should realize is, take it out of immigration, do a search/replace of the opinion and replace immigration with the topics you just mentioned Dany, federal firearms legislation or taxes. What if Trump said, "This pandemic is killing the economy, everybody in the country just pay 50% of what you owe. I'm not going to send the IRS after you. They've got a lot of other things to do. They've got to finish auditing my tax returns. They're too busy to actually go chase people for the other 50%." So you could say, "Look, what is so different about immigration compared to those other

areas?" It's a good way to test is the Supreme Court really serious? And so like you, many people say, "No, he can't be serious." But then at least a natural question you asked, "Well, then what is John Roberts doing?" I think there's a political aspect to what he's doing. I think it was present in a lot of other cases he decided this term like the Louisiana abortion case and the gay rights case.

John Yoo: I think that what he's trying to do in the short political term is lower the profile of the Supreme Court. He did this in 2012 with the Obamacare decision too when he was the fifth vote to uphold Obamacare. I think he's trying to make the court less of a partisan target during an election year. I think it's a long-term losing strategy though, because it also shows that Roberts responds to political pressure and then that means it's only going to invite more political pressure. And the political pressure's mostly going to come from the left. If you look at 2012 and now 2020, they're the ones who've been attacking the Court repeatedly, trying to push it towards these decisions, which I don't think make a lot of sense on the law. But they seem, I think, to influence Roberts to try to play games with the law in order to remove the Court as a target in the elections.

Marc Thiessen: That is not his job, John. His job is to interpret the law according to the Constitution. He gave us this whole speech during his confirmation hearings about how, "I'm an umpire, I'm not a player on the field." Right? And he keeps picking up the bat and picking up the ball and getting involved in the game.

John Yoo: Oh, I think yeah. I remember that he said, "Judges only call balls and strikes." But I think Roberts thinks he's become the commissioner of Major League Baseball.

Marc Thiessen: Yeah. He's becoming a player, he's taking the field. Here's a broader question. If you can explain Roberts, I'd love to hear it. But here's a broader question. Why are we Republicans so bad at picking Supreme Court justices? The Democrats... I'm adding, to continue the baseball analogy. The Democrats are batting 1000, their justices never come over on... I know there's all these cases where it's like nine to nothing and united and that's the non-controversial stuff. But on these major divisive issues, they never defect to our side of the case. We're batting less than 500. Go back to Reagan, until now, we're not even batting 500 in terms of appointing conservative justices. We finally thought with Bush, "Oh, we got Roberts and Alito, we're doing great." And then Roberts just goes south and I think he's voted with the liberals three times at least. There was just this Nevada church case where basically Roberts held that Caesar's Palace can have more people in it than a church can, so much for give unto Caesar what is Caesar's, right?

John Yoo: The only time that was true was the Roman Empire days.

Marc Thiessen: I know. Why are we so bad at picking Supreme Court justices? And really has the Federalist Society approach to this whole judicial selection process — I know these are fighting words in your legal world — been discredited? We're bringing a knife to a gunfight. Maybe we should be picking activist judges too, who we know are going to vote the right way instead of hiding behind textualism and all the rest of it. Because the results over decades have been the activist judges on the left win.

- John Yoo: That's a great question Marc. I spend a whole chapter in this *Defender in Chief* book, trying to figure this out and whether Trump makes any difference. I agree with your description of what's going on. In fact, the judge I clerked for, Larry Silberman, a famous DC Circuit Judge. He gave a speech about this back in the day. There was a... *The New York Times'* Supreme Court reporter was a woman named Linda Greenhouse. I think she covered the court for 25 years. And Silberman said, "Look, you notice that Supreme Court justices appointed by Republican presidents keep moving to the middle while the ones appointed by Democrats," as you said Marc, "almost never move towards the right." In fact, there's just one ever, Byron White, who was appointed by President Kennedy. So, Silberman with his classic wit, he called the "Greenhouse Effect." And the reason it's the Greenhouse Effect is because he said there's this whole industry of *The New York Times* and law professors and the chattering classes and TV, always praise conservative justices when they do something liberal. They always say, "Oh, they're growing."
- John Yoo: And they always criticize any liberal justice who would ever reach a conservative result. So you always have that pressure. It's like a hydraulic force that's just always moving. And that's not just of course the courts. You and me, Marc and Dany, have all seen that with other politicians in other areas in Washington too. So how could you stop it? Well, in a way, you could say the Federal Society tried by promoting originalism, by promoting conservative judicial making. So, I would make this claim. Yes, that is a problem. But I think Trump tried to do more than any past Republican president. And you're quite right, I think two-thirds of the Supreme Court justices since 1968 have been appointed by Republican presidents, but we have a terrible batting record, not even 500 as you say. But I think what Trump did for the first time was one, he put out that list of potential nominees during the 2016 campaign and promised that he would select from it.
- John Yoo: The list was created by the Federalist Society and the Heritage Foundation. I don't know why he left out AEI, but we weren't in on it. But he put in the Federalist Society, he said, "Make up a list and I will pick someone from that list." No president, no nominee has ever done anything like that. And then the second thing I'd say is, he's done a remarkable job with the lower courts. I talk a little bit about this in the book. It's not something that gets a high profile in the media, but Trump has appointed dozens upon dozens of judges to lower courts. It's the farm team as it were, appointed by far I think, the youngest, the most intelligent, the most daring, the most committed to original understandings of the Constitution that I have ever seen. I think Bush and Reagan did pretty well, but Trump's nominees to lower court far outpaced them.
- John Yoo: Usually we used to joke, like when I was working in the Senate Judiciary Committee, or I was working the executive branch, you'd say, "Well, we'll get one superstar and then we've got to appoint one judge who's like the senator's brother, or the senator's roommate from college." And you don't see that, you don't see hardly any senators' roommates from college being appointed to the circuit courts. As you said, Marc, still, you've got to appoint people who've got public record as younger people being conservative to fight off this hydraulic pressure that's constantly pushing you in Washington to "grow" in office, which usually means move to the left.

- Marc Thiessen: And also he's benefited from the fact that the Democrats got rid of the filibuster for judicial nominees. So he's been able to do this by simple majority, which has helped but-
- John Yoo: Yeah, so that's Dany's rule of what's good for the goose is good for the gander. It was Harry Reid who got rid of the filibuster for judges. They can't complain now, as they do, but they can't complain about how fast now Trump and Senator McConnell are moving Trump judges through the Senate.
- Marc Thiessen: It seems like Trump has done, maybe, possibly, fingers-crossed broken the mold with Kavanaugh and with Gorsuch. Kavanaugh seems to be voting well and reliably. Gorsuch has been the same. What's at stake in this election in terms of the Supreme Court and the judiciary?
- John Yoo: I do talk about Gorsuch — a lot of people are unhappy with Gorsuch because he's the one who wrote the opinion extending federal anti-discrimination law to gays and transgender in the workplace. But on the other hand, that's the only decision I can think of in any significant case where he did not vote with Thomas and Alito and Kavanaugh. And Kavanaugh actually, is even more so... Kavanaugh has probably voted more conservatively than Gorsuch. And people forget this, at the time Kavanaugh was picked, he was the most moderate name on that list of Supreme Court appointments that Trump had put out. So, they've actually voted, so far, in a pretty unified way with Thomas and Alito to create this conservative majority. But again, what's at stake in the election? And again, this is probably the issue, I think the polling says about 25% of the people who supported Trump, only supported him because of judicial appointments. I think that's kind of weird. I love studying the Constitution, but that's not the most important issue to me.
- John Yoo: But nevertheless, it's really important to about a quarter of the Trump base. And look at what the opponents to President Trump have proposed doing if the Democrats take power in 2020. During the nomination campaign, I think I counted up — I think about all but one or two of the Democratic nominees for president said they would pack this Supreme Court, that they would add six justices to the Court. Raise it from nine to 15. This is an assault on the judiciary and its independence of a kind we haven't seen since the New Deal period when FDR threatened the same thing to force the Supreme Court to stop opposing the New Deal. He failed, FDR lost, but the court with a John Roberts-type Chief Justice, completely changed its views on the New Deal and allowed this huge expansion of the administrative state and regulation that we're still living with today.
- John Yoo: And then the other thing at stake is, unfortunately, Justice Ginsburg looks like she's had a recurrence of cancer. She may have to leave the court for medical reasons, maybe even this year. Justice Bryer, another Clinton appointee who's also above 80. You would just think that the next president is going to have two, maybe three appointments to the Supreme Court, that's really going to, I think, set the trajectory of constitutional law and the role of the court and all these social issues for the next 25 years.
- Danielle Pletka: So, John, let me ask you my exit question, which is on the same lines. You've

heard me say that part of the challenge with executive authority that we've had and the overwhelming power of the executive that we've seen in the last decade plus, is that the United States is sort of behaving like a banana republic. "Oh, no, no, that was Bush administration policy." Oh, no, no, that was Obama administration policy." We basically changed policies 180 degrees every administration. With the latitude that the Court has just given to whoever the Commander in Chief is, what is it that the next Democratic president is going to do in your view? Other than packing the Court, which I think is a very, very likely prospect with a congressional action.

John Yoo: That's a great question, Dany. I know you guys love talking about foreign affairs on your podcasts. I'm a regular listener to the episodes and I think about it a lot, too. I do think that another big difference is foreign policy. And one of the interesting things I tried to do in this book was try to figure out what is the Trump Doctrine? Because I think we can all agree the Trump White House looks chaotic, it looks unpredictable. It doesn't seem like in foreign policy they have a theme or a strategy. But I think if you take a step back, there is a big difference between Biden and Trump at the level of foreign policy and strategy. And it seems to me, Biden, you're going to return to a sort of pro-internationalist approach to foreign policy, a dependence on multilateral institutions like the UN, cooperation, leading from behind, trying to reach deals with countries like Iran or Russia. And I think in contrast with Trump, this was the hard part trying to figure out what is the Trump Doctrine.

John Yoo: And I think a Trump Doctrine is really a return to maybe 19th century ideas about the balance of power where the United States is not going to guarantee the peace around the world anymore. I think one of the things Trump has introduced is that we can't pay to do that anymore, as we did after World War Two. And that we're going to, maybe, return back to being a normal nation state defending its own sovereignty and pursuing its national interests rather than trying to be the guardian of the international system. And that really does, as you said Dany, both of those visions, really do depend on the executive's control of foreign policy, the Commander in Chief power, and protecting the national security. And so a president, unlike others in domestic policy, in foreign policy, a president changing in an election can shift course on American foreign policy 180 degrees.

Marc Thiessen: Are there any areas in domestic policy where you think Biden — this is my exit question — where you think Biden could take this power now that it's been proven and since he's on the side of the angels, it's okay if he does it. What are some areas that Biden could take this power domestically and do the same thing that Obama did with DACA?

John Yoo: Again, with immigration, which is one of the most hot button issues of course, he could completely change immigration policy now, because the Supreme Court made clear that the president could do it pretty much for his own term and then two or three years into his successor's term. So, I think it would probably end congressional efforts to reach a compromise on DACA, DAPA, other ideas about immigration, because I think the Biden administration will just do it itself. I think you could also see huge changes in health care. This is the thing, the more complicated the law is, the more regulations there are in a certain area, the easier it is for the president to use this power. Because he could say, "Just don't enforce

this little subparagraph B, three, A, don't enforce this sentence here, that sentence there." And you can really change the law a lot. So, I think in the Obamacare statute, there's a lot of empty spaces that have been filled in by regulations that presidents like Biden could change.

John Yoo: Take for example, those Little Sisters of the Poor, who are constantly being persecuted by the Obama administration. They've been in the Supreme Court, I think three times now, they just won this year, but it's not over. But think about what they're fighting about. Their fight is about, can the executive branch require every employer in America to offer a health care plan — and not just any health care plan — but one where the government tells you what you have to offer? And the Little Sisters don't want to pay for health care policies that require contraceptives. Putting aside whether you think contraceptives are a good or bad idea or abortion is a good or bad idea, the Little Sisters have a religious right, I think, to not pay for things that conflict with their religious beliefs. All of those regulations are created by the executive branch. So Biden, he could come in and he could take things off the policies, add them to the policies. This is an area that amounts to 18 to 20% of our national economy. And the second point would be the Green New Deal.

John Yoo: Suppose Biden wins and he wants to reorient the economy away from fossil fuels and he wants to get rid of fracking and all those things that they discussed in the primaries. Again, he could probably do that through his power to enforce some laws, not enforce other laws, declare a national emergency over global warming, which would then give him more access to move money between accounts and spend them on things that he wants to and things he doesn't want to. I think actually that again, it goes to Dany's way. A lot of Trump supporters have applauded President Trump's broad use of executive power but they also should think what will happen if President Biden wins and uses those same powers not to build a wall, but to fight global warming?

Danielle Pletka: John, you've been awesome, per usual and everything you've said suggested that we're going to have you back again and again and again.

John Yoo: Awesome

Danielle Pletka: John, thank you a ton. Really, you are awesome as always.

John Yoo: Thanks, Marc. Thanks, Dany, Thanks for having me back.

Marc Thiessen: Hey, Dany, I want to talk about the Supreme Court. Because this is a continual source of frustration for me and for all conservatives, quite frankly, because what's happening is, is we are bringing a knife to a gunfight. The left appoints these justices, they all vote in block in lockstep, and then we get the presidency and we don't even pick half of the good judges the right way. And we end up with the Anthony Kennedys and the Souters. And now the John Robertses. And we've got to fix this. Truth be told, I know you're not a huge Trump fan, but he seems to have done the best so far. It's still a small sample, but between Kavanaugh and Gorsuch, they've been pretty solid. Maybe he's broken the mold. I don't know.

- Marc Thiessen: And maybe, as John says, because he put out that list and they're sort of pre-vetted and we know what we're getting in the election when it comes to the Supreme Court justices, but I'm sick and tired of arguing about textualism and originalism. I want the right outcome, which is to defend the liberty of the American people, the religious liberty, restraint on the executive power like this in this DACA case, and we keep coming out the wrong way.
- Danielle Pletka: Okay, so I'll take your Supreme Court and I will raise you, Congress. I'm sorry, you worked on Capitol Hill, I worked on Capitol Hill, John Yoo worked on Capitol Hill. What the hell has happened to the United States Congress. We now... And this is not just this podcast, we now talk about our government as if Congress doesn't exist, except as an irritant, a barometer of political correctness or as a place where stupid, stupid things get said. If we're not talking about AOC and her latest outrage or Ilhan Omar and her latest outrage, we're not talking about anything. Why has Congress ceded its power? And I'm talking about this as an institutional branch of government, not as a Mitch McConnell versus Nancy Pelosi question. Why has Congress, Republican and Democrat, ceded its authority to the executive branch and the courts? Why did this happen?
- Marc Thiessen: I agree with you. I don't know, I think maybe it's an element of the polarization in our country more broadly, that we can't get anything done, that people there's no... In a politics where everything's about turning out the base on the left and on the right and there's no advantage to being the guy who compromises and so they can't get anything done. But again, I want to push back to the Supreme Court because look, when we elect right wing members of Congress or left wing members of Congress, for better or for worse, they do what they were elected to do, right? They follow what they promised to do for the most part. Presidents of the United States, we elect a Republican, we elect a Democrat, you elect Donald Trump, he's going to do what Donald Trump said he was going to do. In the Supreme Court, we elect the president and he appoints these judges and they don't do what they're supposed to do. There's no reliability.
- Marc Thiessen: The American people spoke, and many of them voted for Donald Trump, me included at the time, primarily because of the Supreme Court and the result of these elections is that we don't get the justices that we voted for. And something's got to change, because the court is not doing its job. Whatever you think of the outcome, when John Roberts rewrites Obamacare to make the individual mandate a tax — when he allows President Obama to do something that was completely unconstitutional and creates this new presidential power that doesn't exist under the law. His job isn't to... John was talking about how he's trying to make the Supreme Court uncontroversial in an election year. Maybe that's true. That's not his job. His job is to look at the law, what the law says, and rule on it and who cares what people say about the ruling. It's supposed to be right. It's the one institution that's supposed to be immune from that kind of political influence. And John Roberts is just a political weather-vane.
- Danielle Pletka: So, I do agree about that and I also agree with John, that I think that is Justice Roberts's motivation, is to keep the Court out of things and to try to force things back to the executive, into the legislative branch and sort out. But of course, that hasn't been the outcome. And having done that with Obamacare, It surprises me that he wants to do it again with DACA. I will say one thing and we ought to wrap

up and let everybody get to their cocktail hour or whatever it is that they're doing while listening to us. And the one thing that each one of our recent podcasts has underscored to me is that a lot hangs in the balance in this next election.

Marc Thiessen: That it does.

Danielle Pletka: And I don't want it to be that way. I will tell you, I had a very interesting conversation with a friend who shall remain absolutely nameless. I would say that a conservative Democrat who works in our government and who said, "I would feel a whole lot more comfortable voting for Joe Biden if I knew that there was going to be a Republican Senate."

Marc Thiessen: Well, I will raise you going back to your issue of Congress. It's not just that there won't be a Republican Senate to hold it check, they are going to get rid of the legislative filibuster. Joe Biden, basically after saying he was against it during the primaries, has basically said, "It depends on how obstreperous the Republicans are." That's the point of the minority, sometimes is to be obstreperous. And they're going to get rid of the legislative filibuster and they're going to ram this stuff through with a simple majority and... I know you don't want the stakes in the election to be this, because I know you don't want to vote for Donald Trump, but he's the only thing standing between us and that outcome.

Danielle Pletka: Okay. And on that horrifying note, let us leave everyone this week. Donald Trump, the only thing standing between us and something much worse. Good God. Folks, thanks for being with us. Take care, let us know if you have comments, concerns, and criticisms for Marc.

Marc Thiessen: As always.