Transcript: Tell Me About the 25th Amendment

Announcer: Welcome to Civil Discourse. This podcast will use government documents to illuminate the working 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: Good morning, Nia. How are you?

N. Rodgers: I'm spiffy. How are you?

J. Aughenbaugh: I don't know how to respond to that, but I'm fine. I'm well caffeinated and that's always the first thing to find out about me.

N. Rodgers: Is, "Have you had your coffee yet?"

J. Aughenbaugh: Yeah, has Aughenbaugh had his first pot of coffee? If so, you can talk to him.

N. Rodgers: And friends, yes, that was the word. Pot. Not first cup of coffee. First pot of coffee, implying there will be more pots of coffee during the day.

J. Aughenbaugh: That is true.

N. Rodgers: And one day your heart will just explode and that will be interesting for medical science. So, I know a thing about you, that our listeners may or may not know, so I'm going to tell them, which is that you never sleep. You are-

J. Aughenbaugh: I am an insomniac.

N. Rodgers: You have insomnia issues.

J. Aughenbaugh: Yes.

N. Rodgers: So, I know that you have read the Mueller Report.

J. Aughenbaugh: Yes, I have read it.

N. Rodgers: All 800 billion pages of it. Well, except with redactions, it's probably like 10 pages, right?
J. Aughenbaugh: Yeah, it's about a quarter. I mean, it's actually a pretty quick read because of all the redactions.

N. Rodgers: But it's 200 pages of still stuff in there.

J. Aughenbaugh: Yes.

N. Rodgers: And in the Mueller Report, am I right that they mentioned the 25th Amendment?

J. Aughenbaugh: Yes. There was a mention of the 25th Amendment, and in particular, it related to the sequence of events that transpired after President Trump fired FBI Director Comey, because there were officials within the Justice Department who began to have a conversation about whether or not they should approach Vice President Pence and/or other Cabinet members about invoking the 25th Amendment.

N. Rodgers: Okay. So, the first question I want to start with is actually a back up question. I want to ask you about the 25th Amendment, but I want to ask you about Amendments in general. Because there's only, what? 27 of them total?

J. Aughenbaugh: 27.

N. Rodgers: That's not very many for a document that's 250-plus years old. Right?

J. Aughenbaugh: Yes.

N. Rodgers: So, that's not a simple thing. You can't just amend the Constitution just causally. That's not something that can be done easy, right? Aren't there just a couple of ways that you can amend the Constitution?

J. Aughenbaugh: Yeah. The one method that has been used for all 27 Amendments is both Houses of Congress approve a proposed Amendment and then they send it to the States. And then three-quarters of the states have to approve an Amendment.

N. Rodgers: The State Legislatures?

J. Aughenbaugh: Well-

N. Rodgers: It's not the Governor, right?

J. Aughenbaugh: No.
N. Rodgers: They can't just say, "I'm on board, let's go," because that would be pretty easy, relatively speaking.

J. Aughenbaugh: Yeah. I mean, it's the People's representatives in both Congress and in the States that have to approve it.

N. Rodgers: So, federal and state level. So, that's a hard bar to get over, right?

J. Aughenbaugh: For sure.

N. Rodgers: Because there have been lots of Amendments that have not made it over that bar. Is that-

J. Aughenbaugh: Yeah, the most recent one that there's kind of sort of been a resurrection of a discussion is the Equal Rights Amendment, which was proposed in the early '70s. And then there was a Sunset Clause that was inserted in that proposed Amendment. States had to go ahead and approve it within 10 years, and if the requisite number of states did not, then the proposed Amendment would fail.

N. Rodgers: Is that a normal thing, a Sunset Clause, to put in?

J. Aughenbaugh: No.

N. Rodgers: Oh, really?

J. Aughenbaugh: No.

N. Rodgers: So, some Amendments can just hang around forever?

J. Aughenbaugh: Well, the classic example is the 27th, the last Amendment that got approved, I believe in the early '90s, that Amendment, the 27th Amendment, which mandates that members of Congress cannot receive a pay raise until one session of Congress has occurred. Meaning, they can't vote themselves a pay raise.

N. Rodgers: "I think I need more money. I want to make more money starting next week."

J. Aughenbaugh: Yes. Now, the 27th Amendments was actually one of the Amendments that was proposed with the Bill of Rights.

N. Rodgers: So, that has been hanging around for hundreds of years.

J. Aughenbaugh: Yes, a couple-
N. Rodgers: A couple hundred years.

J. Aughenbaugh: Yeah, it was a couple hundred years.

N. Rodgers: Wow.

J. Aughenbaugh: And it has a fascinating backstory.

N. Rodgers: Well, apparently it has a long backstory.

J. Aughenbaugh: There was a, I think it was either a high school or college kid, I want to say in Texas, wrote an essay about the Amendments that did not get approved as part of the Bill of Rights. And when he submitted the essay, his teacher gave him a C grade on the essay. But then he went ahead and reached out to various state legislatures, and for our listeners, you have to put this into the context of the time. During the 1980's and early 1990's, the American Public actually voted members out of Congress because of the Federal Government not being able to balance its budget. And it was also the time period where you had term limits. Various states passed term limits, limiting the length of time that either members of Congress could serve representing the state, or members of their state legislatures could serve.

J. Aughenbaugh: Now, eventually this went to... The limitation, it was a case that arose from Arkansas, where Arkansas had passed term limits on members of the House and the Senate representing the State of Arkansas. The law got challenged the whole way to the Supreme Court and the Supreme Court said term limits on Congressional members violates the US Constitution. Okay?

J. Aughenbaugh: So, this was a time period where-

N. Rodgers: So, for all those people who think there ought to be term limits, that question has already been-

J. Aughenbaugh: Yeah, you can still set term limits on state legislative members, you just can't do it for members of Congress-

N. Rodgers: And Governors. The Governor of Virginia can only serve once, right?

J. Aughenbaugh: But again, you still do that in the State Constitution, right?

N. Rodgers: Right.

J. Aughenbaugh: So Virginia's the only state that says Virginia Governors cannot run for reelection, they have to actually sit out a term.
N. Rodgers: Yeah, you go now. You can come back later.

J. Aughenbaugh: And it's a way to go ahead and limit the power of the executive. Though, it should be noted that former Governor McAuliffe, when he announced he was not running for president, did not foreclose the idea that he was going to run for Governor again in 2021.

N. Rodgers: Well, we're not even going to... I'm not going there with you. I see where you're trying to take me and I'm not going.

J. Aughenbaugh: So, let's go back to the Amendment process. So, we identified one process that is identified in the US Constitution, and that is Congress has to approve it. And by the way, the president has no role in this, okay? The president has no role with-

N. Rodgers: They can't veto, they can't-

J. Aughenbaugh: No.

N. Rodgers: None of that stuff.

J. Aughenbaugh: No.

N. Rodgers: It comes within the Congress and then goes out to the states.

J. Aughenbaugh: The states, that's right. If Congress goes ahead and approves it, it goes out to the states.

N. Rodgers: And is it a simple majority or is it... You said it's two-thirds, right? No, that was two-thirds of the states.

J. Aughenbaugh: The states, that's right.

N. Rodgers: Is it a simple majority in each-

J. Aughenbaugh: Yeah, simple majority.

N. Rodgers: ... House on Congress? So, getting a simple majority at this point would be difficult for anything other than we all agree to breathe.

J. Aughenbaugh: Yeah, I mean, because remember-

N. Rodgers: Be Partisan politics-
J. Aughenbaugh: It does require bicameralism, right?

N. Rodgers: Right. They set that up pretty smartly, because 27 alterations in this many years is actually a pretty good track record for the founders.

J. Aughenbaugh: Yeah, the second method is a Constitutional Convention. We've only had one of those and that was the one that produced the Constitution.

N. Rodgers: Hence the name. "What will we call this?" "Oh, I don't know. We'll call it a Constitution Convention since we're writing this big old document." Okay, so that's possible, but it's rare. So, anyway, I just wanted to make sure that we all understood how we get to Amendments. So, the 25th Amendment, correct me if I'm wrong, is 1965 that this thing gets written.

J. Aughenbaugh: Right, yes.

N. Rodgers: And then gets through the states in, what? '67, '68, something like that?

J. Aughenbaugh: Yeah, it was '67, I believe.

N. Rodgers: So, I mean, I'm not trying to be picky, but didn't presidents die before that, or become incapacitated before that?

J. Aughenbaugh: Sure.

N. Rodgers: So, was it just one of those things where everybody ran around and threw their hands up and then had to figure out what was happening?

J. Aughenbaugh: Well, I mean, the larger issue was actually replacing Vice Presidents.

N. Rodgers: Were they dropping like flies?

J. Aughenbaugh: Well, a quarter of them never finished their terms in office prior to 1967. You got to remember-

N. Rodgers: Was it just like, "I don't want to do this anymore?"

J. Aughenbaugh: I mean, some of them died, others are just like, "I don't want to do it." I mean, the Vice President position, historically, and I think... Who was it? It was the first Vice President for President Franklin Delano Roosevelt, a guy by the name of Jack Garner. I think Jack Garner was a former Speaker of the House from Texas. Garner once commented, and please forgive me, I don't think I got the exact quote, he said the position wasn't worth a bucket of warm spit.
N. Rodgers: That's gross.

J. Aughenbaugh: That's gross, but his larger point was-

N. Rodgers: What do you as this guy? You're waiting for somebody to die.

J. Aughenbaugh: Yeah, and many Presidents don't want to be one-upped by their Vice President. It's only been recently that we've actually seen Presidents give meaningful roles to Vice Presidents. So, if you think about-

N. Rodgers: Al Gore.

J. Aughenbaugh: Yeah, Al Gore. President Clinton gave him a couple pretty significant responsibilities. One was in regards to the environment, but the Public Administration and scholar in me notes that he was put in charge of the National Performance Review.

N. Rodgers: Oh, right. A book came out. Didn't he do a whole big-


N. Rodgers: That's it, Reinventing Government. Well, and President Bush served President Reagan as a... Didn't he do a lot based on his previous work in government and the CIA and all that? He was doing a lot of foreign stuff, wasn't he?

J. Aughenbaugh: No, not really.

N. Rodgers: No?

J. Aughenbaugh: No, because the Reagan White House was a pretty closed affair. I mean, it was basically Nancy Reagan, Ed Meese, Donald Reagan, Caspar Weinberger, and they were more conservative than Vice President Bush, the one that became the 41st.

N. Rodgers: 41.

J. Aughenbaugh: Yeah. So, he wasn't really part of that inner circle. Where you see it is Clinton with Al Gore, Bush II with Dick Cheney. Dick Cheney had a lot of responsibility in the Bush II Administration. Obama with Joe Biden, and in particular Obama never really wanted to negotiate with Congress. So, he basically put Joe Biden in charge of that, in part because Joe Biden was a long standing or long serving member of the US Senate. So, the budget deals that got crafted during the Obama Administration, they were usually negotiated by Joe Biden working with John Banner, who was the Speaker of the House and then the Ranking Senate
Minority Leader was Mitch McConnell, who eventually became a Majority Leader.

J. Aughenbaugh: And then... Well, with the Trump Administration, I mean, God only knows who in the hell makes decision in that White House. I'm sorry, but I mean... I'm not entirely sure what Vice President Pence's job is. And I imagine if we asked him, he probably couldn't tell us either. But nevertheless-

N. Rodgers: Well, and with Donald Trump, part of that issue with Vice Presidential power is, if you are not used to sharing power... If you come from the business world where you don't share power, I imagine it would be difficult for you to say, "Here, let me give you a meaningful job." That would be hard to do. And I imagine that part of the reason that Clinton and Gore were able to pull that off is they did seem to be rather friendly on a personal level, which may also help.

N. Rodgers: I know that... Right at the beginning of the country, the President got the most votes and the Vice President had gotten the second most votes, right? So, that might be a person that you despised.

J. Aughenbaugh: Sure. I mean, so-

N. Rodgers: So, cutting them out would not be be unusual, right? If you disliked them on a personal level, saying, "I don't want you to have anything to do with my administration," wouldn't be all that surprising.

J. Aughenbaugh: That's one of the reasons why we got the 12th Amendment.

N. Rodgers: Could you elaborate?

J. Aughenbaugh: Yeah.

N. Rodgers: Discuss.

J. Aughenbaugh: Okay. So Nia, as you pointed out, our first Presidents, Washington, Adams, basically their Vice Presidents were the Presidential Candidates who had the second most votes in the Electoral College. So, you had a situation where you had a President of one political party and the Vice President of the other political party. And as I like to joke with my students, if we didn't have the 12th Amendment, think about how today the President would be Donald Trump and the Vice President would be Hillary Clinton.

N. Rodgers: Oh, my gosh. That would be so terrible on so many levels. Holy cow.
J. Aughenbaugh: Now, I joke I would love to see the transcripts or the recordings of their meetings. I mean, as a reality show, it would put to shame whatever reality-

N. Rodgers: Oh, Big Brother. Yeah, none of that. You don’t get voted off the island. You just get killed on the spot. Wow, that would be something.

J. Aughenbaugh: But the 12th Amendment for passed because-

N. Rodgers: Thanks for giving me a nightmare scenario.

J. Aughenbaugh: Both political parties recognized that that was an untenable situation. So, what they ended up doing was, when the Electoral College meets, they actually cast two votes. One for the President, one for the Vice President. And the way that it happens now is as soon as soon as somebody gets the party’s nomination, they identify who their Vice President is going to be. And basically the practice that has arisen since the 12th Amendment is the electors for the Electoral College will cast a vote for the President and they will also cast a vote for whoever the President’s handpicked Vice Presidential candidate was.

N. Rodgers: So, that could still stick them with someone that-

J. Aughenbaugh: Oh, sure. It could, theoretically. But-

N. Rodgers: That would be the end of the Electoral College. It would burn to the ground.

J. Aughenbaugh: But you have a situation now to where it is not assumed that the person with the second most votes in the Electoral College is going to be the Vice President, right? And also understand, Vice Presidents weren’t given meaningful roles by Presidents. They are also Constitutionally the convening officer of the Senate. But typically all they do is call the Senate into session and cast tie breaking votes. And tie breaking votes hardly ever occur, though theoretically they could occur all the time, because there are 100 Senators.

N. Rodgers: Right, that could happen frequently if we didn’t have the partisanship that we have currently.

J. Aughenbaugh: Yeah. But back to the 25th Amendment. You mentioned that it was passed in 1965. That kind of begs the question, how did we deal with Presidential and Vice Presidential succession before 1965?

N. Rodgers: Yeah, because there were a few years before that, that we were doing stuff, right?

J. Aughenbaugh: Yes.
N. Rodgers: Well, and the other thing is, I'm reading the 25th Amendment. Don't judge. People who are listening, don't judge. Occasionally you have to just go back and read the original document.

J. Aughenbaugh: It is kind of the operating manual.

N. Rodgers: It's pretty fabulous. And if you just read the Constitution sometime if you're just bored, wow, there's some really cool stuff in there. But this idea that nothing's going to happen to the President, Roosevelt died in office, right? McKinley died in office. People died... Lincoln died in office. Not just assassinations, but illnesses. Wasn't one of them President for like 30 days or something, because he didn't wear a coat in the rain during his inaugural... Was that Harrison? Look at me. I'm not a Presidential Scholar. We should go ask Bill Newman.

N. Rodgers: So, there's been this before, so it's weird to me that 1965... And the only thing that I can think that would have precipitated something like that would have been Kennedy's assassination. Did that have something to do with it, or was there... Or did that bring it to a head, an argument that had been ongoing? What's the deal with that, historically?

J. Aughenbaugh: Well, actually you mentioned two of more than likely the three events that motivated congress to consider a proposed 25th Amendment. One was FDR. And FDR dying in office, and in particular, FDR never really consulted his Vice Presidents. So, there's a well-known and well supported story that Roosevelt dies and Truman assumes the Office of President and he finds out within 24 hours, we actually have the atomic bomb. He was unaware, even though he had been Vice President for about a year. He was unaware that we had been working to develop the atomic bomb.

N. Rodgers: That is the most unpleasant surprise that you can get, "Hi, welcome to the office. We have an atomic bomb." What?

J. Aughenbaugh: And he was actually given, at that point, scenarios for its usage. So, there's that.

N. Rodgers: So, he immediately stopped sleeping at night.

J. Aughenbaugh: There was that. Then there was Eisenhower's health. You had FDR, you had Truman, then Ike gets elected President in 1952. He had a heart attack and he had a couple other medical issues, and he and Vice President Richard Nixon had a kind of formal agreement. They actually wrote it up and got it notarized, but the Attorney General said it wasn't Constitutional. But basically, Eisenhower, when he was unable to be President, Vice President Nixon would run Cabinet meetings, receive foreign dignitaries, etc. So, you-
Per the agreement, or that actually happened when he had his heart attack?

Per the agreement.

Oh, okay.

But then the situation with JFK's assassination really kind of drove home the point, we need language in the Constitution that deals with mechanism or procedures for Presidential succession. JFK gets assassinated, but Vice President Johnson wasn't with him. Vice President Johnson takes the oath on the plane to DC.

Yes, there's a famous photograph with... Jacqueline Kennedy is holding the Bible, I think.

Yeah. And it really drove home the point, what would have happened if JFK had not died, but was incapacitated? Because there's no language in the Constitution about that.

Oh, I see. If he was in a coma or if he had been... I see.

Yeah.

In a vegetative state or something, he'd still be President, technically.

Yeah. And again, JFK's relationship with Vice President Johnson was not wine and roses by any stretch.

Prickly [crosstalk 00:22:49].

Yeah, right. JFK only picked Johnson... In large part, he only picked Johnson for Electoral College success in the 1960 election. Vice President Johnson served in Congress, particularly the Senate from the State of Texas, and many of JFK's campaign staff were concerned that a liberal from Boston would have very little chance at getting Southern Democrats votes.

And they were right.

Yeah, more than likely they were right. I mean, because let's face it, that election was so close that if Illinois would have went for Nixon... And by the way, there were a whole bunch of disputed votes in Chicago.

Oh, Mayor Daley.
J. Aughenbaugh: Yeah, the turnout in Chicago for the 1960 Presidential Election was significantly higher than the turnout for the '56 and '52 Presidential Elections. Today, we would-

N. Rodgers: So ballot stuffing.

J. Aughenbaugh: Yeah.

N. Rodgers: Box stuffing.

J. Aughenbaugh: Today, Nixon's campaign would have already had a cadre of lawyers already on retainer, ready to file suit in Federal Court to ask for a recount of the ballots. But Nixon, to his credit... This is one of those odd times we say Nixon, to his credit, Nixon refused to push for a recount.

N. Rodgers: Did he just think that it would be bad for the nation to drag it out?

J. Aughenbaugh: Yeah.

N. Rodgers: That's kind of what Al Gore said, didn't he?

J. Aughenbaugh: Yeah.

N. Rodgers: When he went to the Supreme Court for President Bush, he said, "You know what? We need to just stop. This is-

J. Aughenbaugh: Yeah, after the Supreme Court ruled against him, Al Gore went ahead and said, "Do I think that there's evidence that I won Florida and thus would have won the Electoral College? Yes, but this needs to stop." So, this all culminates with the Congress actually then considering the 25th Amendment. And almost immediately, the 25th Amendment gets used. You see with the Nixon Administration-

N. Rodgers: Right. Sorry, I was sitting here quietly. It's funny, Aughie, those of you who can't see him, looked at me like, "Hello?" Right, Nixon. He had to resign.

J. Aughenbaugh: But before we get to Nixon, to... You asked the question... This is kind of bizarre. I mean, we're into the 1960's and we don't have a presidential succession plan clearly identified in the Constitution. And it led to various issues. So for instance, President Harrison in 1841 dies. His Vice President is John Tyler, actually from Virginia. Tyler goes ahead and creates the precedent of assuming the Office of President, though members of Congress were under the impression, many members of Congress, that he was just an acting or intern President and thus the country should probably go ahead and have another election to replace
Harrison. And Tyler was like, "No, I was Vice President. Now I am President. I am President for the rest of his term." And actually-

N. Rodgers: So, he just sort of decided that?

J. Aughenbaugh: Yes.

N. Rodgers: Can I just say, it is weird that the Constitution is so clear on so many things and the founders were so thoughtful about so many things, but it didn't occur to them that somebody could croak in the office and that there would need to be a plan other than, "I don't know, what do you want to do?" I mean, this is like trying to decide where to go for dinner. We don't leave that up to the group, because you can't... Somebody has to lead, right? Somebody has to say, "Let's go for Italian," and everybody says, "Yes, let's go for Italian," or, "No, I want to go for sushi."

J. Aughenbaugh: And when you drive to the Italian restaurant parking lot and you see all those spots full and there's people in line outside the door, you should have probably a back up plan, right? But we have our Constitution, to your point, Nia, where the framers never went ahead and said, "What happens when the President dies or has to resign?" There was no language about that.

N. Rodgers: That is just weird. I mean, until 1965 and then suddenly there was language. By the way, for listeners, this will be of course attached to the research guide, but also there are four parts to the Amendment. It's not just if the President dies, the Vice President takes over. That's the first part. But then there's all these other parts that explain other things about it.

J. Aughenbaugh: And before we get to that, I just want to go ahead and remind our listeners, it wasn't just Harrison dying in 1841, right? Garfield gets assassinated in 1883. McKinley dies in, I believe-

N. Rodgers: Early 1900's, like 1902 or something.

J. Aughenbaugh: Yeah, and that led to Teddy Roosevelt becoming President. Or, this is one of my favorite... It's kind of bizarre, but Woodrow Wilson suffered a stroke in 1919. So basically for a year and a half-

N. Rodgers: Didn't his wife-

J. Aughenbaugh: Yes, his wife basically ran the White House.

N. Rodgers: Yeah, she was the President more or less.
J. Aughenbaugh: Yes, Congress was never informed. The Vice President didn't find out until months after. Wilson was basically bedridden. And then you have FDR.

N. Rodgers: People didn't even know he was in a wheelchair, because there were agreements about not showing him in the wheelchair and stuff like that. I mean, it's amazing. That could never happen today. And I'm not wishing this on his at all, but if some reason Donald Trump were injured and he ended up in a wheelchair, there is no way that would not be on CNN within five seconds of it happening. It's amazing to me that in previous presidencies, so many things, infidelity, medical issues, all kinds of social issues, all of that sort of thing just sort of got swept under the rug, because those weren't issues that we talked about. The first thing you see is Watergate really, where somebody says, "No way the gloves are coming off the hands. We're just going to beat this guy to a pulp, because he's doing this thing or he's accused of doing this thing.'

J. Aughenbaugh: When I show students that first televised Presidential Debate between JFK and Nixon, my students come to the same conclusion as those Americans who were polled after the debate. JFK looked young, vibrant, etc. And then I go ahead and share with my students their medical histories. Nixon was in superb health. JFK was a walking pharmacy.

N. Rodgers: Right, he was addicted to painkiller, I think, and he took stuff for his back. I mean, PT-109, right? He was injured in the war.

J. Aughenbaugh: And he suffered from debilitating migraines. Nixon on the other hand slept like a champ, eight hours a night, right? Exercised regularly, there was never any rumors of infidelity. This was a guy who was pretty focused on being a public servant. In contrast to JFK, who basically had to be browbeat into running for office by his very powerful father, and basically ran for President because his very powerful father would just like, "One of my boys is going to be President." But my students are just like, "Why didn't we know this?" And I said, "Because the press didn't report this.'

N. Rodgers: Well, and people who heard it on the radio said that Nixon won. A lot of that was visual, too, right? It was just the fact that JFK was handsome and he handled himself well in front of the camera. He was very talented in that way. People say that Donald Trump is the first Presidential candidate who was really familiar with how to work television. And I'm like, I don't know if that's true, because Kennedy did a great job.

J. Aughenbaugh: Yeah, Reagan was great at it, Clinton was good at it. And we've had other Presidents that-
N. Rodgers: Yeah, I think we've had a history of Presidents that have managed to do that. But anyway, that is all off the topic of the 25th Amendment.

J. Aughenbaugh: Okay, so we get the 25th Amendment-

N. Rodgers: So, it's pretty easy when a President dies, because that's pretty clearcut. That's not a situation from which one recovers. Other than Dawn of the Dead, that's not a situation that we'll see you again.

J. Aughenbaugh: So, the first usage of the 25th Amendment occurs with the Nixon Administration-

N. Rodgers: Where Nixon didn't die.

J. Aughenbaugh: Okay, well, before even Nixon, the 25th Amendment was used because Vice President Spiro Agnew had to resign.

N. Rodgers: Oh, right, because he was indicted, right?

J. Aughenbaugh: Yeah, so what we're talking about here is Section Two of the 25th Amendment, whenever there is a vacancy in the Office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

N. Rodgers: I have a question.

J. Aughenbaugh: Sure.

N. Rodgers: Can you pick anybody?

J. Aughenbaugh: Sure.

N. Rodgers: Could they pick me?

J. Aughenbaugh: Theoretically, yes.

N. Rodgers: Okay. I mean, I'm not saying I'm interested in the job, but I wouldn't turn it down.

J. Aughenbaugh: Again, this furthers your point, Nia, of we go ahead and we pass an Amendment, we go ahead and we finally deal with Presidential succession, Vice Presidential succession, and we never specify the qualifications of who may be picked by the President.
N. Rodgers: Because we like to leave things as vague as possible, because nothing goes wrong in the government when you have that level of vagueness.

J. Aughenbaugh: That's right.

N. Rodgers: So, he can pick anybody. So, Nixon could pick anybody when Agnew steps down.

J. Aughenbaugh: Nixon picks a House of Representative from Michigan, Gerald Ford. Long standing, right?

N. Rodgers: Gerald Ford, who we love.

J. Aughenbaugh: So Ford becomes Vice President. Then Nixon has to resign in '74 because of Watergate, right?

N. Rodgers: But he's just won reelection.

J. Aughenbaugh: He won reelection in '72, so he's about a year and change into his second term. Nixon resigns, so by practice, who becomes President?

N. Rodgers: Ford.

J. Aughenbaugh: Ford. So, Ford, following the 25th Amendment, once again, Section Two, picks Nelson Rockefeller, who wasn't even in government at that time. He was the former Republican Governor of New York. He was no longer in government service, but he was a moderate Republican who Ford basically knew would not upset most Democrats in Congress and most Republicans. So, we had this-

N. Rodgers: So, he was more or less a tapioca choice.

J. Aughenbaugh: Yes.

N. Rodgers: He was sort of neutral and-

J. Aughenbaugh: He was a northeast moderate Republican.

N. Rodgers: And he was wealthy and he was well-known.

J. Aughenbaugh: Yes. And he had-

N. Rodgers: But he had run for President, hadn't he? At some point/

J. Aughenbaugh: Yeah, he had, but we had a bizarre situation for the last roughly two years of that Presidential administration where we had a President and a Vice President,
neither of whom had actually won the Office. They hadn't been picked by the People.

N. Rodgers: Oh, yeah.

J. Aughenbaugh: So, that's the 25th Amendment in practice.

N. Rodgers: Which could go a little rogue.

J. Aughenbaugh: But then we have it used even more unrelated to Presidents having to step down from office. For instance... And all three of these examples deal with a middle-aged male procedure and that is Reagan and then Bush II, twice had to go under anesthesia for colonoscopies. And they invoked the 25th Amendment all three times, 1985, 2002, and 2007.

N. Rodgers: And in fairness, because anesthesia can be deadly.

J. Aughenbaugh: Sure.

N. Rodgers: It can leave you incapacitated and it can kill you. I mean, it's not something you should do lightly.

J. Aughenbaugh: However, it's also been considered a few other times. For instance, in 1981, there was an assassination attempt on Reagan. Reagan did not invoke the 25th Amendment, because he didn't have time before he got rushed into surgery. So, you had that bizarre situation where Bush, Herbert Walker Bush, Vice President Bush-

N. Rodgers: 41.

J. Aughenbaugh: 41. He's not in DC. So, while he is flying back to DC, they held a press conference at the White House, which led to the infamous-

N. Rodgers: Oh, Al Haig.

J. Aughenbaugh: ... Al Haig saying-

N. Rodgers: "I'm in charge here." And everybody going-

J. Aughenbaugh: "Wait a minute."

N. Rodgers: ... "Wait, wait. What?"

J. Aughenbaugh: Dude, you're not the Vice President.
N. Rodgers: Oh, Al Haig. But in fairness, Al Haig was trying to say, "We're under control. It's all good."

J. Aughenbaugh: Yeah, sure.

N. Rodgers: Right? "It's all fine." But saying, "I'm in charge here," was probably the wrong thing to say. You and I remember it this many years later, that's kind of... That's a little sad for Al Haig, because he did do other things besides that.

J. Aughenbaugh: Oh, yeah, he was a well-known General, served a couple bureaucratic Cabinet positions, etc. But now it kind of stands for somebody assuming power who basically doesn't have the authority to assume power, "Oh, you pulled an Al Haig. Oh, great."

N. Rodgers: Yeah, listeners, if anybody accuses you of that, stop and look at what you're doing.

J. Aughenbaugh: Yeah, look at your behavior. The other time in the Reagan Administration, what's his name who kind of did the definitive biography of the Reagan Presidency? I think his last name is Morris. Has a chapter that discussed how in 1987, Reagan got a new Chief of Staff, Howard Baker. And Howard Baker, one of the first things he was presented as Chief of Staff was a consideration by a couple Cabinet members that they invoked the 25th Amendment, because... And they didn't know it at the time, and this was not a diagnosis that was widely used in the medical community. There were complaints among the White House staff that Reagan was distracted, lazy, not really focused on the job.

N. Rodgers: Fell asleep in meetings and there was all kinds of things like that.

J. Aughenbaugh: Yeah. Now, we recognize after the fact, this was probably early symptoms of his Alzheimer's.

N. Rodgers: Right.

J. Aughenbaugh: So, they considered it, they never invoked it. And then the last time it was considered, but never invoked, we now know because of the Mueller Report is-

N. Rodgers: Look, we've come back full circle.

J. Aughenbaugh: Oh, yes, we have. Is during the Trump Administration in the days after Trump terminating FBI Director James Comey.

N. Rodgers: And they were on what grounds? Were they-
J. Aughenbaugh: Basically they would have been invoking... Let me actually pull up the 25th Amendment. They would have been invoking Section Three. Wait a minute.

N. Rodgers: Unable to discharge the powers and duties?

J. Aughenbaugh: No, it would be Section Four. So, I'm going to go ahead and read that. Whenever the Vice President and majority of either the principal officers of the Executive Departments or if such body of Congress may by law provide, transmit to the President pro tem of the Senate and the Speaker of the House, the written Declaration the President is unable to discharge the powers and duties of his office. The Vice President shall immediately assume the power and duties of the Office as acting President.

N. Rodgers: And can I just say that that sounds a little bit like a coup.

J. Aughenbaugh: Yeah, I mean-

N. Rodgers: In another country, we might say, "Oh, if a bunch of the Cabinet got together and said that the President was unable to discharge their duties because they didn't like what was going on," that would be a coup. That would be something-

J. Aughenbaugh: That was actually part of the debate in Congress that led to the 25th Amendment, was the concern that on one hand, they needed language to go ahead and deal with a President who might be incapacitated, but is unwilling to give up the position. Versus, how do we make sure that it's not easily used by a Vice President or by a majority of the Cabinet members to engage in what you just described, a coup d'etat.

J. Aughenbaugh: Now, when you read the language of Section Four, Congress followed up by actually clarifying who were the "principal officers". And basically, what they have identified is that it has to be a majority of the Cabinet secretaries. And right now we have 15 Cabinet departments. So, basically you have 16 people voting and it has to be a majority. Because you have the Vice President, plus the 15 Cabinet secretaries. And they all have an equal vote.

N. Rodgers: And then they would go to Congress, and then Congress would remove the President?

J. Aughenbaugh: Once it gets submitted to the Congress, then the Congress will acknowledge that they have received this. And per the terms of Section Four of the 25th Amendment, the President is no longer holding the power and authority of the position.

N. Rodgers: Is that both sides of Congress?
J. Aughenbaugh: Yes.

N. Rodgers: Okay.

J. Aughenbaugh: Because remember, it gets reported the President pro tem of the Senate and the Speaker of the House.

N. Rodgers: And so, do they vote or is there just, "Thanks for letting us know"?

J. Aughenbaugh: It's just a, "Thanks for letting us know." There's no vote in Congress.

N. Rodgers: Oh, okay. So Congress doesn't have any option to say, "No, no, no, you can't do that." I mean, theoretically, I guess if you could get the other people on your side, then they're arguing that that's a...

J. Aughenbaugh: Yeah.

N. Rodgers: That seems a little scary. But then again, I would imagine that people who took... We've had discussions about the people who take those positions. Those are very serious people and that is a very serious accusation. That is not something that you would-

J. Aughenbaugh: And also, remember, too-

N. Rodgers: That you would easily go, "Yeah, it sounds bonkers to me." That's something you would ever actually invoke, unless you were really prepared for the fallout from that.

J. Aughenbaugh: I mean, it's a serious action, but also remember too, all 15 those Cabinet secretaries owe their position to the President.

N. Rodgers: Right.

J. Aughenbaugh: I mean, they were nominated by the President.

N. Rodgers: So, they know him, they're unlikely to turn on him in that way, just randomly. I mean, it would have to be a really serious-

J. Aughenbaugh: This would have to be a pretty serious accusation to go ahead and overcome their natural personal loyalty to the person who gave them their job.

N. Rodgers: It's such a weird thing to think that our current government, they may have had this discussion. That seems weird to me, but only because I'm not comfortable with the idea of a group of people who may or may not be medical
professionals, deciding whether somebody can or can't. You know what I mean? I would want consultation. It's too bad there's not something in there that says you have to actually consult with an outside group or you have to consult with the members of Congress or you have to do something. I mean, think about it, he is elected by the People. So-

J. Aughenbaugh: Sure, but I mean, think about all the commentary. And I've read a bunch and I've heard a bunch, particularly from my students, about how the 25th Amendment should be invoked in regards to our current President. And I'm like, "Okay, so you guys are medical professionals?" And they're like, "No, but he's just crazy politically."

N. Rodgers: Well, that's not... So, have lots of people been crazy politically?

J. Aughenbaugh: Sure. I mean-

N. Rodgers: So, that doesn't seem like to me that that's a reasonable... I mean, we have term limits. We call them elections, and there's one coming up in two years. If you really believe that President Trump is not good for the nation or not good for people or whatever, then go out and vote. That's how you fix that.

J. Aughenbaugh: Well, and the other thing, too, once again, if you read the Mueller Report, there were easily a half a dozen executive branch officials who ignored direct orders from the President. That's institutionalism at large. So, if you're that afraid, you should also be hardened by the fact that we've got people on the executive branch who are like, "Hey, I swore and oath to uphold the Constitution and what he wants me to do is law breaking 101. I'm not going to do it." And they didn't. And I'm like, "Good for them."

N. Rodgers: Yay, it works. The system works.

J. Aughenbaugh: The system works, right? So at the same time, we bemoan the fact that we can't hold bureaucrats accountable. A whole bunch of them went ahead and served us pretty darn well, according to the Mueller Report.

N. Rodgers: And they hold themselves accountable.

J. Aughenbaugh: Sure.

N. Rodgers: Which is a good-

J. Aughenbaugh: I share your concern, but at the same time, the history books are rife with examples of Presidents who... You're like, "Wow, this person was running the country." They were alcoholics, they were racist, they were bigots, they-
N. Rodgers: They were on drugs, they were high, they were-

J. Aughenbaugh: Yeah, right. I mean, and I go back to Woodrow Wilson. I mean-

N. Rodgers: They were unconscious.

J. Aughenbaugh: Right.

N. Rodgers: Which is-

J. Aughenbaugh: I mean, a year and a half, right? And this was the guy, by the way, who led us into the war and who negotiated for the winners, the treaty that ended the war. So, I mean, you kind of wonder here, "Okay, so he has a stroke. We may need to go ahead and get him out of office, right?" This was the United States on the world's stage, writ large. I mean, you could make the argument out during the Spanish American War that World War I is where we kind of came out of our isolation, our shell for the first time. We should probably have somebody fully functioning running the government, post World War I. We didn't. And nobody in Congress knew.

N. Rodgers: But she must have done okay, because nobody said, "Hey, things are really falling apart around here." So technically one could argue, she might have been the first female President.

J. Aughenbaugh: Well, I mean, actually I've read a couple books that would make that argument.

N. Rodgers: Which would make me happy to think about.

J. Aughenbaugh: But the 25th Amendment, fascinating stuff, isn't it?

N. Rodgers: It is. It's scary, but it's fascinating. And I think that for anybody who doesn't think about these things in terms of sort of historical terrifying precedent, when you realize how recent it is, you think, "Holy cow, this is crazy." But before we go, I want to ask you one other question about what I think is something that may be tangentially related to the 25th, which is that we have had a lot of older Presidents in our time, Presidents who when they get elected, they're in their late 60's, early 70's, and they serve through those time periods. Do you think that there was any thought about that when they were working on this?

J. Aughenbaugh: I mean, I've read the floor debates that led up to the passage of the 25th Amendment.

N. Rodgers: Of course you have.
J. Aughenbaugh: And again, you can find those in the Congressional record. So, once again, I'm throwing out yet another government document you could look up. I mean, there was some discussion. There were not too coded references to FDR. Truman was in pretty good health. Eisenhower, a couple Southern Democrats were a little snarky about Kennedy's health. They didn't reference him specifically, but that informed the debate, right? I mean, Kennedy was young, but Eisenhower wasn't, FDR wasn't. And in more recent times, if you think about Reagan for instance, Bush I, not so much Clinton. Though again, age is not always a good barometer in regards to physical health.

N. Rodgers: Right, because Clinton's health was terrible.

J. Aughenbaugh: It was terrible.

N. Rodgers: When he was in the White House, he was obese, he was in poor health in many ways.

J. Aughenbaugh: And even Bush II, I mean, he was a bicyclist, golfer, etc, but he had two colonoscopies, he had some skin cancer issues. The current President is obviously in his 70's. It's an issue that's being debated now. Joe Biden, I mean, we're recording this podcast, the day after former Vice President Joe Biden announced that he's running for the Democratic Party nomination. And I read easily three or four articles and all of them mentioned his age.

N. Rodgers: Same with Bernie Sanders.

J. Aughenbaugh: Yeah, Bernie Sanders.

N. Rodgers: And Donald Trump. I mean, of course we're two years out, so everything could change. The planet could be hit by a comet next week. But barring something amazing, at least one of these people will probably still be in it at the time of the election.

J. Aughenbaugh: For the general election, yeah.

N. Rodgers: And you're talking about... Well, and Hillary Clinton. She was not... I mean, she's not old, but she's not young either. So, it seems to me that that's kind of an interesting sidebar question about the 25th, is that if you keep electing people who are older or not in particularly good health... And I know sometimes they release health reports and sometimes they don't, then this is going to become more and more important as you keep doing that.

J. Aughenbaugh: And this was also an issue that you're going to be exploring with another faculty member in regards to the issue of packing the court, because one of the
alternatives to packing the court is having term limits for federal judges. Because again-

N. Rodgers: Oh, that's true. One could argue... I mean, I love Ruth Bader Ginsburg, but she's quite elderly at this point.

J. Aughenbaugh: Yeah. And-

N. Rodgers: Still on top of things. She's smarter than I am and she's quicker than I am, but-

J. Aughenbaugh: Again, have we had Supreme Court Justices serve into their 80's and we found out after the fact that their mental faculties had diminished? Yes. And that's part of a larger debate we're going to have to have, because the US, like many Western Democracies, is graying. It's getting older. And many individuals are wanting to work longer than they previously did and it kind of begs the question, how do we address this issue? And I don't know if there's a right answer or we're going to touch upon that in this podcast, but you make a really good point. If we elect presidents who are in their late 60's or early 70's, many of whom had had high stress jobs most of their professional lives and many of whom are like the rest of us. Their dietary habits are less than exemplary. I mean, all I keep on thinking about is both Trump and Clinton-

N. Rodgers: Oh, yeah, with their love of cheeseburgers.

J. Aughenbaugh: Right? And I'm right there with you guys.

N. Rodgers: And we are as a nation more obese than we were, so naturally, more people who are coming into service are more obese than in previous generations. And there are all kinds of things health wise that this is going to bring up. But this is a really interesting discussion and it makes me think there's a whole lot more to it that we should probably get into, but we probably can't get into that today. But I want to thank you for explaining it to me, because I didn't realize it was so recent. And now that I know that that's at least one less thing keeping me up at night, is that, "How is this handled?" Apparently there's a plan.

J. Aughenbaugh: Yes.

N. Rodgers: So, it's a little vague around the edges, but at least there's a plan. I'm going to ask just your opinion to end, do you think that we will see a 25th invocation any time soon in the presidency?

J. Aughenbaugh: No, probably not. In part, because the process... It's a difficult process to go ahead and have a majority of the Cabinet members and the Vice President declare a President unfit to serve. Politically, particularly if either House of
Congress is of the same political party as the President, there would be hell to pay if that actually happened. And a lot of these charges that get made today are so obviously partisan, that it's pretty difficult to go ahead and take them seriously.

J. Aughenbaugh: I would hope that there's enough of us who kind of are reflected in the comments you made a few moments ago, where you're like, "Do the medical professionals get to weigh in on this? Do they actually..." Because this is the kind of thing that somebody... Let's just say for instance we have a President who has to take a new medicine for a chronic condition, and it throws them off their game for a couple weeks. Well, the 25th Amendment was designed to go ahead and allow a President to go ahead and recover after a couple weeks and then come back into office, because that can also happen.

N. Rodgers: Right. If you're reading the Fourth Section, you should note that the President just writes a letter and says, "I'm feeling much better now."

J. Aughenbaugh: Yes, and then it goes to a vote again of the same people.

N. Rodgers: The Cabinet?

J. Aughenbaugh: Yeah.

N. Rodgers: And then they go, "Oh, okay. Everything's better."

J. Aughenbaugh: So, I generally like the fact that the 25th Amendment gives us a process. It may not be the best process, but it gives us a process to go ahead and deal with circumstances that arose enough in history that we kind of had to address. It's kind of like one of your opening comments for this podcast. This was 1965. Did we have presidents die and resign and stuff before? Yes, we did. And we didn't have a process to go ahead and identify who was going to go ahead and take over and how long would they take over, etc.

J. Aughenbaugh: So, the old administrator in me is just like, "Okay, it may not be the best process, but it's better than not having one at all."

N. Rodgers: Yeah, sometimes we get it ready. It just takes us 200 years. Okay, well, thank you so much.

J. Aughenbaugh: Yeah, I enjoyed talking about it.

N. Rodgers: We'll talk to our listeners soon.

J. Aughenbaugh: All right.
N. Rodgers: Okay.

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