

JOHN YOO: “IT SUCKS TO HAVE JUDGES PROTECTING THE CONSTITUTION”

John Yoo complains that the Supreme Court’s strong rulings last term are an “unprecedented” grab for power.

Slowly but surely, the justices have expanded their power to make many of our society’s fundamental political and moral decisions. Only the court now decides whether schools or the government can resort to race-based preferences when it admits students or doles out contracts. States and the federal government must live by the court’s dictates on the regulation of abortion. Whether religious groups can help educate inner-city children or provide welfare services is up to the justices. Use of the death penalty, indeed whether each individual execution will go forward, is ultimately controlled by our unelected judges.

[snip]

Some might prefer that judges still make these decisions because they hear cases in a formal, rational setting and issue long opinions explaining their reasons. Nonetheless, the courts are far from ideal as policymakers: They have great difficulty trading off competing values in these sensitive areas; they are insulated from the political process; and their only access to information comes to them through the narrow lens of a lawsuit.

When the federal judiciary decides national policy on these issues, under the guise of interpreting the

Constitution, it prevents the people from making the decisions for themselves.

Not surprisingly, Yoo's argument gets particularly laughable when he complains about *Boumediene*.

The decisions announced this summer only reaffirm the court's power. In *Boumediene v. Bush*, five justices – the wandering Justice Anthony Kennedy joined by a liberal bloc of Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer – took the unprecedented step of striking down a wartime law enacted by Congress and the president.

U.S. history has never seen what the *Boumediene* majority now demands: Alien enemy prisoners at war with U.S. forces and detained outside the United States have the same right as criminal suspects to challenge their capture in civilian courts. Hundreds of years of practice, and the decided views of the political branches, to which the Constitution gives all of the powers over war, were tossed overboard.

After all, this was a guy who routinely ignored laws passed by Congress—including laws passed during the Vietnam war—to rationalize things like domestic surveillance and torture. But he has found one law—the Military Commissions Act—that he believes should be protected above all else.

Regardless of whether it violates the Constitution or not.

Which is really the argument Yoo is making: how dare the Supreme Court ensure that the political branches don't violate the Constitution. It makes it really difficult, you know, to change the law at will if you're actually bound by the

Constitution.

Yoo claims this is unprecedented—I guess because it adds to his histrionics—but what he's really asking is for permission for the "political branches" to legislate away the Constitution. Not that I'm surprised by that. Me, I'm still more surprised that fairly mainstream publications still consider Yoo's opinion or judgment to be worth squat.