



WTH is going on with SCOTUS? Ginsburg's successor and the history of Supreme Court vacancies in an election year

Episode #70 | September 24, 2020 | Danielle Pletka, Marc Thiessen, and Dan McLaughlin

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 is going on?

Marc Thiessen: What the hell is going on is there are charges of hypocrisy in Washington, Dany.

Danielle Pletka: No! Wait, wait. Stop the presses. Good god. I am scandalized.

Marc Thiessen: Yes. So the Democrats are accusing Mitch McConnell and the Republicans of hypocrisy because they held up the nomination of Merrick Garland to replace Antonin Scalia for the Supreme Court, and said that it should be decided by the voters, but now they are going to rush through a confirmation of President Trump's nominee to replace the late Justice Ruth Bader Ginsburg. Is that hypocritical, Dany?

Danielle Pletka: Look, I guess, having worked on the Senate, I would say that my view of the Senate is if you have the power to do it, and the people elected you to exercise that power, it's more of a dereliction of duty not to. Not only that, but I think we all know, we all know, that if the shoe were on the other foot...

Marc Thiessen: Amen.

Danielle Pletka: ... this would be exactly the same. Chuck Schumer with his pious adherence to precedent, which, by the way of course, he has totally done a switcheroo on because he made the exact opposite argument, so does everybody look a little bit two-faced? Kinda. Not just the Republicans, the Republicans and the Democrats.

Marc Thiessen: The Republicans are doing back flips, right?

Danielle Pletka: Right.

Marc Thiessen: And the Democrats are doing double back flips, because under Bush, Schumer and Biden... it was called the "Biden Rule" back then, which is they said that,

"No, you cannot confirm a Supreme Court justice during a presidential election year." But then, when Barack Obama was president, "We have to confirm the justice during an election year. It's outrageous not to do it." And now that Trump is president we're back to the "Biden Rule."

- Danielle Pletka: Right, well situational ethics and situational principles are very much a Washington feature, and I would say that both parties are equally sinners in that regard. The one thing that I think we have forgotten is that, you know what? A president, like him, hate him, love her, hate her, is owed some respect for their choices.
- Marc Thiessen: What? What?
- Danielle Pletka: Well, but I'm sorry. This happened where Obama's folks didn't get confirmed, it certainly happened in the Trump administration where basically nobody but judges are being confirmed, and I got to say, this is a parlous road to go down. You can say on the judicial side this started with Judge Bork, and it was a travesty.
- Danielle Pletka: So I think this really is a pox on everybody's house. We should try to return to a more respectful way of doing business.
- Marc Thiessen: Well, there is a lack of consistency in what people are saying, but there's a pretty consistent history of what people have done.
- Marc Thiessen: I mean facts matter, and the record is pretty clear that when the president and the Senate are of the same party and there's an election year nomination, the nominee almost always gets confirmed. And when the president and the Senate are of different parties, almost always the nominee doesn't get confirmed.
- Danielle Pletka: Right. 10% of cases I think that happened, and it was a very, very long time ago.
- Marc Thiessen: And Mitch McConnell, to his credit, he said back during Merrick Garland, that that was the principle, that there hasn't been, since 1888 under Grover Cleveland, that the Senate had confirmed, in an election year, the nominee of the president of the opposite party. And so I'm not sure how inconsistent Mitch McConnell is being. Lindsey Graham on the other hand...
- Danielle Pletka: Look, we can go after everybody, but the bottom line is there's going to be a nominee, and because the filibuster is no longer in place that nominee is almost certainly-
- Marc Thiessen: And who's fault is that?
- Danielle Pletka: Yes. Harry Reid.
- Marc Thiessen: Yeah, Harry Reid. I just want to-
- Danielle Pletka: We just had an episode on the filibuster. We know exactly... our faithful listeners know the history.

- Marc Thiessen: Yes, but this is a slightly different history because why are the Democrats in this situation? They made their own bed, right? Because they removed the filibuster for all judicial nominations except for Supreme Court justices, right? They held it out and they didn't do it for Supreme Court justices. Then, when Neil Gorsuch came up, they filibustered him, and if it hadn't been for that precedent plus the filibuster of Gorsuch, then the Republicans would not have eliminated the filibuster for Supreme Court justices. If they had not done that, Brett Kavanaugh would not be on the bench right now, and if they had not done that, there would be zero chance that Donald Trump could confirm whatever person he's picking right now. So the Democrats created this situation by breaching the norms, from beginning to end, and politicizing the judicial confirmation process. And so it was a stupid mistake for Harry Reid to do it-
- Danielle Pletka: No, it was a venal mistake, not a stupid mistake.
- Marc Thiessen: A venal mistake, and it was a venal mistake to filibuster Gorsuch. And there were some smart Democrats at the time who were saying, "Don't filibuster Gorsuch. Let him through because we want to preserve that filibuster because there might be another nominee-
- Danielle Pletka: One day there might be a Republican president.
- Marc Thiessen: Exactly.
- Danielle Pletka: No, that could never be.
- Marc Thiessen: Exactly. And so they created this mess they are in, and if they had not done that there would be zero chance that Donald Trump could confirm somebody right now.
- Danielle Pletka: So the one thing I want to get off the table, because it's bugged me all week since Justice Ginsburg died, and before we turn to our really awesome guest, is this notion that we all should have some respect for her dying wish not to be replaced. I have just been gobsmacked at the number of otherwise sensible people who are, like, "But, but it was her dying wish." Are we in a republic or a monarchy? And even if we were in a monarchy, would we care what her dying wish was?
- Marc Thiessen: I wonder if Scalia's dying wish was that Roe v. Wade be overturned?
- Danielle Pletka: Mm, probably.
- Marc Thiessen: I wonder, do you think Scalia wanted Barack Obama to replace him? Of course not. But the dying wish of a Supreme... Quite frankly, I mean I know we don't want to speak ill of the dead, but let me briefly-
- Danielle Pletka: Well, I was about to say, but let me.
- Marc Thiessen: ... but let me briefly. I think that just shows everything that's wrong with her judicial philosophy, is that the political outcome is the problem. You would think

that the response would be, "My dying wish is that a giant of the law would come and fill my shoes. That the president and the Congress could work together to appoint somebody who will be a great Supreme Court justice." No, her dying wish is that the president not follow the words that she said about Merrick Garland, which is, "There is nothing in the Constitution..." this is her speaking out and sticking her nose into the Merrick Garland fight... "There is nothing in the Constitution that says the president stops being President in his last years."

Marc Thiessen: So she thought it was perfectly fine for Barack Obama to put Merrick Garland on the bench to replace Antonin Scalia, her dear friend who she loved but disagreed with, and she criticized the Senate for not confirming him. And now all of a sudden, she wants the opposite to happen because she doesn't like who controls the White House. That's the kind of activist liberal-

Danielle Pletka: Outcome-oriented.

Marc Thiessen: ... outcome-oriented judicial philosophy. And for all our faults on the right, and we have tons of them, our biggest problem is that our-

Danielle Pletka: Speak for yourself, Marc.

Marc Thiessen: Well, you're... Yeah. To the extent you're on the right.

Danielle Pletka: Yes.

Marc Thiessen: One of our biggest faults is that we are awful at picking Supreme Court justices because our justices don't think that way. Our justices go out and do what they think is right for the law, and don't start with the outcome, and so therefore half of them go south on the objectives that the right has. Their people never come over. Their justices never come over and join Scalia and the Gorsuches, and the Alitos.

Marc Thiessen: Our people defect all the time, because they actually have a judicial philosophy that says, "I'm going to rule by the law regardless of what my preferred outcome is." And that is not the philosophy of the left, that was not the philosophy of Ruth Bader Ginsburg.

Danielle Pletka: And on that final rant, now seems an appropriate moment to introduce our guest. So most of you probably know who Dan McLaughlin is. He writes for National Review Online where he's a senior writer. I actually know him first from Twitter where he is under the handle @baseballcrank. He's a former attorney, he practiced securities and commercial law in New York City, and he was a contributing editor at RedState, a columnist at The Federalist. He's also, and I can't leave this out, he's a baseball blogger at baseballcrank.com, and at Boston Sports Guy. You will all be happy to hear that I did not display my woeful ignorance about my favorite team in the world, the Red Sox, by talking sports.

Marc Thiessen: Do you know what sport they play, Dany?

Danielle Pletka: I believe it's baseball, but nowadays you can't be sure of anything. Anyway, have

a listen. He's awesome.

Marc Thiessen: Well Dan, welcome to the podcast.

Dan McLaughlin: Glad to be here.

Marc Thiessen: Well thanks for joining us. So we are now in this epic battle over the Supreme Court seat of Ruth Bader Ginsburg. The Democrats are accusing the Republicans of hypocrisy because they held up Merrick Garland in an election year, but now they're pushing through Ginsburg's replacement. Mitt Romney was one of the votes in question, and he said that he looked at it and that the Constitution and the history support going forward. You've written [a great article](#) on that. I think he was probably relying in some extent on your research. Tell us about the history and whether, in fact, that's true.

Dan McLaughlin: Yeah, so really the question here is, first of all, can and should the president make a nomination in this situation? There have been 29 cases in US history where there was a vacancy and an opportunity for a president to make a Supreme Court nomination either in an election year or in a lame duck session after the election. And in all 29 cases, the president has made that nomination. So, from the president's end of Pennsylvania Avenue, the precedent is very clear; you will always make the nomination. Almost all of those nominations were made more or less right away. I think James Buchanan was the only one who waited a long time to do it, and the report-

Marc Thiessen: And he's not a good model.

Dan McLaughlin: Yeah, a very poor choice in Buchanan's case because Democrats had the Senate at the time, and by the time he sent the nomination up, most of the Democratic Senate caucus had seceded from the Union.

Dan McLaughlin: But anyway, so from the president's perspective it's easy. From the Senate's perspective, what has happened? Well, in 19 of those 29 cases, the president's party controlled the Senate, and 17 out of 19 the president got his nominee through rather than letting the nomination go to the president's successor, or into the next term. And of the two that didn't, one of them was a technicality, which was George Washington wanted to put a nominee on the Court who had actually voted to help create the Court, and the Constitution made him ineligible for that until there was a new Congress seated. So that was just a technical matter.

Dan McLaughlin: So really, the only one of those 19 cases where the president didn't get what he wanted was in 1968 when you had the filibuster of Abe Fortas and Homer Thornberry, which was a bi-partisan filibuster, and it was in large part successful because of major ethical issues that ended up forcing Fortas off the court.

Dan McLaughlin: So all of those cases when the president's party controlled the Senate, the president got what he wanted. Now, in the 10 cases in which the opposing party controlled the Senate, nine out of 10 of those the president did not get what he wanted before the election. Only one of them, in 1888, Chief Justice Melville

Fuller was confirmed by the Republican Senate for Grover Cleveland, his nomination. And the other cases, a few of those the president did finally get something after the election, but only in favor of the party that won the election.

Dan McLaughlin: So in a couple of those cases, in 1876 for Rutherford B. Hayes, and in 1845 after the 1844 election for John Tyler, in each case the party in power won the presidential election and was able to get some of what it wanted, not everything, but some of what it wanted after the election. And then the one other example of those where the president finally got what he wanted was Dwight Eisenhower appointing William Brennan as a recess appointee in October of 1956. After the election in the new Senate, Eisenhower sent Brennan up as a lifetime appointment, and was confirmed by the Senate.

Dan McLaughlin: So as to why we haven't had a fight before the election, in the immediate term before the election, the simple answer is we've actually only had, in a presidential election year, in all of American history, two vacancies that opened between Labor Day and the election. Eisenhower's was one. The other was in 1864 when Roger Taney, who was the author of Dred Scott and basically the arch nemesis of Abraham Lincoln, died in mid-October. But what happened in 1864, as in 1956, was that the Senate was out of session. No nominee could be sent up. Lincoln, I suppose, could have sent a recess appointment, but the Republicans held the Senate. He knew he could get his choice as soon as the Senate returned, and so when they returned to Washington in December Lincoln sent up his former Treasury secretary, Salmon P. Chase, who Lincoln was trying to get rid of anyway, and get him out of Lincoln's hair, and where safer to put him than on the court? And Chase was confirmed the very next day.

Danielle Pletka: So here's my question. There's a lot of clarity about, as you say, the other end of Pennsylvania Avenue and what they should do. The congressional end is a little bit more complex, and many are trying to hoist Mitch McConnell by his own petard, saying that he argued against confirming Merrick Garland because it was the latter days of a presidency, and that he didn't know who was going to be next, and wanted to respectfully allow whoever was going to be president to fill the seat. And now, of course, he doesn't respectfully want to allow whoever is going to be president to fill the seat. How do you assess those arguments?

Dan McLaughlin: Well, I think if you look carefully at what McConnell said at the time, in his first press conference after Justice Scalia died, and again in a nationally televised interview with Chris Wallace, McConnell specifically talked about the fact that this was not just because there was an election but because there was an election and the two branches were divided. The Republicans had been given control of the Senate. He specifically cited the example, the fact that this hadn't been done since 1888 with different parties controlling the White House and the Senate. So McConnell, I think, was aware of the history and the precedents, and Chuck Grassley, who was the chairman of the Judiciary Committee at the time, made several repeated references to those historical precedents as well.

Dan McLaughlin: Now, it is absolutely true that if you look at every single statement that McConnell and Grassley made, let alone any number of other Republican senators, there were a lot of people who painted with a fairly broad brush about the need to take this to the voters in an election year. I think Lindsey Graham in particular made

some rather unfortunate statements saying, "Well, you know, you can come back in four years and throw these words in my face."

Danielle Pletka: Okay.

Marc Thiessen: That's happening.

Dan McLaughlin: Those are famous last words of politics, right? But the reason why you put this to the voters in election year in the first place is because there is a disagreement between the president and the Senate. So when you have a Republican president and a Republican Senate, there's no disagreement. There's nothing for the voters to resolve. And the reason why it matters it's an election year is, of course, if you have the flip side, which is you have the president and the Senate of different parties and it's not an election year, typically the president has eventually... There has often been a lot of blood on the floor, but typically the president does eventually get a nominee through simply because you can't keep a seat open, at least nobody in history has tried to keep a seat open, for two, three, four years at a time.

Marc Thiessen: Well, and McConnell would take that even further to say that in 2018 the Republican Senate got a mandate on the judicial front, because this came right after the smearing of Brett Kavanaugh in such an unbelievably disgusting fashion, and literally the polls show that that cost at least three of the four Democrats who lost that election their seats, that that was the driving issue. The voters gave Republicans expanded majority in 2018. They didn't win the House, but they expanded their majority in the Senate campaigning on the Supreme Court.

Marc Thiessen: So McConnell's argument is that the president is president for four years, and two years ago the voters gave us an expanded majority in the Senate precisely over this issue. Is that a fair argument?

Dan McLaughlin: Yeah, and I think if you look at where the polls were going in the Senate races, it's very clear that there was a break in the Republican direction, in a couple of those key Senate races, right around the time of the Kavanaugh hearings, and yeah, when you contrast that-

Marc Thiessen: McCaskill, Donnelly, all of them.

Dan McLaughlin: Yeah, and when you contrast that with what happened in the House and the governors' races in that year, races where the Supreme Court could not be on the ballot and Republicans got pasted, I think you can, in fact, make a very strong case that at least as to the voters who were actually voting... And I think if you look at 2014 and 2016, certainly the other elections that built the current Senate majority, I think Republican voters have responded to messages about the Supreme Court for a long time.

Danielle Pletka: Everybody keeps trying to argue this on the merits, you know, "Well, no. Here's the reason why, and here's the reason why," but isn't the right answer that if you were a Congress elected you hold power until the next Congress takes its seat, and the president holds power until the new president is inaugurated. And if you

have the power to either go forward or to derail a nomination, that's what's going to happen. I guess I shouldn't be surprised by everybody trying to get on their principled high horse, I suppose, but isn't this just a clear matter of who has the power and when?

Dan McLaughlin: I think that's the starting point. I think you always start with the idea that if the voters have given you the power to do something, that it's sort of presumptively legitimate to do it if it's the right thing to do, if it's the right thing according to your end principles of what the Court should look like, how it should function. But there are norms in the Senate, there are norms in much of American government. There are sometimes reasons when you shouldn't do something that you have the power to do, and that's when you really look at the historical precedents to say, "Is there either a well-established norm, or at least some precedent that helps guide us in knowing is this maybe some situation where we shouldn't take our power to the maximum?"

Dan McLaughlin: I would argue here that whether or not you consider this a norm, and that some of the pushback on citing this precedent is the idea that, "Well maybe there aren't enough examples to consider this an established norm, in the way that things that happen several times a year would be considered a norm." But I think if you start with the idea that exercising power is legitimate unless it's restrained by a norm, then the best you can say is, "Well, there is no norm here, but there are precedents, and the precedents have divided this way."

Dan McLaughlin: As far as whether these folks are sincere or not, look, I was a practicing lawyer for two decades, and if you were standing up in court citing precedents to a judge, the judge doesn't care whether you're only citing those precedents because you're trying to win the case. A precedent is a precedent. It is a historical fact, and so to be able to point to this as there is a dividing line in the history and it supports a Republican position, that's true. Why shouldn't you cite it, and it absolutely does show that this is a legitimate exercise of power.

Marc Thiessen: You might even call it stare decisis. Well here's a norm that seems to be on the chopping block, which is court packing. So a lot of Democrats are saying to the Republicans, "If you do this, if you exercise your Constitutional powers before the election, we're going to undo it when we come into power by packing the Court and installing a liberal majority." They don't use those exact words, but that's essentially what they're saying. Is that a norm? Is there a precedent for doing that?

Dan McLaughlin: Really, there is not. First of all, the size of the Court has been fixed since 1869, and I think that the prestige of the Court certainly has risen quite a lot since then. And if you look at the expansions of the Supreme Court that took place before that, because the original Court was six justices, which, first of all, the Founders seem a little naïve to have created an even number of seats on the Court. But the expansion of the Court from 1789 up until into the... It was expanded in 1807 to seven justices, and in, I think 1837, to nine justices. The reason it was expanded at that point was purely geographic, which is that justices in those days were still expected to ride circuit. You had to go out and literally visit the various circuit courts around the country, and therefore as the country expanded, it was no longer enough to have just six justices riding from Maine to Ohio, particularly in

the age before rail transit.

Dan McLaughlin: So there were undoubtedly some ideological motives there. Both Jefferson and Jackson, who were behind those expansions of the Court had longstanding fights with Chief Justice Marshall, and they wanted to expand the Court. Marshall himself, by the way, was a lame duck appointee. John Adams put him on the Court after Adams lost the election, so the Democrats spent a lot of years fighting with him. What's closer to a precedent there is if you look at what happened between 1863 and 1869, which I think is wrapped up in the Civil War. First, the Court was expanded in 1863 to 10 justices, which, again, one wonders if the idea that an even number of justices was a good idea in a country that was literally in the middle of fighting a civil war.

Dan McLaughlin: But it was expanded in good part because, again, you had geographic issues. The justice who was appointed at that point was Stephen Field, who was from California. Field actually, on his appointment, didn't come east right away. He was handling judicial business out west, including a treason trial of some guys who were trying to privateer a ship in San Francisco. That's another story.

Dan McLaughlin: But anyway, what the Republicans did do immediately after the Civil War is the one example that looks like an actually somewhat successful example of court packing, which is that in order to deny Andrew Johnson any justices, they basically shrank the court. They passed a bill saying as justices die or resign, the Court will be contracted and there will be no new nominees. That ripped Johnson's power right out from under him. This was part and parcel of the same effort that went into trying to impeach Johnson for firing members of his cabinet. They were trying to essentially dismantle the presidency. Then as soon as Johnson's out of office, the Republicans pass a new bill saying okay, we're going to bring the Court back to nine, and President Grant is going to be able to nominate appointees.

Dan McLaughlin: By and large that's a rather disreputable episode in the whole history of the reconstruction Congress. Obviously, it was a reaction to Johnson's reconstruction policies, which were terrible. But ever since then the only real court packing attempt we've had was FDR in 1937. At that point, FDR was coming off one of the greatest landslides in American history. He had like a 50 vote majority in the Senate, and still his own party and the public rebelled against it, said that this is tyrannical, it was dangerous, and that's why everybody who has gone to school ever since then, at least until they maybe stop teaching American history-

Marc Thiessen: It's the root of many problems.

Dan McLaughlin: Yes... has read in their history books what court packing is, why it was unpopular, why it was dangerous, and why even voters who loved FDR thought it was a step too far.

Danielle Pletka: So give us a little bit of a history lesson, because I think you've hit the nail on the head. I think actually people don't learn about this, and it's no surprise that someone like AOC, who has really not spent a lot of time with the history books, is one of the people most aggressively advocating this, along with several other

younger members. What happened? How did the public stop the president and the Congress that was of his same party from packing the court?

Dan McLaughlin: Well, undoubtedly a major part of it was the fact that a significant faction of FDR's party in Congress rebelled. There was the Chairman of the House Rules Committee who declared that this was a dangerous power that no man should exercise. And the newspaper press in those days was certainly a partisan press. It was a less partisan press than today, a less partisan press by far than in the 18th or 19th century, but still fundamentally responsible enough that a lot of newspaper editorials, a lot of the press coverage at the time called out FDR for how dangerous this was, and that it was really tampering with the rule of law. FDR even presented it at the time in non-ideological terms. He claimed that he was just worried about the Court's justices being too old. I forget if it was over 70 or over 75, but he was planning to add another member to the Court for each one over a certain age.

Dan McLaughlin: And so even FDR was kind of embarrassed to say exactly what he was doing, but he mostly said what he was doing. He said that the Court was standing in the way of progress and whatnot, and I think a lot of people recognized that that's banana republic stuff. It's one thing to play hardball over who gets to fill the jobs, but to just expand the number of justices for no reason other than that you don't like the outcomes that the Court is giving you, it really is a fundamental departure from the rule of law.

Marc Thiessen: They've been talking about this since before Ginsburg. The Senate Democrats sent a letter to the Supreme Court, when they were taking up a New York gun case a year ago, saying that, "If you take up this case then we will have to consider reforming the Supreme Court." Weren't they really planning this even before Ginsburg?

Dan McLaughlin: Yeah, of course they were, and it was something that was... I mean, look, Pete Buttigieg for example. There were, what, 18, 19, 20 candidates in the Democratic field? Why did Mayor Pete from a tiny town in Indiana suddenly rocket into the national attention? It was because he proposed a court packing plan. So this is something that was ventilated in the Democratic primaries. Kamala Harris was for it, Elizabeth Warren was for it, and to me at least, my view of the Democratic primaries was that this whole divide between the economic moderates and the Bernie people was secondary to the issue of the people who were looking to burn down the system.

Dan McLaughlin: So the candidates that alarmed me the most were the court packing candidates. To their credit, both Joe Biden and Bernie Sanders, having lived many a year on this earth, at least warned and recognized that if you started down the path of court packing there was absolutely no way to stop the other party from doing the same thing.

Danielle Pletka: So Dan, tell me what you think will happen. If Biden is elected and a Democratic Senate with him, if, as seems almost a certitude at this point, they get rid of the filibuster, do you think they will expand the size of the Supreme Court?

Dan McLaughlin: I think when it comes down to it, I don't think that that's something they will want

to do right away. I think the filibuster is something they will want to do right away. They will push something that Republicans will oppose, probably a voting rights bill, possibly something on the environmental or healthcare areas, but something that they feel gives them an argumentative upper hand that they can declare, "This is the will of the people." Maybe even a gun control bill. And then they will move from there to eliminate the filibuster.

Dan McLaughlin: One thing about eliminating the filibuster is you really don't need the White House. You need the president not to be loudly opposed, but it's not something that requires a presidential signature. So a Joe Biden, there probably is not a person alive on this earth who has participated in more Senate filibusters than Joe Biden. I don't think Joe Biden really wants to get rid of the filibuster, but I have no question that he would nod along, at least, when somebody comes and tells him that the filibuster has been abolished.

Dan McLaughlin: Court packing is different. I think, again, you would probably need the trigger of the Court doing something that you could then react against. I think a lot, frankly, depends on Joe Biden's health because there is no question that Kamala Harris is willing to do court packing. Biden has said he is not, but again, Biden-

Marc Thiessen: He was against the filibuster, too.

Dan McLaughlin: Joe Biden says things-

Marc Thiessen: Taking away the filibuster, too, until recently.

Dan McLaughlin: Yeah. Biden says things and then he can be pressured, and that may only increase with age. But I think there's no question that if Harris takes the wheel, at that point court packing is very much on the table if the Democrats are still running the Senate.

Marc Thiessen: See I just can't see how they don't do it, because think about this; the first excuse is going to be, "Merrick Garland's seat was stolen." Now it's going to be, "Ruth Bader Ginsburg's seat was stolen," and even if Ginsburg had survived into the Biden administration, let's say she retired healthy, and Breyer retires, and then they replace the two of them, they still haven't shifted the ideological direction of the court at all. They're just replacing old liberals with young liberals. Do you think the left would consider that a satisfactory outcome?

Dan McLaughlin: No. Look, there's no question if you look at the commentariat, the pundit class that progressives are pushing very hard already for court packing. Quite a lot of them are. So there will be immediate pressure to do it. At the same time, I still think, particularly if it's a fairly close margin of Democratic control in the Senate in particular... I don't think Republicans should back down now because they're worried about that happening later, I think the court packing fight is a fight that Republicans can, should, and will wage on the merits when it comes. I think it's important to raise the alarm now about the fact that you've got people in positions of significant power, including the vice presidential candidate of the Democrats, who think this is a good idea. But ultimately, if it's coming it's going to come. It's going to be principally driven by the internal dynamics of the Democrats, and it is a fight that I still think Republicans can win.

- Danielle Pletka: Well that's good to hear. I have an exit question for you, Dan. You know so much about this. What do you think about the question of term limits? You know, when I think about... Well, FDR commented on the age of his Supreme Court justices, but when I look at this hyper-political desire to hang on by your fingernails until a president of your political suasion comes in, it seems wrong. Should there be term limits?
- Dan McLaughlin: I think it is unhealthy the extent to which the shape of the Court is determined by the lifespan of the justices and by the willingness of different justices to hang on or not hang on. And I think we are coming towards an eventual Constitutional crisis that we have, bizarrely, not really faced, even though there were issues with it in the 70s and certainly in the 1890s, where you have a justice who is very obviously no longer capable of doing the job. If you go back to John Marshall's day there was one justice who I think was institutionalized for a couple of years. He was locked up in a nut house, and they just shrugged and went along with that in those days.
- Dan McLaughlin: But I think that there is a problem there, but like many procedural fixes, I think it only makes sense to really do it... It's only feasible to do it when you can have real bipartisan agreement on something that will not give one side or the other a leg up, and it's very hard with the existing structure of the Court to do that, to be able to say, "We're going to change the way the Supreme Court justices are selected, or the way in which they are removed from the Court." But I think if you were creating the Court knowing the politics of the world, if you were creating the Court from scratch today, yeah, I think you would try to have more regularly staggered terms and limitations of some sort on exactly how long. You would basically try to keep people from remaining on the Court past the age of 80 or something.
- Dan McLaughlin: And doing so, I think, would actually, depending on what the length of terms you set, would actually incentivize also the nomination of maybe older justices. If you know that you can't sit on the Court past the age of 80 and past 20 years, why not pick somebody who's 60? Whereas you don't want to do that if you know that the amount of power a justice exercises depends on how young they are when they take the bench.
- Marc Thiessen: Well Dan, this is fascinating. Thank you so much for writing these great articles and digging into this history because this is one of the recurring problems in our politics that Dany and I bemoan, which is that people are so ignorant of our history and we're glad to have someone who isn't.
- Danielle Pletka: Dan, you were fantastic. Thanks a ton, Dan.
- Dan McLaughlin: All right, thanks for having me.
- Marc Thiessen: So here's the question that we haven't touched yet, Dany, which is, is this going to help Donald Trump or help Joe Biden?
- Danielle Pletka: Oh, that is a really hard question. That's really interesting.

- Marc Thiessen: I actually don't think it is, but I want to hear your theory.
- Danielle Pletka: Well, I think that people don't think rationally about this stuff, and I didn't say this in our previous conversation about this, but I really feel like the hagiography around Ruth Bader Ginsburg, this a weird glorification of a Supreme Court justice, as wonderful as she may have been, has elevated her and her loss in the public mind. So the sin of Donald Trump replacing this wonderful liberal may energize some people. On the other hand, the horror that we laid out in our filibuster podcast of a packed court may energize some Republicans. So I actually don't know. You do?
- Marc Thiessen: I think so.
- Danielle Pletka: Yeah?
- Marc Thiessen: And I'll tell you what the hint there is. The other day Schumer and McConnell were both speaking on the Senate floor about this, and so McConnell did his tribute to Ruth Bader Ginsburg, and then made his defense of why this was the right thing to do, and then Schumer started to speak, and the news cut in because Joe Biden was giving a speech. So they didn't actually cover Schumer's speech because Joe Biden, the presidential nominee of the Party, and I was on Fox News at the time, on the air, and we sat there for half an hour listening to Joe Biden speak, and he didn't mention the Supreme Court once. He didn't mention it in the speech. We had to cut away because the show was ending, so they came to us for some commentary, and they broke in and told us the speech ended. He didn't mention the Supreme Court.
- Danielle Pletka: So your view is...?
- Marc Thiessen: If this was a winning issue for Joe Biden, he'd be talking about it night and day.
- Danielle Pletka: I feel like you can never judge what Joe Biden is talking about and what actually matters.
- Marc Thiessen: Well maybe he didn't remember. But here's the thing, this was an issue that helped Donald Trump enormously in 2016. There are a lot of reluctant Trump voters, and I was a reluctant Trump voter in 2016, who voted for him precisely because of the Supreme Court. The exit polls show that Trump won people who said the Supreme Court was the most important issue by 15 points, 56 to 41 over Clinton, and 26% of Trump voters in 2016 said this was the most important issue for them. Only 18 of Hilary Clinton's voters said that. So this is a really important-
- Danielle Pletka: There's no polling on that now, about what-
- Marc Thiessen: There's not yet. I'm sure there will be soon, but if you think about it Trump's success in appointing justices made this less of a prominent issue because he saved the conservative majority on the Court. He put two justices on there, we now have a five to four conservative majority. Scalia's seat was saved, we got Kavanaugh on there, we made progress. He put 200 judges on the federal court and district courts and circuit courts of appeal, and so he's done much of what

people asked him to do. So this was not a salient issue. It is now. If you want to energize those swing voters, those reluctant Trump voters who are only supporting him because of the Supreme Court, the idea that the Democrats will win and pack the Supreme Court with liberal justices, talk about a motivating issue, and it cuts our way. Our voters care more about this than Biden's voters do. And they will crucify any senator who doesn't back President Trump and vote to put a conservative on the Court. Poor Susan Collins who's caught between-

Danielle Pletka: A rock and a hard place, yeah.

Marc Thiessen: ... in a whipsaw because the moderate liberal Republicans or Democrats who supported her, they'll crucify her if she does vote for the nominee, but the Trump base, who she can't win without, will crucify her if she doesn't.

Danielle Pletka: I feel badly for her. It's hard being a moderate Republican woman coming from Maine.

Marc Thiessen: Yeah.

Danielle Pletka: Of course, yet more affirmation that this is not a country anymore in which moderates can prosper. You've got to be out there on the fringes for people to jump up and down and get excited. That's a big shame.

Danielle Pletka: Well, we've got about a month and a half left in which we can see what happens, and what people care about, so not that long to wait.

Marc Thiessen: Well stay tuned, and next week we're going back to foreign policy. We've got the ambassadors of Israel, the UAE, and Bahrain. We've got two podcasts with three ambassadors talking about the historic Middle East deal. You will not want to miss that.

Danielle Pletka: Take care.