

## **Transcript:**

### **Intro:**

We the people of the United States. A house divided against itself cannot stand. Life, liberty, and the pursuit of happiness

### **Jason Raia:**

Hello, and welcome to *George Washington Slept Here*, the civic education podcast from Freedoms Foundation at Valley Forge, where we explore American history, civics, and the idea of liberty through conversations with some of our favorite thinkers, writers, and leaders. I'm Jason Raia, Chief Operating Officer at Freedoms Foundation and host of *George Washington Slept Here*. Our format is simple, a long form conversation with a friend of Freedoms Foundation where everyone can learn something new. Before we go any further, a little housekeeping. We encourage everyone to subscribe to *George Washington Slept Here* wherever you listen to podcasts, and make sure you get every new podcast as soon as it is out. We love hearing from our listeners, so please email us at [gwshpodcast@gmail.com](mailto:gwshpodcast@gmail.com) with your comments, questions, and suggestions. Today's interview is with John Yoo, Emmanuel Heller Professor of Law at the University of California, Berkeley. Hello, John.

### **John Yoo:**

Hey, Jason. Great to be here.

### **Jason Raia:**

Great to have you. Our conversation today is going to be structured in a way to keep us on track. We wanna explore your origin story, how you became the person sitting here before us, and your current work as a law school professor, writer, and commentator? And then I wanna talk about the state of America today. And finally, we end with a quiz. So, John, tell us where you were born and raised?

### **John Yoo:**

I was born in Seoul, South Korea, but I was raised here. So I grew up in the South New Jersey suburbs, and I grew up in the Philadelphia suburbs. So I just woke up this morning, and it took me about 17 minutes to drive here because I was driving fast. I've been driving down the Schuylkill Expressway for the last 41 years. I'm from here. I remember wandering around Valley Forge as a little kid. You know, endless grassy fields seemed to me back then, and so it was wonderful to be back.

**Jason Raia:**

Well, that's great. So you're you, you were born in Seoul. What brought your family here to the United States and then specifically to the Greater Philadelphia area?

**John Yoo:**

So Korea, at that time is hard to imagine, now that Korea, I think, is the 10th richest country in the world. But back when my parents left, it was poorer than North Korea. It was a time of great poverty, and it was a military dictatorship, though an ally of the United States.

**Jason Raia:**

Right. It's not until 1989 that they become a democracy?

**John Yoo:**

That's right. Not till 1980 right after the Olympics.

**Jason Raia:**

Right.

**John Yoo:**

And so my parents wanted to come somewhere where they would have greater, political and economic freedom for them and their family. Now, I've always been interested in how immigrants choose where to go in the United States because they could go anywhere.

**Jason Raia:**

Right.

**John Yoo:**

So, a lot of them don't know a lot about the United States. They get their, they get their impressions from, you know, the most unusual sources. So my parents liked classical music, which is still very popular in Korea. And at that time in the 1960's, the Philadelphia Orchestra was one of the greatest orchestras in the world and there was a conductor named Eugene Ormandy, one of the great conductors of the, you know, fifties and sixties and seventies. And so they picked Philadelphia just because they thought, well, if it has a great orchestra, then the city must be great too. It was very funny. I was like, I'm glad you didn't like the Detroit orchestra.

**Jason Raia:**

There's many things that could drive that kind of decision. You hear about, oh, there's a family there. There's a community there. Someone from our village lived there and wrote back and told everybody this was a great place. But your parents, it was the orchestra.

**John Yoo:**

Yeah. Well, also because this is, not like those other stories that you hear with, I think immigrant families that came because my parents are I think of that first wave of Asian immigration after the 1965 Immigration Act. So there were no other people to ask where to go. There were no other communities to follow. I think most Koreans live in Los Angeles and New York.

**Jason Raia:**

Okay.

**John Yoo:**

Yeah. But actually, I think the LA orchestra wasn't very good back then. But they could have picked New York, I suppose, but Philadelphia suited us just fine. We're really happy that we came here.

**Jason Raia:**

That's great. So who as you're growing up here in the United States, who were your most important influences, who would sort of help you make decisions as to what you were gonna do and become?

**John Yoo:**

Oh, well, I went to a school, high school, starting in middle school. I went to a school called, Episcopal, which actually has moved out farther to here, but when I went to it, it was on City Line Avenue, which is right on the it's called the City Line Avenue because it's right on the border –

**Jason Raia:**

Literally, well, on one side, you're in Philadelphia. You cross the street, and you're outside of Philadelphia.

**John Yoo:**

Yes. A town called Merion, which also we had the schools that have a funny look here, very across from St. Joe's University. And then right next to it was the Barnes Foundation. So it was

right next to this crazy old man's house who happened to fill it with billions of dollars worth of impressionist art, and then our school was right next to it. So that's quite a big impact on me. I would say there's a teacher there that had a particular impact on me, named John Plant, who was the teacher of Latin and Greek.

So I took 6 years of Latin and 5 years of ancient Greek there. And he had the most extraordinary life. He was British, and dressed like he was British. You know, he looked like you could tell he was, like, off of Masterpiece Theater.

**Jason Raia:**

Right. So plenty of tweeds.

**John Yoo:**

Yes. Yeah. Yeah. But he had been a soldier under Bernard Montgomery at El Alamein.

**Jason Raia:**

Oh, wow.

**John Yoo:**

Amazing story, which he didn't ever tell in class. I only learned it after. And then he stayed in Egypt and became a professional golfer and married one of the daughters of the royal family who was an artist. I know you can't make this stuff up.

And then ended up being, you know, a Latin and Greek teacher here in Philadelphia. His career took them all the way to here, so he was a wonderful influence. And then, of course, a broader culture grew up during the time of Reagan.

**Jason Raia:**

Right.

**John Yoo:**

And, I think Reagan had, Reagan and the so Reagan revolution, even though I was a teenager at the time, had a profound influence on me.

**Jason Raia:**

And, of course, culturally, you and I are both growing up at the sorta height of the Cold War. Reagan and Gorbachev and everything we did was sort of defined by that in very real ways.

**John Yoo:**

Yes. Well, part I mean, part of that is very real for my family because we're, a way in a way, we're in the United States because of the Korean War.

**Jason Raia:**

Right.

**John Yoo:**

The first conflict of the Cold War. But, yeah, I think people forget how present and important it was. I still remember elementary school doing a nuclear bomb drill.

**Jason Raia:**

The duck, the duck and cover.

**John Yoo:**

Yeah. Which when I then went to college and studied the history of the Cold War. It was just so ridiculously silly. Given how destructive -

**Jason Raia:**

Never gonna do anything.

**John Yoo:**

Yeah. And I remember learning as a kid that Philadelphia had the, I guess, the major refinery on the East Coast, so it was a number one target in any war. So it would but it was, so ever present and an important part of life. I think that it's unlike anything today.

**Jason Raia:**

Right. Right. And, yeah, defined us in ways that it's hard to imagine. And it certainly makes sense that you and many others have this sort of foreign policy, this interest in foreign policy because so much of our lives was defined by- so you decide to go to Harvard after you leave Episcopal. What drove that decision, and then eventually law school at Yale, and so you're at that point, it feels like you're on a track.

**John Yoo:**

Yeah. So I went to, Harvard because it was just for Asian families, the best school. The one they'd heard of.

**Jason Raia:**

Right.

**John Yoo:**

Even in, You know, Korea in the 1960's, they'd heard of Harvard. And, it was funny because I didn't feel I got a very good general education until my senior year.

**Jason Raia:**

Interesting.

**John Yoo:**

So in the first early years, actually, I studied American history, I majored in history. I, so I studied all the stuff from the colonial period all the way to the 20th century. But then my senior year, I decided to try to go out and get a better general education. And that's when I encountered people I didn't even think of as being conservative at the time, but people like Samuel Huntington, Harvey Mansfield, and Daniel Bell. I mean, I had classes with all of these amazing, people who I guess today they would be thought of as neoconservatives now.

**Jason Raia:**

Right.

**John Yoo:**

But, back then, they were offering courses on, you know, introduction to political theory, American exceptionalism, democracy, you know, topics that I just, was naturally drawn to.

**Jason Raia:**

It's interesting that it took to your senior year to to find those professors professors and, and and, but you did. And so, I'm wondering if that is what that senior experience at Harvard and finding these professors are what pushed you toward law, or were you already thinking about that? How did going to law school sort of figure into your plans?

**John Yoo:**

I had thought about going to law school while I was in college, but I didn't think about becoming a practicing lawyer. I thought about being a scholar. I could just as well have gotten a PhD in history. And I remember talking to the assistant professors who do all the work in the Harvard history department to teach all the classes, do all the advising. And I remember talking thinking about it, and they said, oh, no. Go to law school. It's too hard to get a history teaching job anymore. And -

**Jason Raia:**

Right.

**John Yoo:**

Certainly, someone interested like me and, like, the founders and military history, diplomats, they were like, you'll never get a job And, you know, major American history department. So they said much and I was right. They gave me great advice.

**Jason Raia:**

Right. Right.

**John Yoo:**

I mean, I'm really glad that I followed their advice, but, because, law allowed me to combine the stuff I'd learned in history, but with all these theories about social science that I picked up in my senior year.

**Jason Raia:**

Right. Right. So you end up at Yale Law, and unlike, it seems a lot of people who are going into law in the 1980's, you're looking at the Constitution. You're looking at the foundations of the law in some really philosophical ways as opposed to I wanna be a trial attorney who gets rich and has a boat, a vacation house and, you know, all of that stuff.

**John Yoo:**

Pretty good now that you described it. I really went the wrong direction. So yeah. First of all, Yale is really different from the other law schools, although I didn't know it at the time. Again, back then, there was no internet. There were no books about how to pick law schools.

**Jason Raia:**

Right. Maybe you got a flier from somewhere. But yeah.

**John Yoo:**

I mean, the only shocking thing is I probably learned a lot from just talking to people who are a year ahead of me in school, who also know nothing. So there's a lot more information available now. But, what I didn't realize was Yale, really, the professors, their main interest is in teaching people to become professors. But it was very interesting. So it was basically and one of some Yale professors would say this was basically like a PhD program for lawyers who are gonna go into –

**Jason Raia:**

It's really a PhD in the law-

**John Yoo:**

Yeah.

**Jason Raia:**

As opposed to-

**John Yoo:**

So yeah. So I don't know if I would ever hire a Yale graduate to do any legal work for me. But I would certainly enjoy talking to a Yale graduate about ideas.

**Jason Raia:**

Right. So that's really interesting. And I think those of us who sort of sit not been to law school and sit outside of it, those nuances are really interesting that there are schools that are more philosophical like Yale. There are schools that are more about trial and how to and, sure, everywhere in between. So you finish your law degree, and I know you do a couple of clerkships, but you end up in the Department of Justice, for the Bush Administration and the Office of Legal Counsel. How did you wind up there, and what was your job as legal counsel to the Bush Administration.

**John Yoo:**

So I was a professor at Berkeley right after my clerkships, and so I wrote about war powers. Because I was interested in diplomatic history from college and also, maybe because I was a product of the Korean War, I've been interested in war. Just the –

**Jason Raia:**



Sure.

**John Yoo:**

Study of it. And the way a lawyer thinks about it is very boring compared to the way other people think about it. You know, we don't think about, oh, is, you know, going to Vietnam a good idea? You know, that's not the lawyer's job. Is it legal to go to Vietnam?

**Jason Raia:**

Right.

**John Yoo:**

And when I was in college also, and this is not untypical for the Cold War, I worked on my dissertation, my thesis and a lot of my classes on the Cold War, and that, historiography is very much focused on the presidency.

**Jason Raia:**

Right.

**John Yoo:**

I mean, at that time in the eighties, actually, you've got a picture here of Eisenhower on the table. Eisenhower was the big thing at the time because his archives had just been opened. So, the focus on the presidency and their decisions is the way a lot of Cold War history was done then. And so when I got to law school, I studied the presidency. When I became a law professor, my major article in the nineties was about, the president's war powers, not most most, I would say 95% of law professors think that most of the wars we've had are unconstitutional because they think Congress has to declare, has to decide to go to war first, which has not really happened in most of our wars since 1945. So that was what I wrote. And so it would be natural to hire me to work in this office because this office exists to advise the White House and all the other federal agencies on the Constitution.

**Jason Raia:**

Okay.

**John Yoo:**

Yeah. It's an extremely important yet extremely obscure office where there's probably never been a head of the office who's ever spoken on TV at a press conference.

**Jason Raia:**

Right. There job is not out front. It's in the back office.

**John Yoo:**

You'll see, like, when they announce the prosecution of someone, they'll have, like, 10 people standing behind the attorney general. You know, down to the guy who wrote the complaint, wrote the indictment, but there won't ever be a head of this office on TV.

**Jason Raia:**

That's interesting. But you've come out of this Yale tradition. You're teaching at the University of California Berkeley Law School, and we know that in your time there, 9/11 happens.

**John Yoo:**

Mhmm.

**Jason Raia:**

And you are called upon to write a memo essentially on what does the Constitution say about combatants outside of the United States? What does the Constitution say specifically about the interrogation of those individuals? And there is this question of does the Constitution apply to them? What does international law say? What are our treaty obligations? You know? And it's all in the context of a war. A very strange war is being prosecuted, because this is not a state to state war that, you know, we can traditionally look to in history. This is, you know, very different. So what was your charge in writing that memo and what conclusions did you come to?

**John Yoo:**

The 9/11 attacks caused us to have to rethink how the laws of war applied to a different kind of enemy. So during the same period, we also had the war in Iraq.

**Jason Raia:**

Right.

**John Yoo:**

Didn't have to rethink anything. Right? As you said, that's a normal state to state war. Geneva conventions apply. There's a whole you know, books and books about what the army in the field does.

**Jason Raia:**

Right. You've got soldiers in uniform.

**John Yoo:**

Soldiers in uniform fighting for, under a command structure with a civilian, you know, a leadership and territory and cities and borders.

**Jason Raia:**

Right.

**John Yoo:**

And so, 9/11, we encounter a group, not a nation. No cities, no territory, no population, no uniforms, no units. They don't fight in a conventional manner. In fact, the way they fight is a violation of laws of war. Their main tactic is to attack civilians, which is the core principle of the law of war, laws of war are to distinguish between civilians and combatants so you don't hurt civilians.

**Jason Raia:**

Right.

**John Yoo:**

And so we had to sit there, and, I think, the weight of the legal part of the government fell on our office because that's what we do. We think about constitutional and legal issues, and this was unprecedented. So actually, the first thing we had to decide was whether it was a war at all. There were people who thought, well, terrorism until 9/11 had been treated as a crime. And we give an example. There was a bombing of a destroyer called the USS Cole.

**Jason Raia:**

Right. In the year before.

**John Yoo:**

Yep. And our first action was to send out the FBI to secure what we call the crime scene and to conduct an investigation. And that's, it's not a partisan. That's just how every administration had treated terrorism up until 9/11. And so first, we decide whether it was a war. We decided it was, and then we had to decide, well, how do the rules change when you fight a group, not a country? A group that hasn't signed the Geneva Conventions, doesn't obey any of the laws of

war. So we actually looked at historical precedent, like the American Revolution, like the Civil War, times where the United States had fought groups, not people. So that's where the interrogation issue is, so actually the first issue is detention. The first question that came up was, we're starting to capture these people.

Do they get to live in a POW camp like the kind you would see, this is gonna date me, the type kind you see in *Hogan's Heroes* where they live in barracks and sort of wander around and and and so or do we can we keep them in cells?

**Jason Raia:**

Right.

**John Yoo:**

Which is, criminal justice approach, But which is prohibited actually by the Geneva Conventions. That was actually the first issue we had to think about. The second issue is, can we use drones to attack them? You are behind the lines. Again, you can't do that in the criminal justice system. You can't shoot suspects who are not threatening anybody. But in military warfare, you can bomb enemy bases well behind the scenes. So, we approved drone strikes. And then the third one's detention. If you capture people, can you put the can they just say, oh, my name, rank and serial number is so and so, which is the Geneva Convention System. Or are you allowed to interrogate them in a tough manner? And so we decided legally you could because they were, outside the Geneva Convention framework. You couldn't hurt them, but you could, you could try to pressure them in psychological ways. That's the view we came to. And so, ultimately, what the CIA and the Defense Department suggested was why don't we use interrogation methods the same system that we use to train our own soldiers? And they said we would not actually do anything that would hurt our soldiers.

**Jason Raia:**

Right.

**John Yoo:**

So we're not actually gonna harm any of them, but It's a way of pressuring them because these people and this is a and this is one last difference, I think, between fighting the enemy who's armed, uniformed and in normal conventional units and terrorists who wanna hide in the civilian population and kill civilians is, The only way really to get intelligence and to try to see what they're gonna do is through the information in their heads And through surveillance of their communications, they're always trying to blend in with the civilian population.

So the normal things you would do, like surveillance from the air, you know, surveillance from contact, intercepting, it doesn't work because they don't operate in normal units. They don't

have normal conventional goals. So if the objective is to try to stop future attacks, then we decided, well, that was a legitimate way to try to get information to stop them.

**Jason Raia:**

So, and I know part of what the memo argues is, about specifically about 5th Amendment, which is due process.

**John Yoo:**

Mhmm.

**Jason Raia:**

And the 8th Amendment, you know, cruel and unusual punishment. And if I remember correctly, you sort of come out and say 5th doesn't apply, 8th does in the cruel and unusual part, but that does not prevent you from being able to, you know, subject them to the kind of interrogation that is gonna reveal the information that will save lives.

**John Yoo:**

Well, the larger constitutional question there is, does the Constitution protect members of the enemy during wartime abroad. And this was actually where we looked at things like the Civil War and the Revolutionary War. In our view and this is actually was the view the Justice Department had taken for many, many years was that it would be impossible to apply the Bill of Rights to members - not just possible, but illogical to say, oh, the Bill of Rights applies to enemy soldiers who you're fighting on a battlefield, who you're allowed to shoot, You know, if you're fighting them, but they would have the right of free speech. It doesn't, it just doesn't make sense. And, actually, Lincoln was very interesting. Lincoln so we found a letter that Lincoln had written about this very question because at the very outbreak of the Civil War, there's a case that comes out of Baltimore, the very beginning of the Civil War because the North is trying to get troops down to Washington, D.C. to protect it. There's a strange break in the rail line. The railroad, for some reason, stopped in Baltimore.

And then you would have to march or walk to another train station and get another train to go from Baltimore to Washington, and Union troops were attacked by Confederate sympathizers in that walk at the very beginning of the Civil War. And so, Lincoln orders the military in Baltimore to try to arrest the people who are the heads of the Confederate sympathizers. Chief Justice Taney, the author of Dred Scott, happens to be in Baltimore at this time-

**Jason Raia:**

Yep.

**John Yoo:**

And he orders their release under a writ of habeas corpus. And Lincoln-

**Jason Raia:**

Is this Merryman?

**John Yoo:**

Yeah. Merryman case. Yeah. We talked about it. And Lincoln refuses. He just doesn't answer Taney. So it's actually, I think, the only case where a president has refused to obey a judicial order. And then later, Lincoln says, you know, Taney's decision makes no sense. Lincoln was caught in something, though, because he said he always said that everyone in the Confederacy was still an American citizen.

**Jason Raia:**

Right.

**John Yoo:**

He would not admit that they were another country. But at the same time, he said we're fighting a war with them, and we have to follow the rules of war. And he said something like, otherwise, what if I was walking in Washington, D.C. and I saw Robert E. Lee walking down the street, I can't do anything to him unless there's a jury trial to find someone guilty. He said no, of course, or Stonewall Jackson? He said, no, of course not. Of course, it's a war. Should be able to detain them right away. They wouldn't have normal constitutional rights because we're at war.

**Jason Raia:**

Yeah.

**John Yoo:**

That was the basic constitutional question we had to answer that underlies all of these memos and all these questions. This, under the pre 9/11 world, we had treated it like a crime, and so terrorists would get due process rights, like under the 5th amendment.

But if it's really a war, we don't give Bill of Rights protections to the enemy because you couldn't fight a war, you couldn't shoot them. You know, you couldn't fight a normal war. I think the legal question actually was not as hard as the political issue because I think today, even a lot of people in society think, oh, we've overreacted to 9/11. Terrorism really isn't a war. Really is

more like a crime. We really should just use the standard criminal justice system rules. Like, why don't we read the Miranda rights when we, arrest what people call the still call, arrest them

**Jason Raia:**

Right.

**John Yoo:**

But that's right, that's the sort of law and order framework on how to deal with crime, not how you deal with war.

**Jason Raia:**

Right.

**John Yoo:**

So that's the fundamental decision we had to make on this.

**Jason Raia:**

So I wanna focus a little bit on *Crisis in Command*, which is your book on executive power, and you start at the very beginning with the Articles of Confederation, Constitutional Convention here in Philadelphia, even Federalist Papers and the bait around ratification. Tell us what the framers thought about executive power. And then what's your thesis of how executive power is either redefined or expanded in certain presidencies.

**John Yoo:**

What struck me about the way lawyers had been writing and thinking, or constitutional lawyers had been writing, thinking about the executive power is that it was somewhat divorced from, I think, the 18th Century way of thinking of executive power, which was much more attached. We're connected to political theory. And you could say maybe this is one of the most important questions about, political theory is applied to constitutions as how do you have an active energetic government, but one that doesn't become a tyranny. There's something that the political theories people have been thinking about since, you know, early, you know, ancient Greek, Greek times. Aristotle talks about it. So, one thing that I thought important to do was to understand what the executive power, which is actually the phrase used in Article 2 of the Constitution creating the presidency was to recapture what did people at the time who thought about these things participated in the drafting ratification of the Constitution, what would they have understood the executive power to be? If you read constitutional law casebooks, you would think it was only about firing people. That's what all the Supreme Court cases are about. It's just, can the president fire people, which is important for control of the administrative state,

but it almost ignores the major question, which is what does the executive power mean in terms of the president's constitutional authority that lies outside the authority of Congress? Just like we think of what is the judicial power mean, or the legislative power mean. And so that's one thing I tried to do was, and then I thought of it as The executive has two aspects.

One is structural. What the founders decided to do was to vest it in one person. Another structural thing they decided was not to have the executive chosen by Congress. You know, the president was responsible and elected through the mediating structure of the electoral college to the people.

**Jason Raia:**

Right.

**John Yoo:**

And so they wanted to have a president who was independent of Congress, but someone who could act with vigor and speed and energy in the terms of the Federalist Papers because that's why you had it in one person. There were proposals to have it placed in two people and –

**Jason Raia:**

Right.

**John Yoo:**

Make it like a Roman consulate where each one could veto the other, and is specifically rejected. And then the other question I think on which constitutional law people had shied away from was what were the substantive powers of the presidency, not just its independence. I think of that almost like I call it in the book, I think, the human resources version of the president. The presidency is just about management of the executive branch.

**Jason Raia:**

Right.

**John Yoo:**

And I think the harder question is what powers do we give to the president, in a way that is just all concentrated in that word, the executive power, but aren't really enumerated in the text. And so here, I was very much persuaded by Alexander Hamilton. I noticed you have a building named after–

**Jason Raia:**



We do.

**John Yoo:**

– when I drove in. And, Hamilton has this, he talks about this in the Federalist Papers, particularly Federalist No. 70 starting there and on. But, actually, I think his most important thinking about the presidency is in this debate that occurs right after the founding called the Helvidius and Pacificus Debates. This is a fascinating debate, because it is about whether President Washington could declare neutrality in the French Revolution. And so in the Constitution, there's no discussion of foreign affairs, or there's [power to start wars. There's a power to make treaties.

But there's no power there to say, oh, we're gonna be friendly to you or we're not gonna be friendly to you. The power to conduct diplomacy is not mentioned. And so the two great collaborators, Madison and Hamilton, take opposite positions. This is what's so wonderful about this debate. So Hamilton, as is typical, went first. And then he also and he is so great. He called himself Pacificus.

You know, that he's the peaceful one. And he immediately took to what was the form of debate, which was publishing pamphlets under pseudonyms. And he made this first argument, which I think has been compelling ever since, which is, Congress's powers in Article 1 are enumerated. The first sentence of Article 1 says the legislative powers herein granted are given to Congress. So it's an enumerated list. Hamilton says Article 2 doesn't say that. Article 2 just says the executive power is vested in the president. So he says from the start, the Constitution gives the president the executive power but doesn't define it.

**Jason Raia:**

Right.

**John Yoo:**

It's not limited. And so then he says, well, how would we figure out what that means? So he said, let's look at the powers that executives have always had under our system. And then think about the powers of Constitution deletes, specifically. So he gives us an example, treaties. Under the British Constitution, the king made treaties alone. Under our system, the president and senate make them together. So he said, every time that happens, of course, we delete that from the executive power. But then he says everything that's left, we assume rest with the president. So he says so the president gets to decide neutrality because declaring the foreign policy positions of the country has always been. And so the greatness he looks back you know, it goes through Blackstone to Locke. I think he goes all the way back to the first modern political theorist who is Machiavelli. Although Hamilton would never associate himself with Machiavelli,

his vision of the executive really traces us way back all the way to Machiavelli. And so that's essentially how I approach it. So I always often say I never came up with any new theory here. I'm actually quite a Hamiltonian, and I'm actually in a way filling out the Hamiltonian theory about the executive for modern times.

**Jason Raia:**

You had of course, at the heart of that debate, is how much power should the executive have? And you have this very early in the book, there's this great line, and I apologize if I don't have it perfectly. But you said, basically, the framers saw that the executive needed to be strong enough to promote the common good, but not so strong as to risk despotism. But I was struck by that common good. There is this idea that the president's job is to promote the common good. That it is a singular person, but that is what has to be the guiding principle in every decision that the president makes.

**John Yoo:**

Yes. I mean, the primary job the president has is protecting the nation. So you have to have a vision of what the public good is and then executing the laws. And we give the president a lot of discretion in how to execute the laws. The laws are sometimes written very generally in a very vague manner. We expect the president to take and execute those laws in a way that promotes the public good too, that he not, you know, waste money pursuing, you know, personal petty, you know, biases or fights and try to enact, implementation or implement the laws in a way that's best for the country as a whole.

**Jason Raia:**

Yeah. Yeah. Yeah. Absolutely. So I want to ask this question because you spend a fair amount of time on it. So the framers layout in Article 2, executive power, as you've said, it's unenumerated, and then George Washington comes to be elected. And we specifically named this podcast *George Washington Slept Here* because of this idea that he's the great uniter, that he's the one person who everybody in those early days of the Republic and particularly after the constitution that drew everyone together, that people who disagreed on every other thing looked at George Washington and said, well, if general Washington says that this is the way we need to go, this is the way we need to go.

**John Yoo:**

Except for that scoundrel, Thomas Jefferson.

**Jason Raia:**

Yes. Well. But even at the beginning, he was on board.

**John Yoo:**

But it only took about two years for Jefferson to turn on him. Actually, one year, one year, Jefferson's already up to no good.

**Jason Raia:**

But he really—

**John Yoo:**

Yes.

**Jason Raia:**

— defines executive power in decisions that he's making in that first year, 2, 3, 4, of the appointments that he makes, of his refusal to consult Congress. Tell us about George Washington.

**John Yoo:**

Well, I think George Washington is, so I think he doesn't get the credit in popular culture that he should or even in the historians that he should today. But, actually, he makes a lot of fundamental decisions that have shaped our country and shaped the presidency that didn't have to be made that way.

**Jason Raia:**

Right.

**John Yoo:**

So, just one example is, from the very beginning, he creates a cabinet government where he, the president, is the head, and he appoints the cabinet officers. Think about the way he could have done it, the way it's done in Britain. He could have thought of his government as a coalition of the parties in Congress and try to get leaders from each coalition to become cabinet members, and then try to think of cabinet meetings as a way to, right, harmonize the majority party's different coalitions to one policy.

**Jason Raia:**

Right. And, ultimately, to advance bills in Congress to become laws.

**John Yoo:**

Yes. And that 's basically, think of the president as a prime minister. He's basically someone who works for congress or just happens to run the majority party in congress. Washington comes in, and he actually organizes the presidency in a way that's familiar to him, which is, you know, running an army. And so he thinks of the cabinet officers as subordinates.

**Jason Raia:**

Right.

**John Yoo:**

Doesn't think of them as equals. He gives them directions and orders, you know, instead of consultations with his cabinet officers. When he has questions like the French Revolution question or the National Bank question. These very early questions. He asked for the opinions, and we still have them in writing because they used to write them down and send them to the president. But he thought it was still his ultimate decision.

**Jason Raia:**

Right. He's the decider. Everyone else is giving advice. Yes. But every decision is his decision, which keeps everything in you don't have multiple decisions being made or oppositional decisions being made.

**John Yoo:**

This is what Hamilton, this actually lives up to the Hamiltonian vision expressed in the papers is that if you have the power concentrated in one person, then everyone knows who's responsible.

**Jason Raia:**

Right.

**John Yoo:**

You know, one of the things they worried about with the cabinet government is that no one would be able to tell who made that decision and who's responsible.

**Jason Raia:**

Absolutely.

**John Yoo:**

And so we and that's another thing. Washington takes responsibility for the decisions, he explains why he does things. You know, one of the things that Washington doesn't get why Washington doesn't get as much credit, I think, is that it doesn't leave behind the paper trail of a Hamilton -

**Jason Raia:**

Right.

**John Yoo:**

- Jefferson or Madison of voluminous writings. You know, Washington's not a thinker. He's a doer. And so he makes decisions, and that's I think that's an I think that's, how he so we just the presidency as we have it today is the presidency that Washington it's there were many possible presidencies that could have been-

**Jason Raia:**

Right.

**John Yoo:**

-Created after out of the constitutional text.

**Jason Raia:**

Right.

**John Yoo:**

Where the president is far more subordinate to Congress. But another good example of this is how presidents treat the advice and consent function of the senate. So in two places, the Senate was actually part of the executive branch for the making of appointments of officers and judges where in England, that had to have been done by the crown and the Constitution the President nominates and then with the advice and consent of the Senate, makes the appointment. And then treaties. Again, under the crown in Britain, that was solely the king. In the U.S. Constitution, the president makes the treaties with the advice and consent in the Senate. And so there's this famous example. You could have read that text. A different President could have read that text and said, oh, I better bring the senators into the White House. We should have a general discussion about who would be a great Supreme Court Justice or whether to make a treaty.

And then I'll go do it consistent with what we discuss. Then I'll come back to them and see if they like what I did. Washington tried that once with the treaty. So the very first treaty, he and

this is all in Philadelphia because that's where the government was in the beginning. Those have all been downhill since we moved it out of Philadelphia, by the way. Clear- you know? It would be great to have cheesesteak loving members of Congress. It would solve a lot of problems in our government. So then Washington walked across the street from the Executive Branch House to Independence Hall, basically. Where they or the what they called the Pennsylvania State House at the time where the Congress is meeting, and he tried to take the advice of the Senate on whether to make a treaty with the Indian tribes. And he only got to ask 1 question.

**Jason Raia:**

Mhmm.

**John Yoo:**

And then apparently from the records we have, three hours ensued of arguments and yelling and debates amongst –

**Jason Raia:**

The other Congress hasn't changed in 250 years.

**John Yoo:**

Exactly. And so he, Washington, who had a terrible, actually, Washington had a terrible temper, and he worked all his life to keep it under control. He eventually, at the end, stormed out of the building, and it was heard to say, I'll be damned if I ever step foot in there again.

**Jason Raia:**

Yeah.

**John Yoo:**

And after that, no President has ever stepped foot in the Senate to take its advice on the making of a treaty or the appointment of a Supreme Court justice, as a good example, Washington instead turned it into I make the choice, and then I send it to the senate for approval after my choice to formalize it. I'm not going to invite the Senate to make the decision jointly.

**Jason Raia:**

Right. And what that also creates and what you know, part of the legacy that George Washington leaves us on wxecutive power is there's now a double check. There is the advice and consent and the vote of the Senate on those things. But then there's also the election of the

President if they are unhappy with his foreign policy or they are unhappy with his choice for judges, or they are unhappy with any of those decisions that he's making as President, and this is the advantage of having a sole individual, they can vote them out.

**John Yoo:**

Yes. This, in fact so, again, reinforces the Hamiltonian vision. The President is singularly responsible for the decisions of the Executive Branch. You can't hide behind the Senate, which is what could have happened if you had thought of the nomination or the treaty making power as a kind of collective decision between the two branches.

**Jason Raia:**

Yeah, so, George Washington sort of cast the mold. Who are some of the other most important, you know, Presidents in helping us better understand those unenumerated powers of executive authority.

**John Yoo:**

Well, even though I was just calling him a scoundrel, which he was, Thomas Jefferson, is a good example. Actually I think the main theorist of executive power in our history, and that's, the book I'm working on right now is about Alexander Hamilton Who was far more important than, you know, jumping around singing songs on a Broadway stage.

**Jason Raia:**

But a lot more people know who he is because of it.

**John Yoo:**

I'm glad. Yeah. I'm glad

**Jason Raia:**

Absolutely.

**John Yoo:**

Yeah. I'm glad of it, but it's interesting. I haven't watched the Broadway musical, but still, I think Hamilton is always thought of as a man of action. Even in the play he's presented as a person who does things. He was the guy in the room making the decision, but I actually think he's more important for his thoughts. And, actually, that's what I'm writing my book about because there are very few books.

**Jason Raia:**

Yeah.

**John Yoo:**

Actually about Hamilton as a thinker. Which is surprising given how I think we actually live in Hamilton's Republic.

**Jason Raia:**

Yeah. Oh, no no question.

**John Yoo:**

No. Not Jefferson's. But we don't think of it that way. We're, like, rhetorically a Jeffersonian republic. But anyway so another and, actually, this goes to your question because Jefferson is, you know, created the first political party in our history, and that political party is designed to defeat, you know, the Washington Party.

He's a great critic of things that Washington has done, but when he came into office Hamilton predicted this actually. He said, when Jefferson becomes President, he will be a great friend to the executive power, and he turned out to be so. I think the greatest, this is interesting. The greatest act, I think, of Jefferson's Presidency was the Louisiana Purchase.

**Jason Raia:**

It's funny you mentioned that because one of the things we do, here at Freedoms Foundation with our high school program called Spirit of America Youth Leadership is often we will have a debate between Thomas Jefferson and John Adams. It's like a meeting, they're really, really wonderful, and we've actually, you know, are going to have an episode with the interpreter who is Thomas Jefferson. But what's really interesting is in their debate, and the students are there watching, and they're able to engage with questions. But one of the keys of disagreement between these two is whether Thomas Jefferson acted legally in making the Louisiana Purchase.

**John Yoo:**

Yeah. Well, so Jefferson doesn't think so. Just that but as with many ways, Jefferson being an intellectual figures out a way to do it anyway. So Jefferson actually had a view of the Constitution, which I don't think is correct, but he did believe it, which was if you were going to acquire territory from which you are gonna draw new states, you should amend the Constitution. So his hypothetical was, does this mean like the unit otherwise, that the United States could just absorb Holland as a new state just by passing us an act of Congress? He said, no. It's such a



fundamental change in the political bargain that there should be a Constitutional Amendment. So when the Louisiana Purchase possibility comes up, he actually drafts Constitutional Amendments to purchase Louisiana because that's what he believes constitutionally. Then he heard that Napoleon was thinking of backing out of the deal. So then they just rushed through –

**Jason Raia:**

Right.

**John Yoo:**

–buying Louisiana. And so after his Presidency, Jefferson has asked, how could you do this? You know, you actually violated your own view of the Constitution. And so Jefferson essentially, Jefferson said and this is actually a different view than Hamilton, but actually, in some ways, I think a much more expansive view of the presidency. Actually, I think more than I even thought I might hold. He said the President sometimes has to violate the Constitution and the law if the public need is great enough and then he said, this is what we call the per the prerogative, which is something John Locke discusses too. And then he said, and then the only way to check it is to ask the people after I do it to approve me, to give their approval.

**Jason Raia:**

Right.

**John Yoo:**

So, Jefferson actually thinks executive power includes the authority to violate the Constitution.

**Jason Raia:**

So that's a perfect segue to Abraham Lincoln because there is that same sort of question much more important than just purchasing a piece of property no matter how large it is.

**John Yoo:**

Although it was at a good price. Well, Americans love discounts.

**Jason Raia:**

15 cents an acre or something? But with Lincoln, it is this question of the power to hold the union together. And you have this great analogy, that, actually, I think is a Lincoln analogy where he says, you can sacrifice a limb to save the body, but you never sacrifice the body to save the limb. This idea that, yes, he may have to exceed what was envisioned as presidential

power in order to hold the union together, but that is the job of President. And so it's this really interesting conundrum.

**John Yoo:**

Yes I mean, this is, he could have gone the Jeffersonian route. And sometimes he would say things like that, as you the quote you mentioned, or you say, are are all the laws but one to be violated and I have to enforce this one law, which in the case he's talking about was the writ of habeas corpus and let the Union fall to pieces.

**Jason Raia:**

Right.

**John Yoo:**

And so he would make comments that referred to this Jeffersonian idea of the prerogative. But my argument about Lincoln is that the way and this one of the reasons he's a great President, maybe even greater than Washington or at least on a par with Washington is that he says, no. I'm not going to ever claim that the Civil War is such a great emergency that the Constitution doesn't apply. So we're still gonna have a Congress. We're still gonna have elections.

We're still going to ask Congress to, you know, raise the taxes and to spend the money and to decide how big the Army is, And I will respect the constitutional limits of my authority. I'm not going to claim a vast prerogative. But he said, what I will do is say that the executive power in the way that Hamilton argued in *Pacificus*, can expand during wartime to protect the country from this one of a kind threat, a Civil War, which is not even discussed or anticipated in the Constitution. And so here this is great so I think the one clear example is the Emancipation Proclamation.

**Jason Raia:**

Right.

**John Yoo:**

Maybe Lincoln's greatest act within the war was to free the slaves. But he didn't claim, oh, I was President, I'm just gonna free the slaves during wartime. Instead, he treats it as a war measure. So for example, it only applies in the areas of rebellion. People may not realize that he did not free the slaves in the loyal areas of the North, and he realizes it's only temporary during the time of the fighting, that's why he wanted the 13th Amendment enacted because that would permanently eliminate slavery for all time. So Lincoln actually carefully exercises power as President even while rhetorically he said, oh, I might have to do extraordinary, potentially even unconstitutional things. He tried never to do that.

**Jason Raia:**

So I have two more questions specifically about executive power that I wanna get to. One is to tell us what the lesson of Richard Nixon is when it comes to executive power because unlike those who you list as the great presidents who helped define it, Richard Nixon is the exact opposite.

**John Yoo:**

I have such a soft spot. He was, you know, he was, you know, a very smart, capable guy, I mean, in terms of experience and intelligence and training and background, but so hated too by the intellectual class. So I, basically, my argument in the book and since has been, you know, Presidential power is flexible. It expands to meet the moment. If there really is a true emergency like the Civil War, then executive power expands to give the President the powers necessary to deal with the emergency. What I think Nixon's constitutional fault is is that he thought he was an emergency and he was not. So he made claims for vast executive powers, and then he turned them inwards on the country.

**Jason Raia:**

Right.

**John Yoo:**

And that was his I think that was his eey mistake. And I think that so you could say there's two kinds of mistakes presidents can make. One is, I think, I point to President Buchanan, thought of as the worst president in American history, unfortunately, from Pennsylvania.

**Jason Raia:**

Yeah. The only one.

**John Yoo:**

Yeah. Is that right?

**Jason Raia:**

I think so.

**John Yoo:**

Oh my gosh. So Buchanan did not rise to the challenge of the Civil War. He did not understand executive power to be broad enough to handle the greatest threat to the security of the country. He actually thought that the President had no authority to stop the Civil War, to stop secession even though he thought it was unconstitutional just like Lincoln did. So he's that that's the example where the ex he did not expand the power of the executive to treat an emergency properly. Nixon's in the reverse example. He expands presidential power. There was no emergency.

You know, that he was paranoid in that sense. He thought there were these plots and efforts to get him in when in reality, what he did is he used these vast presidential powers over national security to interfere in domestic politics. That was his mistake.

**Jason Raia:**

Right. Right. Because there is and and and you you allude to this and and directly speak to it in the the book that foreign policy it is specifically presidential and then the execution of laws, but it is interesting once we start getting into domestic policy where the the Venn diagram of legislative power and presidential power and what is each is bailiwick, which one gets to my last question, which is brings us right into the, I think, specifically into the the modern era is the question of, executive orders. And, tell us about how executive orders fit into executive power, presidential power, but then also the weakness of them and where they are appropriate and where they maybe aren't appropriate.

**John Yoo:**

Yeah. So I think of the Constitution as creating reverse polarities for the presidency in foreign affairs and domestic affairs. So foreign affairs, the president acts first.

**Jason Raia:**

Mhmm.

**John Yoo:**

Congress often follows. The initiative is in the President, and the President sets the policy, develops a policy that sets it and executes it. Congress provides the money and the resources. Think about domestic policy's exact opposite. Congress is the main policymaker. Congress goes first. The President comes in at the point of the veto and then at the implementation of the laws, second, not first. And executive orders are efforts by Presidents to, make policy at a level with Congress in a way to try to assume in domestic affairs some of the initiative and authority they have in foreign affairs, which I think the Constitution really wants them to be the exact opposites almost when it comes to domestic and foreign affairs.

So there are some species of executive orders which are perfectly harmless and are not controversial, for example, Congress passes a law. It has some ambiguous terms in it, and the president tells the executive branch how to carry it out. So, many, many executive orders are just the president directing the Justice Department or the health Department of Health and Human Services to just carry out a law in a certain way. Every president has to do something like that. But the executive orders we've seen with more and more frequency are different. They are executive orders where Presidents say Congress has refused to pass a law. So I'm just going to do it anyway because that's my policy preference.

So I'll point to two, one was the Biden effort to cancel all student debt in the country. Right. I think that's clearly up to Congress and the power of the purse, and President Biden will call us.

**Jason Raia:**

And the Supreme Court has agreed with you.

**John Yoo:**

Yeah. So I am picking executive orders at the Supreme Court struck down. Right? So so right. The, but that's that's I think that is a kind of executive order which represents an unconstitutional expansion of the Presidency in domestic affairs. Obviously, Congress could cancel all student debt if it wanted to. They've passed no law to do so. And so for the President to say, I'm just going to make this major decision about spending and the money that's owed to the Treasury, just because in fact, it's very hard to identify what power Biden claimed he even had. To do it, which is why he lost so easily at the Supreme Court.

But this is, I think, a dangerous trend. Politically, I see why this has happened, you know, because Congress has refused to handle all the important questions on which people are getting elected or not. And so the President feels if he doesn't do something, he's gonna be punished by the voters.

**Jason Raia:**

Right.

**John Yoo:**

So the President tries to fill that gap as it were. But it made this a good place to talk about this in this setting is that's what the founders wanted. People don't realize the founders wanted a Constitution that would create a government that made it hard to pass law. You know? They they this is not part of the Presidency part of the book, but the in other parts of my work, I've stressed that the founders thought states would be the primary regulators of most things in life, and the federal government would just sort of step in to fix discrete problems or areas of the states couldn't handle, but the federal government was gonna be specialized and narrow.

**Jason Raia:**

Right.

**John Yoo:**

And so, they designed a system where it would be really hard to pass laws. And in the end I blame all this is, maybe conversation at the time. I blame this all on Woodrow Wilson and a little bit on Teddy Roosevelt. They had the vision. Well, if that's an absolute Constitution. We need to have lots of laws all the time because the society and the economy is so complicated. And so the President is gonna step in and fulfill that law making function that Congress can't perform under the Constitution. That I think is an important, constitutional rubicon that we crossed during the progressive era.

**Jason Raia:**

Right. Right. Well, we definitely will have to have you back, to talk about that. I think that's a great place for us to end this discussion. We do have a quiz. We do this quiz with—

**John Yoo:**

Oh, I thought that was was the quiz.

**Jason Raia:**

No. No. Here is the fun part. So well, excluding Washington and Lincoln, who's your favorite President?

**John Yoo:**

Oh, excluding Washington and Lincoln? Those are but in my book, I see those are my two favorites.

**Jason Raia:**

I know. We don't let anyone pick Washington or Lincoln. That's too easy.

**John Yoo:**

So I actually, despite the fact that I think he really did misinterpret the Constitution, I do give a lot of respect to Franklin Roosevelt.

**Jason Raia:**

Okay. That's well, we will -

**John Yoo:**

Saving us in WWII.

**Jason Raia:**

We will definitely have to have you back and have that conversation. What's one thing you want every American to learn more about?

**John Yoo:**

Oh, clearly about the founding. Or the Civil War. One or the other.

**Jason Raia:**

Agreed. And yes. If you had not chosen a career in the law, what do you think you would have become?

**John Yoo:**

Oh, I think I would have become a historian.

**Jason Raia:**

Okay. Fair enough. Let's see.

**John Yoo:**

I would've also your but your idea of a trial lawyer with many boats and planes and homes holds great attraction.

**Jason Raia:**

But you would've gotten bored eventually. What pet peeve annoys you the most? And I ask this all the time because I have million of them. We were talking, the other day about the way email search functions work. I type in something and it'll spit out something from 2013, but I can't find the email somebody sent me last week.

**John Yoo:**

So I have something a little more, maybe some more, university based, but I hate what we call the gratitude sandwich. Do you know what that is?

**Jason Raia:**

No. Tell me.

**John Yoo:**

So this is every time someone below a certain age, this is definitely a generational thing asks a question. They say, you're such a wonderful person. Why do you come here and say such a stupid thing? But thank you so much for coming here. Right? Every question is phrased in this gratitude. And I just like so I was actually just, teaching a class today, and I just said, well, remove the buns.

**Jason Raia:**

Yes.

**John Yoo:**

I don't wanna hear how great I am. I don't wanna I don't want you to tell me how –

**Jason Raia:**

Gluten free. All you want is the meat of the sandwich.

**John Yoo:**

Ask Me your direct harsh question. It will save 67% of the time of this session.

**Jason Raia:**

I love that. Oh, that's great. What one book would you recommend to listeners?

**John Yoo:**

Ah, so given my Roman Greek training, I would say Thucydides' *Peloponnesian War* is worth everyone reading.

**Jason Raia:**

Okay. Excellent. We will have to put that in the notes. Do you have a favorite movie? And it doesn't have to be the favorite of favorites, but you know?



**John Yoo:**

I mean, I like *Star Trek* a lot. Like so but I would pick *Star Trek II: Wrath of Khan*.

**Jason Raia:**

Yeah. That's probably the best one.

**John Yoo:**

It's funny. With William Shatner screaming Khan.

**Jason Raia:**

Yes. Yeah.

**John Yoo:**

One of the great -

Jason Raia:

And Ricardo Montalban

**John Yoo:**

-has Ricardo Montalban.

**Jason Raia:**

Yes. What one thing would people be surprised to know?

**John Yoo:**

I don't know how handsome and good looking I am? Or what a wonderful athlete I am?

**Jason Raia:**

That's right. You played with—

**John Yoo:**

youth discrimination and taste in all matters? Which one of those would you pick?

**Jason Raia:**

Part of the reason I know you is because you played youth soccer with a mutual friend of ours.

**John Yoo:**

Yes. Steve Target. Yes. Yeah. So I was not very good at soccer. I have to say. But, I think of our time when we're growing up, when people's parents figured out, oh, just throw all the kids onto a field and let them run around till they're exhausted.

**Jason Raia:**

Right. Right.

**John Yoo:**

It was a good form of childcare.

**Jason Raia:**

Final question. Bourbon or scotch?

**John Yoo:**

Oh, bourbon.

**Jason Raia:**

Okay.

**John Yoo:**

Because America.

**Jason Raia:**

Yes. Absolutely. No.

**John Yoo:**

No. I mean, they're very similar, so why not just buy them made in the USA?

**Jason Raia:**

I love it. John Yoo, thank you so much for being on our show. Great having you. Great discussion. If we're lucky and the stars align, maybe we'll get you back this summer to do one of the teacher programs, we're gonna be at Liberty Hill. We would love to have you be part of that. I also wanna thank our producers, Lara Kennedy and Sarah Rasmussen and, special shout out to friend of the pod, Bill Franz, for his artwork and, for historic interpreter, Bob Gleason, for contributions to the intro, please subscribe, follow, rate, and review *George Washington Slept Here* wherever you listen to podcasts or email us at [gwshpodcast@gmail.com](mailto:gwshpodcast@gmail.com) or visit us at [www.freedomsfoundation.org](http://www.freedomsfoundation.org)

**Jason Raia:**

Thanks for now.