Transcript: Rules for the Rulemakers: The Federal Register

Announcers: Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American government and offer context around the effects of government agencies in your everyday life. And now your hosts, Nia Rodgers, public affairs librarian, and Dr. John Aughenbaugh, political science professor.

N. Rodgers: Hey, Aughie.

J. Aughenbaugh: Hey, how are you?

N. Rodgers: I'm good, how are you?

J. Aughenbaugh: Good.

N. Rodgers: You want to talk to me about the Federal Register?

J. Aughenbaugh: I would be happy to.

N. Rodgers: Okay, so for the people who are listening who don't know what the Federal Register is, I have a definition here written by the government that says, "Published by the office of the Federal Register. The Federal Register," which I think is funny, the office of the Federal Register, "The Federal Register is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents." We're going to link to the Federal Register to get you started going there, listeners. But I found something that I want to ask you about.

J. Aughenbaugh: Okay.

N. Rodgers: It's interesting to me. The Department of Justice, Office of Justice Programs Bureau of Justice Statistics intends to request approval from the Office of Management and Budget for a generic information collection clearance that will allow BJS to conduct a variety of cognitive, pilot, and fields test studies. BJS will submit the request for review and approval in accordance with the Paperwork Reduction Act of 1995.

It then goes on to ask for comments by March 29, 2019 and then to list contact information and to list further information. So they're putting out a notice that they're going to ask for something, not, "We're asking for something," but, "We're going to ask for something."
J. Aughenbaugh: Yes. Basically what the Department of Justice is doing, and they've announced it in the Federal Register, is that they're going to ask the Office of Management and Budget to review something that they want to do in the future. Basically this is known as notice and comment rule making. It's more formally known as informal rule making. All federal agencies, if they are about ready to engage in the execution of law or whether it be through a regulation or something substantive that they want to do, they have to follow a federal law that was passed in 1946 known as the Administrative Procedures Act.

That act basically known by many federal bureaucrats as their bible, okay? They're supposed to follow it. If they do, it usually means that whatever they're doing is going to be fine in regards to the law, okay?

N. Rodgers: What is this act? Okay, what did you say the name of the act is?

J. Aughenbaugh: The Administrative Procedures Act of 1946. So for the listeners, a federal agency has the authority to act because Congress has passed a law that says, in this case, the Department of Justice, "We want you to be able to do surveys to figure out X." Okay? So that's in a piece of legislation known as authorizing legislation. They're authorized to do this. Okay?

N. Rodgers: So PL number, number, number, hyphen, number number.

J. Aughenbaugh: [crosstalk 00:04:06] number. Yes. Okay

N. Rodgers: Says the Department of Justice-

J. Aughenbaugh: The Department of Justice can-

N. Rodgers: ... can go survey for X reasons.

J. Aughenbaugh: For some reasons, for the X reason, okay.

N. Rodgers: Does it also give them money to do that?

J. Aughenbaugh: Okay, that it comes-

N. Rodgers: In the law?

J. Aughenbaugh: That comes in a different piece of legislation, an appropriations bill.

N. Rodgers: So we're going to get to that later.

J. Aughenbaugh: That's right.
Okay. Okay, so basically Congress passes two different types of bills, either authorizing legislation, which basically says through the executive branch, some agency within it, you're authorized to do this. But agencies really can't do anything unless they also get money, okay?

Ah, so they can authorize and not give you money, but that's their way of getting cover for, "Oh no, you can do that if you can find the funds for it."

Yeah, that's what "But we're not going to give you any money to do that."

Yeah, that's what, in a conference paper that I wrote many years ago, me and a colleague at Virginia Tech, Kevin Long, we refer to it as public policy light. That's where the Congress says to the agency, "Yeah, you have the authority to do this, but we're not giving you any money." As Nia just pointed out, that basically gives cover to Congress. Congress can go in and say, "Well, we gave the executive branch the authority to solve this problem."

"We didn't say you couldn't do it."

Yes. Then of course-

It's not our fault you don't have money hanging around.

Okay. The bureaucracy, which is usually nameless and faceless and is never heard of, okay, won't go ahead and say, "But you guys didn't give us any money to do it." It's kind of sort of like if your parents went ahead and said, "Oh sure, you could go ahead and do X with your friends," and then you say-

"Oh, you can take the car to Mexico. There's no gas in it and I'm not giving you money to put gas in it, but you could push it to Mexico if you wanted to."

Yes, okay. But let's just say in-

Which from Virginia would be quite the trip.

Yeah. We don't want to know how you got money for the gas. Really, we don't. Okay? But in this particular situation, assuming that the Congress gave the Department of Justice the money to do these surveys, according to the APA, or the Administrative Procedures Act, and the acronym is the APA.
N. Rodgers: Wow, not to be confused with the citation manual or with the American Psychological Association.


N. Rodgers: There's only so many acronyms, aren't there?

J. Aughenbaugh: Yes, there are. Despite our best efforts to come up with more. So an agency wants to go ahead and do these surveys. They basically, according to the APA, the Administrative Procedures Act, have to give notice to the public, but also because of other requirements, the Office of Management and Budget, which basically does a kind of sort of cost scoring. The Office of Management and Budget will want to make sure that whatever benefit the Department of Justice claims will accrue from doing these surveys is worth the cost. Okay?

N. Rodgers: Oh, so we're going to find out whether people prefer broccoli or cauliflower is probably not going to be worth the $5 billion that it would cost to survey the American populous.

J. Aughenbaugh: Yes, and also with what Nia read just a few moments ago makes reference to the fact that in the past, agencies would issue proposed rules or proposed actions in hard copy paper. But because of the Paperwork Reduction Act, they now do this online. Okay? In another podcast, we actually talk about the Paperwork Reduction Act, that that's where I go ahead and ruin Nia's childhood by pointing out all the flaws in the Schoolhouse Rock video, "I'm just a bill." But that's-

N. Rodgers: Childhood killer.


N. Rodgers: Crusher.

J. Aughenbaugh: That's a little foreshadowing for... I want to tease you guys, right? So back to this particular proposed action. So according to the APA, most of what agencies do is considered informal rule making or informal regulations. The process is known as notice and comment. So as Nia read to you all, basically the Department of Justice provided notice that they wanted to do X. They wanted to do these surveys. Right?

N. Rodgers: Then they asked for comments by a certain date.

J. Aughenbaugh: Date, okay.
N. Rodgers: They give you the contact information, which is sporting of them, otherwise you'd have to try to figure out who you were supposed to comment to.

J. Aughenbaugh: Yes.

N. Rodgers: So is that so that I can say as a person, "I don't think you should be doing this survey. I think it's a waste of time or money, or in some way it's going to harm me."

J. Aughenbaugh: Me, it might violate privacy, whatever the case may be. You as an individual, and let's be very clear, typically only those stakeholders who are really interested in what a particular agency does actually read the Federal Register, right?

N. Rodgers: But everybody should read the Federal-

J. Aughenbaugh: Should read it, the-

N. Rodgers: This should be the first thing you do in the morning, pop it open on your phone, catch up with what's going on. Okay, I know that's not going to happen.

J. Aughenbaugh: But to-

N. Rodgers: But if you did have a stake in it, for instance, to not be ugly, but the wall that's been discussed at the southern border, there are people whose land would be directly affected by building a wall there, right? Their property might be divided. So they have a stake in commenting. They have a stake in saying-

J. Aughenbaugh: So when that executive order was issued by the Trump administration, in the Federal Register, it will have contact information and a deadline for you to go ahead and provide commentary or comments if you wanted. Those individuals would want to go ahead and do that.

N. Rodgers: Does the agency have to read the comments?

J. Aughenbaugh: No.

N. Rodgers: So you might just be yelling into the darkness, like nothing will happen.

J. Aughenbaugh: When I-

N. Rodgers: Although it's in their best interest to read them, right?

J. Aughenbaugh: Yes.
N. Rodgers: Because they might be overlooking something.

J. Aughenbaugh: Something, yes. But the way I explain informal rule making to my students is this. It's symbolic. It's symbolic politics. The Administrative Procedures Act was passed by Congress after the New Deal, where the federal government bureaucracy grew dramatically, where the authority of the federal government, but particularly the executive branch increased in very significant ways.

What Congress was hearing from the public, but typically, again, important stakeholders was how do we make sure that agencies were giving a process to the effected public by those who would be effected by all these new regulations, all these new federal government programs? Congress's response was, "Okay, we want the executive branch to be able to act. We've created a large administrative state to do this, but at the same time, how do we make sure that basic American, if you will, democratic principles or values are being maintained?"

One of the most important ones in the US Constitution is due process. Let's give Americans a process to where they can, okay, at least give feedback to these agencies that we, in Congress, have given the authority to act. In many ways, it's like the US Constitution that was written by the framers. On one hand, we give the federal government the authority to act. But then we also make it very difficult for the government to actually act. So you have the requirement that both houses of Congress have to pass a bill. The president has to sign it into law. Then it can be challenged in the courts. That's all time-consuming. The government can act. It's just a little bit more difficult, because we want to make sure that it's acting in the public's best interest.

N. Rodgers: So we like the adversarial process.

J. Aughenbaugh: Sure.

N. Rodgers: Because that means that, one, it slows everything down so people can't just leap out there and do something the next day, unless there's a true emergency.

J. Aughenbaugh: Yeah. The awesome part of government is not, okay, just immediately going to happen. The Notice and Comment provision of an informal rule making in the Administrative Procedures Act forced the agency to, one, do research before they issue the proposed rule or what we're going to do. "We're going to do surveys." "Well, have you thought about why you want to do surveys?" Well, most agencies will go in and say, "Okay, so why do we want to do these surveys?" Which is what you were describing with the example here in the Federal Register.
So the APA forces the agency to do work upfront. Then they tell the public, "This is what we are proposing to do." Then the public has an opportunity. It forces the agency to wait 30 days to do something, okay?

N. Rodgers: To be responsive, theoretically to be responsive.

J. Aughenbaugh: Yeah, to be responsive. Now to your question a few moments ago, do they have to pay attention to the comments? I said no. With informal rule making, they don't. But if the agency wants to go ahead and cover themselves, particularly if they get challenged in court, they will go ahead and show how they responded to the comments, why they disregarded some but they considered others. Okay?

N. Rodgers: Do they incorporate things from the comments... I mean do they withdraw and then incorporate things from comments and then come back again?

J. Aughenbaugh: Oh sure. I mean, yeah-

N. Rodgers: Okay, so they are responsive.

J. Aughenbaugh: Yeah, but they don't-

N. Rodgers: Some of the time, but they don't have to be.

J. Aughenbaugh: Don't have to be. They don't-

N. Rodgers: There's no law that says, "You have to care."

J. Aughenbaugh: Yeah, okay.

N. Rodgers: But it's smart for them to care for a variety of reasons.

J. Aughenbaugh: Variety of reasons.

N. Rodgers: Right? They'll catch mistakes, but they'll also show that they are part of a representative democracy.

J. Aughenbaugh: Yes.

N. Rodgers: Railroading people is probably not a good idea in the long run.

J. Aughenbaugh: Yeah. It's not good in regards to the agency's relationship with the effected public. It's not good for the agency in regards to its relationship with Congress,
because many people who feel... If they feel as though a regulation harms them, will complain to their member of Congress.

N. Rodgers: I was going to say, they're not just fussing to the agency. They're also fussing to their-

J. Aughenbaugh: To their representative or their US Senator. If that doesn't work, okay, then they might, and they have the resources to hire good attorneys, then lawsuits are filed. When lawsuits are filed, okay-

N. Rodgers: Everything stops.

J. Aughenbaugh: Yeah, everything stops until a court decides whether or not the agency actually followed, wait for it, the Administrative Procedures Act. Okay?

N. Rodgers: Ah, hence the bible.

J. Aughenbaugh: Yes, hence the bible, right?

N. Rodgers: Okay, because it comes back to that over and over and over.

J. Aughenbaugh: Yeah, because if the agency follows what the APA requires, in terms of process, usually most courts, even if they disagree with the substance of the rule or what the agency wants to do, okay, federal courts will go ahead and say, "Well, they followed the APA, and that's what Congress requires of them." So if the other political branch says this is what the executive branch has to do, we're generally going to go ahead and defer. Okay?

N. Rodgers: Oh okay.

J. Aughenbaugh: All right? Now that's one type of agency action, informal rule making. There are two others, okay? One’s known as formal rule making, okay? Agencies hate formal rule making, okay?

N. Rodgers: Do they have to wear a tie and tails and they have to... Please tell me there are pearls involved and there's-

J. Aughenbaugh: No, it's not that kind of formality.

N. Rodgers: Oh, because that would be awesome.

J. Aughenbaugh: Okay, so I'm going to go back to...

N. Rodgers: Putting on the Ritz.
J. Aughenbaugh: You would like it. Me, as somebody who prefers to go in and teach most of his classes in jeans or cargo shorts, I would be like, "Are you kidding me? No. You want me to do what?" Okay, so-

N. Rodgers: You've worn a suit three times, right? Your wedding, your daughter's first dance, and eventually your funeral.

J. Aughenbaugh: Your funeral, yes. Right. As my students like to say, "Aughie, did somebody die?" If I show up in a suit.

N. Rodgers: That's true. You have done Constitution Day in a suit, which I think is very nice.

J. Aughenbaugh: Yes, and in part because it is the Constitution, and also in part you asked me to do it, okay?

N. Rodgers: Right, and you were working with Dr. Kneebone, who always wears a suit.

J. Aughenbaugh: I'm pretty much sure that he gardens in suits.

N. Rodgers: I think he does too. He's awesome.

J. Aughenbaugh: Right? Okay. Great guy, and I'm just like, "Well, if he's going to be wearing it, I don't want to go..."-

N. Rodgers: You don't want to look like that guy standing next to him.

J. Aughenbaugh: Well, he makes the effort. I figure the least I could do, right? Okay, so back to authorizing legislation.

N. Rodgers: So formal.

J. Aughenbaugh: Okay. So let's say most of the time Congress, when they authorize an agency to do something, we'll just go ahead and say informal rule making may be used. But occasionally Congress will go ahead and say formal rule making. Now with formal rule making, it's a lot like a hearing. So the agency will issue a proposed rule in the Federal Register.

N. Rodgers: So that's the starting point no matter what.

J. Aughenbaugh: Yes. They-

N. Rodgers: If we're going to make a rule about anything-

J. Aughenbaugh: Rule about anything, yes.
N. Rodgers: We put it in the Federal Register.


N. Rodgers: So we have to tell people.

J. Aughenbaugh: Tell people.

N. Rodgers: We can't just sneak around making rules and not have people know that those are going to be the rules.

J. Aughenbaugh: Yeah, that-

N. Rodgers: That doesn't mean internal rules of the way you run your department.

J. Aughenbaugh: No.

N. Rodgers: That's external rules.

J. Aughenbaugh: Yes.

N. Rodgers: Rules that will affect the public.


N. Rodgers: Okay. Have to be-

J. Aughenbaugh: Yeah, they have-

N. Rodgers: Is that back to the APA?

J. Aughenbaugh: Yes.

N. Rodgers: You have to announce them in a written or, in this case, digital now?

J. Aughenbaugh: Yeah. They have to be listed in the Federal Register. Now with formal rule making, again, the agency will have to tell the public, "We want comments by a certain day or time, or we are going to have hearings." They have to list the days and times and the locations. These are hearings on the record. Again, agencies don't like this, because with informal rule making, they will receive the comments, but their internal deliberations as to why they may reject all the comments or accept some and not others, they don't have to say that on the record. But with formal rule making, they have to do it on the record.
N. Rodgers: Oh, so there's oaths involved and public things involved.

J. Aughenbaugh: Yes.

N. Rodgers: Okay.

J. Aughenbaugh: This is not-

N. Rodgers: Do they have to do them around the country? Or do they generally do them around the country to get a-

J. Aughenbaugh: No, generally they do them in Washington, D.C, because that's where most federal agencies are headquartered, but depending on the rule or depending on what the authorizing legislation says, they may have to do them around the country.

N. Rodgers: So the example of the wall, if you're talking about something like that where they're going to propose building the wall, they would probably Congress would make them do some in the border areas, rather than making people in southwest Texas go to D.C-

J. Aughenbaugh: Or New Mexico or Arizona.

N. Rodgers: ... or Arizona or California go to D.C.

J. Aughenbaugh: That's right.

N. Rodgers: They would say, "You have to do some of them there, and you can do some of them up here, but you have to give local people access to you as an agency or to you as the people who work in the agency."

J. Aughenbaugh: Here's the thing about the example you just used in regards to the wall. The wall, okay, is an executive order.

N. Rodgers: Right, I know. That's not the same thing.

J. Aughenbaugh: Okay. It's not the same thing, but again, if you're a president and you want to get more support-

N. Rodgers: Ah, you hold a lot of rallies and stuff down at the border.

J. Aughenbaugh: Rallies and stuff, yes. Yeah, there you go.

N. Rodgers: That's dashed clever, isn't it?
J. Aughenbaugh: Yes, it is. Okay.

N. Rodgers: One should always remember about this president, whatever one may feel about his politics, and you're welcome to feel whatever you want to feel, he's very good at how the public thinks and how to reach the public. He's very good at media. He's been doing that a long time. That's been part of his career all along has been that in part, he's... I don't say this pejoratively. He's a showman. He's a-

J. Aughenbaugh: And he-

N. Rodgers: He's able to connect with people, and they say that in person, like when you're at a rally, he's very powerful as a speaker, which has been true of many of our presidents.

J. Aughenbaugh: Presidents.

N. Rodgers: They're better in person. They're better when you can kind of get the feel of how they're working the crowd, in a good way. That's just what they do. That's how politicians are successful. When people say he's not been in politics, I think they're probably not very accurate about that.

J. Aughenbaugh: Well, and he intuitively knows that when the president goes ahead and announces something, the media focuses, right? That's the difference between the president and Congress. There's 435... Excuse me. 535 members of Congress.

N. Rodgers: Yeah, let's just blow off the Senate.

J. Aughenbaugh: Yeah, right.

N. Rodgers: Oh, let's not.

J. Aughenbaugh: No.

N. Rodgers: I want to be the junior Senator from Virginia, remember?

J. Aughenbaugh: Yes. So you have 535 members of Congress. Many of them are not even well-known in their own state or district.

N. Rodgers: I was going to say how many of them do you actually see on the media channels?

J. Aughenbaugh: Yeah, right?
N. Rodgers: You're probably seeing about 100.

J. Aughenbaugh: But even our most boring presidents, if they say anything, the media reports it. It's in the nightly news. It's on the ticker down at the bottom of CNN.

N. Rodgers: It's the power of the presidency.


N. Rodgers: The bully pulpit

J. Aughenbaugh: It's the bully pulpit, right? It started with Teddy Roosevelt. It's the notion that the president goes public, and this president goes public. Now some of you might say, "Wow, he goes public way too often." See his-

N. Rodgers: Twitter account.

J. Aughenbaugh: ... tweets in the middle of the night. On the other hand, okay, he understands, okay, that Americans, okay, respond to that, either positively or negatively. Again, he comes from an environment or a background where news media is generally considered good, even when it's bad.

N. Rodgers: That's true. That's true. A lot of both his Hollywood work and his real estate work-

J. Aughenbaugh: His real estate work, okay.

N. Rodgers: ... is about being known.

J. Aughenbaugh: That's right.

N. Rodgers: Whatever you're known for, unless you're known as a homicidal maniac, which he is not, he's not known as a homicidal maniac.

J. Aughenbaugh: [crosstalk 00:23:50], but-

N. Rodgers: So as long as you're not known for something like that, no press is bad press, as it were. I didn't even think about the cleverness though of holding rallies down there as part of following up on your executive order.

J. Aughenbaugh: Orders. Okay, but with formal rules-

N. Rodgers: Drumming up support.
J. Aughenbaugh: Yeah, but with-

N. Rodgers: Or I suppose in some ways, if your crowds were tiny and booing you, that would also be a response you would want to know.

J. Aughenbaugh: Yes.

N. Rodgers: I don't have the support that I thought I had.

J. Aughenbaugh: Yeah. Think about President Obama's executive order to close Guantanamo Bay as a detention facility in the global war on terrorism. He announced it and in various rallies, people were very supportive. But who wasn't supportive? Members of Congress, including his own party. Therefore, he never got the money to close Guantanamo Bay.

N. Rodgers: See, you can say anything you want as an executive order.

J. Aughenbaugh: Executive order.

N. Rodgers: I executive order that there be no more broccoli.

J. Aughenbaugh: Yes.

N. Rodgers: I brought this up with Bill Newman.


N. Rodgers: Which listeners will hear about I another episode.

J. Aughenbaugh: But-

N. Rodgers: But you can't do that. You can, you can say there's no more broccoli.

J. Aughenbaugh: Say there's no more broccoli.

N. Rodgers: But if Congress doesn't find some way to help you build an anti-broccoli wall and prevent trade from broccoli-

J. Aughenbaugh: And by the way, if you take a look at any congressional farm bill, there are subsidies for, wait for it, broccoli farmers. We want broccoli grown.

N. Rodgers: And broccoli is good for us. Everybody should eat broccoli.
J. Aughenbaugh: Yes. Okay. The Food and Drug Administration highly recommends the consumption of broccoli, okay?

N. Rodgers: I just used it as an example.

J. Aughenbaugh: But that's all right, okay? It illustrates larger points here about the federal register, right?

N. Rodgers: Well and about the federal government. You can declare any... I can declare broccoli as a no-go for whatever through an executive order if I'm president, but if we're funding broccoli and the Commerce Department is encouraging trade in broccoli, I would have to change a lot of different rules in order to kill all the broccoli.

J. Aughenbaugh: Yes.

N. Rodgers: So that's a good thing, because the government, it makes it really hard to eradicate any one thing, because it's spread out over so many agencies, hence the Federal Register where you-

J. Aughenbaugh: And that leads to the criticism that the federal government is so big, it's almost impossible to get it to change. On the other hand-

N. Rodgers: It's so big, it's almost impossible to get it to change.

J. Aughenbaugh: ... it's impossible to get it to change. Yes.

N. Rodgers: So that's a positive and a negative.

J. Aughenbaugh: And it's an accountability measure. Okay? Because just because a particular president doesn't like broccoli, it doesn't mean the rest of the country should.

N. Rodgers: Right. 41 did not care for broccoli. That's the reason it's dear to my heart, because 41 was dear to my heart.

J. Aughenbaugh: Yeah, yeah. President Bush, number 41, the first one, he didn't like broccoli. He infamously-

N. Rodgers: He did not make an executive order, by the way, in case listeners are wondering. He did not make an executive order about broccoli. He just was not a fan.

J. Aughenbaugh: Yeah, yeah, and the media had a field day about it. By the way, there's also a comparable West Wing episode where I think Bartlet doesn't like green beans.
N. Rodgers: Ah okay.

J. Aughenbaugh: His press secretary, CJ, says, "He just doesn't like green beans. It's not like he thinks green bean farmers are idiots or bad people. He just doesn't like green beans, right?"

N. Rodgers: Which was President Bush's view of broccoli. He wasn't anti-broccoli for other people. He just didn't want it on his plate.

J. Aughenbaugh: Yes. Right? Okay. I don't like lima beans. I know a whole bunch of people how love lima beans. I think that they're a little crazy, but nevertheless, that's all right. If I was president-

N. Rodgers: Live and let live.

J. Aughenbaugh: Yeah, that's right. Okay. I don't understand tea drinkers, but there's a whole bunch of people who drink tea. God bless you, okay?

N. Rodgers: Leaving more coffee for you, as if you needed more coffee. I'm pretty sure you don't have blood, you just have coffee in your veins.

J. Aughenbaugh: That's what my colleague, Chris Saladino has to say. He's pretty much sure that if they ever attempted to draw blood, they won't find any. What they will find is coffee, okay? But we digress.

N. Rodgers: We do digress, as we often do.

J. Aughenbaugh: Okay. So we're back to formal rules. Okay? Agencies don't necessarily like them, because they have to do things on the record. It's a more formal process. Those who want to comment, okay, can do so either in writing or if hearings are required by Congress, they can actually testify. So the burden on the agency to give reasoned decision making with formal rule making is much more onerous with formal rule making. Congress hardly ever requires it.

Probably the best example is some environmental regulations have to go through formal rule making, okay? In particular, the authorizing legislation for the Environmental Protection Agency has, in some instances, specified that its formal rule making with cost benefit analysis. Agencies struggle with cost benefit analysis, in part because how do you measure in dollar amounts things like better air quality or better water quality? Or if we have better water quality, then people are going to live a longer life.
Okay, and how do we measure that benefit? Because then you have to start making assumptions, "Well, they're actually going to do something productive with their longer life, and some people won't." Okay? But we have-

N. Rodgers: Well, and the assumption that it's just air that will save you over a longer life isn't necessarily the case.

J. Aughenbaugh: Because there's-

N. Rodgers: Lots of people live in places where the smog is horrific and they still manage to live relatively productive lives. They may not have good lungs, but they have relatively productive lives. How do you figure those things out? I could see where that would be very complicated.

J. Aughenbaugh: Then there's people who live in Montana where there's no air pollution and they die when they're 45 because there's other intervening variables.

N. Rodgers: Right.

J. Aughenbaugh: How do you measure that, right?

N. Rodgers: Oh.

J. Aughenbaugh: Yeah. See, that's part-

N. Rodgers: Look, that's hard.

J. Aughenbaugh: Yeah, that is hard. We give, "we" being the public through our elected officials in Congress, give these experts in agencies, whether it be the Department of Justice doing surveys to measure impact of various policies, the Environmental Protection Agency, well, if we require automobiles to have higher gas mileage and less air pollution, well, what will be the impact of that? Well, one of the things that the EPA then has to assume is will the number of Americans driving in cars, will they drive as much as they currently do, and these are all things that these are experts we have tasked with making projections, assumptions, and they have to do it on the record with formal rule making.

N. Rodgers: Oh, painful.

J. Aughenbaugh: Yes, it's very painful.

N. Rodgers: Because in some ways, you're also risking your career if you're wrong.

J. Aughenbaugh: Wrong, that's right. You could-
N. Rodgers: Then it's well known that you were wrong. You were that guy.

J. Aughenbaugh: Yeah. If you're the director of the Environmental Protection Agency and you decide not to go ahead and regulate-

N. Rodgers: Seat belts.

J. Aughenbaugh: Seat belts. Well, that wouldn't be the EPA. That would be the National Highway Transportation Safety-

N. Rodgers: You're right. Wrong agency.


N. Rodgers: It's like a drinking game, listeners, trying to figure out which agency sometimes controls what.

J. Aughenbaugh: Yeah, right?

N. Rodgers: And sometimes more than one agency has a dog in the fight. It's interesting.

J. Aughenbaugh: Yeah, it's like the example I give in regards to gun control. If Congress ever passed a significant gun control, it wouldn't just be ATF, Alcohol Tobacco and Firearms, okay?

N. Rodgers: Even though the name implies-

J. Aughenbaugh: Would suggest that. You're also talking about the FBI, the DEA, because with the drug enforcement, drug dealers frequently, shall we say, enforce their deals with firearms, okay?

N. Rodgers: You'd have commerce with the Secret Service.


N. Rodgers: Because frequently attacks made on presidents are made with firearms.

J. Aughenbaugh: Firearms, okay.

N. Rodgers: Not always, but frequently.

J. Aughenbaugh: Okay, and then a lot of this will get outsourced to states, so then you got to monitor what states do. Of course, my students, they're all like, "Wow, I'm bleary-eyed." I'm like, "Yeah."
N. Rodgers: It's complicated.

J. Aughenbaugh: Complicated.

N. Rodgers: Pull the thread here, and you bunch up the sweater on a completely different side.

J. Aughenbaugh: Yes.

N. Rodgers: That's why you should never yank a thread on your sweater, because nothing's going to come right off clean, because that's how this works. It's designed to work that way. It's designed in some ways to be inefficient in part because you don't want people to be able to make that rule, push it through, and get it done in a really short period of time without there being a chance for people to go, "Whoa, whoa, whoa. That harms me in some way."

J. Aughenbaugh: Yeah, and whether it be-

N. Rodgers: So I think the formal-

J. Aughenbaugh: The formal-

N. Rodgers: ... is interesting, because you allow people to actually speak.

J. Aughenbaugh: Yes.

N. Rodgers: Which can be both good and bad. If anybody's ever been to a local city council meeting, that's always fascinating, and I encourage you to go as a listener. If you've never been to one in your local city, you should go to one.

J. Aughenbaugh: You should go. You should go.

N. Rodgers: Because it's fascinating, and there'll be people there who will be brilliant and well-spoken, and there will be people there who are just not well mentally for a variety of reasons, and they still have the right to speak, because they should, because we are a country that recognizes everyone's right to speak and everyone's right to free speech. That's the whole first amendment thing.

J. Aughenbaugh: But the other-

N. Rodgers: But it is fascinating to listen to-

J. Aughenbaugh: Yeah, but one of the other purposes of government hearings is to actually, as the word suggests, hear what your neighbors, other people of the community,
whether it be a local city council hearing, so you're talking about your community, your city, your town, or a state hearing, or in the case of the federal government, what's other people in the United States thinking? That's why these transcripts of government hearings, to me, are fascinating, because you actually get to read or hear what other people in your "community", what's important to them, what's not. Why is this interest group against, perhaps, these Department of Justice surveys, right? Is it a privacy group? Is it a group of advocates for the people who might have to do the surveys? Why are they concerned, right?

N. Rodgers: Right.

J. Aughenbaugh: Because if the Department of Justice wanted to survey me, okay, I would normally be like, "Well, why? Why would I be of interest to the Department of Justice?" But others will be like, "Well,"

N. Rodgers: What do they want to know? Why do they want to know it? Where are they going to put the information? What are they going to do with the information?

J. Aughenbaugh: Okay.

N. Rodgers: There would be some concern about your privacy and your...

J. Aughenbaugh: So a future podcast that Nia's going to be doing with another VCU professor is going to be looking at the US census and what questions will go on the census. Some of you are like, "Oh yeah, I get that stupid form every 10 years, and I may get around to filling it out." But for others, if it's done in person and it asks questions like, "Are you a citizen?" Or, "How did you become a US citizen?" These are all very invasive questions.

N. Rodgers: Right, they can be completely terrifying.

J. Aughenbaugh: Yes. Why would I want... Whereas some of us, it's just another damn government form I got. Who else-

N. Rodgers: Like really? This is like my taxes.

J. Aughenbaugh: Taxes, right, right.

N. Rodgers: My registration for my car, all the things I have to go do.

J. Aughenbaugh: Yeah.

N. Rodgers: You're right, but it could be very distressing for people.
J. Aughenbaugh: That's why, for instance, just using the example of the proposed questions on the US census and why there's been a federal court case. It's now going to the Supreme Court. It first came out as a proposed US census action.

N. Rodgers: In the Federal Register.

J. Aughenbaugh: Right. It got listed in the Federal Register, right? That's where-

N. Rodgers: The ACLU saw it and said, "Oh heck no."

J. Aughenbaugh: They were like, "Hell no."

N. Rodgers: "Heck no, were not doing this. This is not okay," and other groups too. I'm not just pointing out the ACLU.

J. Aughenbaugh: But by the way, it's a really good example of formal rule making, because the US Census Bureau is a unit of the Commerce Department. The Commerce Department's authorizing legislation requires that not only does the Census Bureau list any potential changes to the census survey form, but they do it via formal rule making.

N. Rodgers: So they have to have hearings.

J. Aughenbaugh: That's right. That's at the heart.

N. Rodgers: Oh my.

J. Aughenbaugh: That's at-

N. Rodgers: But it makes sense, right? Because the census is actually mentioned in the Constitution. You're messing with... When you start making changes to the census that could potentially limit the number of people who are being counted, there are huge ramifications for that going forward.

J. Aughenbaugh: Implications.

N. Rodgers: Implications, right.

J. Aughenbaugh: No, no, but seriously, you're talking about the amount of federal aid dollars that go to states, because it's typically based on the population of a state.

N. Rodgers: Well, and you're talking about representation in Congress, which is huge.

J. Aughenbaugh: The electoral college.
N. Rodgers: Which, as we know, can have dramatic effects on our elections.


N. Rodgers: And see 2000 presidential election.

J. Aughenbaugh: Presidential election, yeah.

N. Rodgers: It's not just this one. There have been others that have been... It's a big deal to change the census. It's a good thing that it's-

J. Aughenbaugh: And the decision making of the director of the US census is at the heart of the federal court case.

N. Rodgers: I believe that current job is empty.

J. Aughenbaugh: Oh no, here's-

N. Rodgers: Is that-

J. Aughenbaugh: No.

N. Rodgers: I thought somebody resigned.

J. Aughenbaugh: Well, it could. It's the Trump administration anyway. I'm sorry. I digress. That was too easy.

N. Rodgers: That was. I'm sorry. I lobbed that in your general direction. You were required to hit it, required to swing.

J. Aughenbaugh: Yes. The third type of rule making, because it's one that is mentioned in the APA, agencies have to be cautious about using the third type. The third type is known as interpretive rule making.

N. Rodgers: Oh, is it like dance?

J. Aughenbaugh: No.

N. Rodgers: Interpretive dance? Martha Graham?

J. Aughenbaugh: It can be that subjective.

N. Rodgers: Oh really? Okay. So that's complicated.
Okay. Basically with interpretive rules, what an agency is doing is issuing instructions on how they're going to go about doing their job. So let's say the United States Congress passes, oh, Title IX, okay? Okay. Title IX were amendments to the 1972 education act, okay?

N. Rodgers: Title IX?
J. Aughenbaugh: Yes.

N. Rodgers: Where is the title from?
J. Aughenbaugh: It refers to the code or the section of the US code, which is the US federal law, okay? So-

N. Rodgers: That's by titles.
J. Aughenbaugh: Yeah, they go by titles.

N. Rodgers: I can't remember how many there are, but it's 60 or 70 some titles.
J. Aughenbaugh: Yeah, there's a bunch.

N. Rodgers: Right.

N. Rodgers: Technical language, there's a whole bunch of those in the law.
J. Aughenbaugh: Okay, and in the-

N. Rodgers: Okay, so it's referring to a specific part of the United States code.
J. Aughenbaugh: Code, okay. Which is the body of federal law-

N. Rodgers: That we all are subject to.
J. Aughenbaugh: That's right. Title IX refers specifically to the fact that... This was passed in 1972, that there should be equal opportunities, no matter one's gender in public education, K through 12, but also colleges. Okay? Now-

N. Rodgers: It commonly is talked about with sports, isn't it? With-
J. Aughenbaugh: Very true.
N. Rodgers: That you have to fund women's sports in the same way that you fund men's sports.

J. Aughenbaugh: That's right.

N. Rodgers: Even if men's sports bring in more money-

J. Aughenbaugh: It doesn't matter.

N. Rodgers: ... to universities, that's not what's relevant.

J. Aughenbaugh: That's right.

N. Rodgers: What's relevant is that they need to be treated equally.

J. Aughenbaugh: Yeah, basically equal opportunity for both men and women. As Nia pointed out, for easily well into the Bush 2 administration, so we're talking the roughly first 30, 35 years of Title IX, the emphasis was on equal opportunity first with athletics, but then just educational opportunities. So if a college or university had certain scholarships set aside that typically went to men, they would also have to be available to women, right?

But then the Obama administration issued an interpretive rule. They reinterpreted Title IX to include not only equal opportunity in regards to athletics, educational opportunities, but then also that colleges and universities, if they wanted to continue to receive federal aid, federal funding, and it's not just student aid, but research grants, etc, had to do a better job in regards to prohibiting sexual harassment and sexual assault on their campuses.

Interpretive rules don't have to go through either informal or formal rule making.

N. Rodgers: Do they have to be announced in the Federal Register?

J. Aughenbaugh: Yes, they do.

N. Rodgers: So all rules, every rule of any kind has to be mentioned in the Federal Register.

J. Aughenbaugh: Federal Register, yes.

N. Rodgers: So that people can react.

J. Aughenbaugh: Yes. Now for agencies, the value of an interpretive rule is they don't have to go through either the informal or formal rule making process. All you had to do is
list it in the Federal Register and say, "We're reinterpreting this." By the way, the IRS does this all the time, right? That's where tax accountants and tax attorneys are like, "Yeah, we can't go ahead and list that deduction anymore. Sorry, Nia." Okay? So if you claim your living room as being used for that crafts business you got on the side, yeah, you can't do that anymore. You're like, "Oh really? Okay." But-

N. Rodgers: But it was just listed in the Federal Register.

J. Aughenbaugh: Federal Register, right.

N. Rodgers: Which is why tax law is so complicated.

J. Aughenbaugh: Complicated, yes, because these kinds of changes happen all the time. Well, in regards to interpreting Title IX, this was huge, okay? Because basically college and universities had to get their act together in regards to stopping sexual harassment and sexual assault on their campuses, or they risked all this federal money that they get.

N. Rodgers: And while you can't stop harassment on campus, you have to put in place mechanisms for dealing with it when it's reported, mechanisms for helping both the reporter and the reportee, right? There has to be representation. There's now all these different rules than there used to be-

J. Aughenbaugh: Yes, and-

N. Rodgers: ... on campuses just in the last few years.

J. Aughenbaugh: That's right.

N. Rodgers: Because they're trying to set up a system to not just ignore or gloss over or whatever, which universities had done in the past.

J. Aughenbaugh: Well yeah, in the past. Colleges-

N. Rodgers: And in some cases, they hadn't known what to do. There are now officers on campuses that are attached to campuses who can guide the process.

J. Aughenbaugh: Yes.

N. Rodgers: In ways that weren't there before.

J. Aughenbaugh: Then there were serious allegations. Colleges, universities covering up sexual assaults because it would be bad PR, right? Or not actually dealing with sexual
harassment. So how can you have equal opportunity? The logic of the Obama administration was how can you say you’re offering equal opportunity when certain members of your community-

N. Rodgers: Are not protected.

J. Aughenbaugh: ... are not protected, right? The downside of an interpretive rule is the next presidential administration can go ahead and reinterpret, and they don't have to go through either informal or formal rule making. So what did the Trump administration do? Well, late last year, the Department of Education for the Trump administration reinterpreted Title IX back to its more historical, if you will, interpretation. Not as much focus on sexual harassment and sexual assault, and more on your generic equal opportunity in regards to athletics and educational opportunity.

There's been very little that those who wanted the Obama administration interpretation can do, because the Obama administration used an interpretive rule. Okay, the equivalent is executive orders.

N. Rodgers: I was going to ask you that. So it's a similar thing.

J. Aughenbaugh: It's very much like-

N. Rodgers: I can say I am banning broccoli, and then you're the president after me-

J. Aughenbaugh: And the next person that's-

N. Rodgers: ... and you're like, "I love broccoli. I want all the broccoli." And it doesn't stand.

J. Aughenbaugh: That's right.

N. Rodgers: But it has to be undone. Executive orders apparently have to be undone, right? They don't just-

J. Aughenbaugh: They have to be rescinded. So to five you an example, earlier on in this episode, I went and mentioned that Barack Obama issued an executive order to close Guantanamo Bay.

N. Rodgers: Right.

J. Aughenbaugh: One of the first executive orders that the Trump administration issued was, "No, we're going to keep it." The Obama executive order was rescinded.

N. Rodgers: Okay.
J. Aughenbaugh: Likewise with interpretive rules, all-

N. Rodgers: It just replaces the rule.

J. Aughenbaugh: Yeah, and though federal courts, okay, will accuse agencies of being arbitrary and capricious-

N. Rodgers: Yeah, I was going to say flippy-floppy, wishy-washy, wishy-washy.

J. Aughenbaugh: Wishy-washy, okay. Usually the agency will go ahead and say, "But the previous leadership of the agency issued an interpretive rule. According to the Administrative Procedures Act, we didn't have to go through a reasoned deliberative decision making process." Federal judges hands are tied.

N. Rodgers: That's annoying.

J. Aughenbaugh: Yes, it is.

N. Rodgers: But I can see as an executive why you would want that power.

J. Aughenbaugh: Sure. Again, as I explain to my students, understand agencies would really like to do almost all their work with interpretive rules. Hey, remember, they're the experts. Okay? On the other hand, from a democratic accountability, okay, if that's a value, we want agencies to at least use informal rule making, even if it's just typically political symbolism or formal rule making, because interpretive rules can be changed by the next administration, and there's basically very little that can be done.

N. Rodgers: They're arbitrary.

J. Aughenbaugh: Yes.

N. Rodgers: I don't like that.

J. Aughenbaugh: And hey, usually the-

N. Rodgers: When I'm president, I'm going to fix that. There's probably no way to fix that.

J. Aughenbaugh: Unless you can convince Congress to go ahead and-

N. Rodgers: And change the act, right? They'd have to-

J. Aughenbaugh: Yeah, update the Administrative Procedures Act and say agencies no longer have the authority to issue interpretive rules, or the other thing that Congress
can do is with authorizing legislation, explicitly forbid an agency from using interpretive rules. That hardly ever happens, because agencies, much like important stakeholders or important interest groups will try to lobby and influence Congress. Don't tie our hands. Remember, you're giving us the authority to act, because we're the experts.

N. Rodgers: Well, and there's the idea that if you do this... Anything that happens in Congress, one of the reasons I think that they don't want to use what they always call the nuclear option, which is a little terrifying as a phrase, is because you will eventually be the party in power.

J. Aughenbaugh: Oh sure.

N. Rodgers: And you will want to be able to do things in a way that advantages you. If you remove that advantage because you're trying to harm the other party, you in the short-term may get that. You may, in fact, harm the other party. But in the long-term, that's going to come back and harm you when you want to do that thing and are not able to do that thing. So I'm assuming that that's one of the reasons they don't remove it is because they are aware that administrations change.

J. Aughenbaugh: Yeah. Nia's referring to the fact the so-called nuclear option refers to the confirmation process in the United States Senate in regards to federal judge nominations, and giving the minority party the opportunity to use debate to basically forestall a vote on a nominee. Now that nuclear option, getting rid of the debate, okay, has now basically made it very easy for the republicans and the Senate to get all manner of nominees to the federal courts through, okay?

So to the point in regards to agency authority to engage in rule making or engage in substantive behavior, you don't want to go ahead and remove interpretive rules because you don't like how a current presidential administration is using them, because hey, if you're a political party, you hope that you will, after the next election, have your person in the office of president. But it's also a recognition from Congress that it's slow to act. So if you-

N. Rodgers: No. Congress is slow to act?

J. Aughenbaugh: I know, this is shocking.

N. Rodgers: Shocking. I'm shocking that there is gambling going on in this establishment.


N. Rodgers: Thank you.
J. Aughenbaugh: Okay. So Congress understands that conditions on the ground, conditions in America frequently change, and that if there's one branch that is best equipped to respond to those changes, it's the executive branch. So even if you disagree with the Obama administration's interpretive rule about Title IX, you understand that, hey, colleges and universities, by many accounts, were failing, okay, some members of their communities by not enforcing sexual harassment and sexual assault norms.

You may not like how the Obama administration went about doing it, but you might have the recognition as a member of Congress. Something had to change, okay? Do you want to hamstring the agencies from responding to those conditions? Think about hamstringing the FDA in regards to a new drug? If you forced the FDA to use formal rule making, a formal deliberative process for every new drug, even one that could perhaps go ahead and deal with a public health crisis, okay, well, you got democratic accountability, but now you have a whole bunch of dead people. Is that good? There's the trade-off.

N. Rodgers: Yeah, the gray area there being you also don't want them to arbitrarily say, "I work for this company and they're great. Go ahead and take this drug, and we don't know what it's going to..." [unclear 00:53:21], right, where we don't know what it's going to do. It gets approved for one thing and it turns out does something destructive. But that is a different episode of this podcast, and we will eventually get to the FDA.

J. Aughenbaugh: So to conclude this particular episode, the value of the Federal Register is this. It forces the executive branch to be transparent about what it wants to do. There are different processes, depending on whether or not Congress has required the agency to follow a particular type of rule making, but at the end of the day, if you have a chance to read the Federal Register, understand that this is your government announcing to the public, "We are thinking about doing X. What do you think about it?" Think about how often the government does stuff where they don't ask for our opinion.

N. Rodgers: Quite a bit.

J. Aughenbaugh: This is actually required because of the Administrative Procedures Act. Just a thought.

N. Rodgers: Right, so people who complain about not having access to their government or not being listened to, you should be looking at the Federal Register, because that will help you figure out what they're doing.

J. Aughenbaugh: Yeah.
N. Rodgers: That's fabulous. Thank you.

J. Aughenbaugh: Well, thank you for the opportunity.

N. Rodgers: I love the Federal Register. I would just encourage you to read it.

J. Aughenbaugh: So do I. By the way-

N. Rodgers: It's online now. You can get ahold of it pretty easily. We're going to give you the link, and that will take you to the homepage for it.

J. Aughenbaugh: If for no other reason, you should read the Federal Register, because if you have a sleep disorder, it might put you to sleep.

N. Rodgers: I imagine there are parts that would put you to sleep. There are other things that you can read that will put you to sleep, and we'll bring up those documents on another podcast. Okay. All right. I'm going to ask you about other things in the Federal Register at another time, because I'm also curious about the idea of presidential documents in there.

J. Aughenbaugh: Sure.

N. Rodgers: But not today.

J. Aughenbaugh: We could also go in and discuss how the federal courts take a look at agencies' use of the Federal Register. Hmm.

N. Rodgers: Hmm. Okay. On that dark and scary note, thank you for listening.

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