Announcer: Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

N. Rodgers: Hey, Aughe.

J. Aughenbaugh: Good Morning, Nia. How are you?

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

J. Aughenbaugh: I'm fine, we're right before spring break.

N. Rodgers: Yeah, I know. So this is going to come out during spring break. So I would like to say to people, if you are going on spring break, like if you're going the last weekend when you hear this, check the State Department's website for any updated travel information about where you should and shouldn't go, but enjoy yourself. I hope you have a good time. I hope you get lots of sleep. Or if you don't want sleep, I hope you get to walk on lots of warm sandy beaches and enjoy yourself, or climb the mountains and ski down them or whatever it is you like to do.

J. Aughenbaugh: Or read a book that somebody did not assign you.

N. Rodgers: Exactly.

J. Aughenbaugh: Yes.

N. Rodgers: That would be marvelous. Or just hang out, do nothing. There's a lot to be said with taking your brain offline. But I felt like it was important that we should mention that given Coronavirus and given that in Italy, schools are closing, we actually have programs that send students and now the university is going to have to work that out about what we're going to do for our CLS students and our born students who are going to places in the world where they might be difficult to visit. So anyway, we wish you all the best of luck with that.

J. Aughenbaugh: What do you want to talk about today?

N. Rodgers: Oh, my gosh, I want to talk about everything. I want to talk about everything. The first thing that I want to ask you about is this, okay, I will not pretend that I read the decisions of the appeals courts of the various, I know you do, but I don't.

J. Aughenbaugh: Perhaps.

N. Rodgers: Well, yeah. Anyway, yes, four o'clock in the morning.

J. Aughenbaugh: Hey, nothing goes better with your first cup of coffee for the day.
N. Rodgers: Than appeal’s court decision?

J. Aughenbaugh: Than perusing the output of our lower federal courts. I’m telling you.

N. Rodgers: I would think for me that would be the thing that I would need to do to go to bed at night. Like put me to sleep. Because I don't understand half the language, but I know that you do because you’re a constitutional scholar and you have to read cases all the time. I always tell when students come to me and we’re talking about cases, I say to them, I have to read a case like six times to understand the decision because of the way clauses are put, because of the way lawyers write clauses.

J. Aughenbaugh: Yeah, it’s a version of English that most of us do not use.

N. Rodgers: Yeah, but you can. I mean, if you just slow down and dissect the sentences. It's like when we were kids and you had to diagram the sentence, I feel like I have to diagram opinions and concurrency's into signs and stuff.

J. Aughenbaugh: Sure.

N. Rodgers: But we have a friend of the podcast who said to me, " [inaudible] , if the McGahn thing was a big deal," and I said, "I feel like I'm being set up," and he said, "no, I would never set you up. Never set you up," and then he snickered. Then when I send you an email and said, "is this a big deal", you wrote back to me "big" in capital letters.

J. Aughenbaugh: Yeah, that's one of the rare times that I actually use caps in an email.

N. Rodgers: Yeah, I was like okay, this is a big deal. First of all Don McGahn.

J. Aughenbaugh: Yes, Don McGahn.

N. Rodgers: He's the, oh sorry, he's no longer, but he was the White House Counsel.


N. Rodgers: Is there one legal counsel or is there an Office of Legal Counsels?

J. Aughenbaugh: He was in charge.

N. Rodgers: Okay. So he was the head of that office. So there's more than one lawyer over there?

J. Aughenbaugh: Sure.

N. Rodgers: Okay.
J. Aughenbaugh: Okay. So the follow-up question was particularly good. So the White House Legal Counsel Office is part of the Executive Office of the President, is part of the West Wing.

N. Rodgers: Okay.

J. Aughenbaugh: Okay, and for those of you who may have watched that old show, I do believe like seasons two and three, the well-known actor John Larroquette, was the White House Legal counsel. Okay, he was in charge.

N. Rodgers: Yes.

J. Aughenbaugh: Yes, he was in charge. But it's basically an office comprised of attorneys whose sole, if you will, client is the Office of the President.

N. Rodgers: But not the president.

J. Aughenbaugh: Not the president individually, but whoever is occupying the office of President.

N. Rodgers: Okay.

J. Aughenbaugh: So remember, guys, this goes back to high school civics or poly 103, Intro to US Government, it's the Office of President. Whoever is occupying the office of the president has their own law firm, it is the White House legal counsel's office.

N. Rodgers: But it's not protecting them from personal criminal [inaudible].

J. Aughenbaugh: No.

N. Rodgers: Let's just pretend for a moment that I'm President, you should know I want to be, and I just decided to steal some of the art in the White House and sell it.

J. Aughenbaugh: The White House legal counsel's office would not represent you.

N. Rodgers: Right, I would have to get my own attorney.

J. Aughenbaugh: Yes. In fact, they probably have already produced a memo instructing any occupant in the position of president that you can't do that.

N. Rodgers: Yeah, you can't sell art. Because it doesn't belong to you.

J. Aughenbaugh: No.

N. Rodgers: It doesn't belong to The President, it belongs to the office.

N. Rodgers: Hence why Mr. Giuliani is involved in [inaudible].

J. Aughenbaugh: Is the President's personal attorney.

N. Rodgers: Okay. So he's defending President Trump as a person?

J. Aughenbaugh: Yes.

N. Rodgers: Not as the Office of the President.

J. Aughenbaugh: That's correct.

N. Rodgers: But the counsel's office, when the president says, the President is going to do this thing, they offer counsel about whether that thing is legal in terms of the Office of the President.


N. Rodgers: Sure, you can paint the White House purple if you want to. What's in the name? Purple house, it's fine with us.

J. Aughenbaugh: I'll give you an example of the handiwork, the output of the White House legal counsel's office.

N. Rodgers: Okay.

J. Aughenbaugh: In 1973, overriding a veto of then President Nixon, the United States Congress passed the War Powers Act.

N. Rodgers: Right.

J. Aughenbaugh: Which basically was in response to Nixon, President Johnson, President Kennedy, who basically got us into Vietnam with no particular end date, if you will. So the War Powers Act basically says that if a president, without a declaration of war from Congress, sends American troops into a foreign land within a period of time, the president then has to submit a report to Congress.

N. Rodgers: We talked about this when I was going to invade Canada.

J. Aughenbaugh: That's right, we did.

N. Rodgers: Okay.
J. Aughenbaugh: Now, every president, from Nixon through the current occupant, Donald Trump; and you might be a future occupant, every president has asked the White House legal counsel’s office for a legal memo as to whether or not the War Powers Act violates Article Two of the Constitution. Article Two just focuses on The Office of the President and the executive branch, whether or not the War Powers Act violates Article Two of the Constitution. Every White House Legal Counsel, has submitted a memo. Some scholars have joked, all they do is like copy.

N. Rodgers: Copy it, change a few dates, change a few names.


N. Rodgers: I'm assuming they use the same legal basis.

J. Aughenbaugh: Oh yeah, sure.

N. Rodgers: Because it hasn't been challenge, you mentioned that.

J. Aughenbaugh: It's not been challenged.

N. Rodgers: It's not been challenged by Congress.

J. Aughenbaugh: That's right.

N. Rodgers: Does Congress having an office counsel? Do they have lawyers.

J. Aughenbaugh: Yes, they do have lawyers.

N. Rodgers: Okay. So they could in fact send a counter memo, and then nothing would happen until somebody went to court?

J. Aughenbaugh: That's right.

N. Rodgers: Okay. But the counsel for the Congress would work the same way. It wouldn't defend you as an individual against individual claims, it would only defend the Congress and the rights of the Congress. So these are higher level lawyers in the sense of they're not about individuals, they're about the greater government, okay.

J. Aughenbaugh: Yeah. Okay, so when Donald Trump was elected president, he picked as his head of the White House Legal Counsel’s Office, Don McGahn, well-known Washington DC attorney.

N. Rodgers: Is that person usually a political person or is that person just a really good lawyer most of the time?

J. Aughenbaugh: Both.
N. Rodgers: Oh, okay. So they're a political player.

J. Aughenbaugh: Sure.

N. Rodgers: Okay.

J. Aughenbaugh: Yeah. I mean, if you're a president, are you going to go ahead and pick a lawyer who's ideological, shall we say, sympathies is for the other side?

N. Rodgers: Probably not.

J. Aughenbaugh: Yeah.

N. Rodgers: Probably not. Okay. Well, I mean, in the ideal world, what you'd have would be a balance in that office so that there would be a reasonable chance that what you do doesn't get overturned or challenged. Because in the ideal world, you'd be able to close all the loopholes.

J. Aughenbaugh: Sure.

N. Rodgers: If you are myopic, you might not be able to do that.

J. Aughenbaugh: Yeah. But it's both political, but also legal.

N. Rodgers: Yeah.

J. Aughenbaugh: Okay.

N. Rodgers: Okay, so he chooses Don McGahn, who by the way, I do not mean to offend Don McGahn; but when I saw a picture of him, I was like that is just a dude. Like he doesn't wear those really sharp suits and he doesn't look all like sharky and stuff like a lot of big-time lawyers do.

J. Aughenbaugh: No.

N. Rodgers: He just looks like a guy, a guy you'd say walking around campus, kind of a professor who is a dude.

J. Aughenbaugh: Yeah, he looks like a bureaucrat.

N. Rodgers: Yeah.

J. Aughenbaugh: Yeah.

N. Rodgers: In the best sense of the word, he just looks like, hey, I'm just here to get it done.
J. Aughenbaugh: He knows what the expected uniform is for his position, okay.

N. Rodgers: Right.

J. Aughenbaugh: He wears it, but he doesn't.

N. Rodgers: Isn't coming there in a $5,000 Brooks Brothers suit and act all whatever. He just seems like he's very low key, like, hey, it's all good.

J. Aughenbaugh: So part of the issue of McGahn, at various times, sat in on meetings as White House Legal Counsel attorneys frequently do, to kind of make sure that the president stays within their lane constitutionally, legally.

N. Rodgers: Not just going off promising things like, "Sure, I'll sell you Alaska for a buck."

J. Aughenbaugh: Yeah, right.

N. Rodgers: Or you're not doing things like that, okay. Mr. President, perhaps we should talk about that.

J. Aughenbaugh: In fact, I was just going to go ahead and say, the other person in the room that says, okay, interesting conversation, but perhaps we cannot do that Mr. President.

N. Rodgers: Okay.

J. Aughenbaugh: All right.

N. Rodgers: What an interesting thought.


N. Rodgers: Right.

J. Aughenbaugh: However, we have roughly 200 years of one president to say, "You can't do that, right?"

N. Rodgers: That would be a tough job with some presidents.

J. Aughenbaugh: Yeah, like the current one.

N. Rodgers: Right.

J. Aughenbaugh: Okay. When special prosecutor Bob Mueller issued his report, there were sections of the Mueller report that indicated that Don McGahn was actually in the room when President Trump was talking about firing individuals related to the Russia involvement in the 2016 presidential election. The
House of Representatives wanted Counsel McGahn to testify as to what he heard, and what positions did the President advocate.

N. Rodgers: So they subpoenaed him?

J. Aughenbaugh: Well, they subpoenaed him when McGahn made it very clear that the only way he would testify in front of Congress is if he was legally forced to. That's basically what a subpoena is. It's a legal document that forces you to appear in front of a government institution with jurisdiction to investigate, hear a case, etc.

N. Rodgers: If you don't, you shall be held in contempt.

J. Aughenbaugh: That's right.

N. Rodgers: Although I'm not entirely sure what contempt. I mean in a court, contempt could mean that you end up in jail, but I'm not sure what contempt of Congress means.

J. Aughenbaugh: No.

N. Rodgers: Can you end up in jail?

J. Aughenbaugh: Yes, historically, both the House and the Senate have arrested people for not complying with subpoenas.

N. Rodgers: Really?

J. Aughenbaugh: Yes.

N. Rodgers: Where did they get arrested to?

J. Aughenbaugh: Well, typically.

N. Rodgers: Please tell me there's a congressional jail.

J. Aughenbaugh: No.

N. Rodgers: Because that would be awesome and boring.

J. Aughenbaugh: Congress usually has the FBI.

N. Rodgers: Oh.

J. Aughenbaugh: Yes. Wow.
N. Rodgers: Wow. This isn't a common occurrence?

J. Aughenbaugh: No.

N. Rodgers: Because I'm assuming that most of the time when you get a subpoena form that says, the Congress would like for you to appear. You don't go, not feeling it. You say, "Oh, let me get my lawyer, and we will go and sit there at the table and then there'll be times when my lawyer will lean over and say, "Pass." which means, don't say anything.

J. Aughenbaugh: There's probably words that are said before.

N. Rodgers: Well, but we are not using those words on this podcast if we can help it.

J. Aughenbaugh: But then you do get yourself a lawyer who sits right beside you as you indicated, and will be whispering in your ear throughout the hearing. Because remember, Congress is not a court of law.

N. Rodgers: Right.

J. Aughenbaugh: When it subpoena somebody, it wants somebody to testify at a hearing to give, if you will, material or testimony to the Congress. So Congress then can go ahead and make future decisions, whether it be about legislation or whether or not they want to continue to investigate somebody in the executive branch or what's going on around the country, etc.

N. Rodgers: As a side note, just as a side note, they also they don't have to subpoena you. Sometimes they just call you. They just call you before Congress. Laurie Hall of the director of the Government Publishing Office, gets called there regularly when it's budget time.

J. Aughenbaugh: Sure.

N. Rodgers: To start explaining what they're doing with the budget and what they're going to be doing all this, but I can't imagine there's a circumstance she's been subpoenaed. I'm assuming gets some letter that says, "Come on in on next Tuesday and tell us what's going on with this, this and this."

J. Aughenbaugh: Yeah. As I explained to my students, particularly in the intro US government class, Congress on a regular basis will ask people who work in government, experts, etc to come to Congress and to testify.

N. Rodgers: Right. But that's not a subpoena. That's a separate thing.

J. Aughenbaugh: No.

N. Rodgers: A subpoena is part of an investigation, right?
J. Aughenbaugh: Yeah. Subpoena is used because either the person who's being asked to provide testimony has indicated, they won't testify without a subpoena or in the case of McGahn, President Trump said, "None of the people who advise me in the White House will testify because I think Congress's investigation is a witch chant that the Mueller investigation basically cleared me." I'm channeling, if you will, President Trump now, "Therefore, this is a huge waste of time. What goes on in the executive branch is covered by executive privilege." So Congress, when they were subpoena did not produce White House Legal Counsel McGahn, the Congress filed a lawsuit. Not the Congress, the House of Representatives. The Senate had nothing to do with this.

N. Rodgers: Right.

J. Aughenbaugh: The House of Representatives filed a lawsuit in a federal court, and in particular, they went to, they filed their claim in the DC Circuit Court of Appeals.

N. Rodgers: So does the Congress often file?

J. Aughenbaugh: No, it is highly unusual.

N. Rodgers: So this was a deliberate act and rare.

J. Aughenbaugh: Yeah. Because most of the time those people who get subpoenas, they don't necessarily want to testify.

N. Rodgers: But they do it.

J. Aughenbaugh: But they do it. Because again, there is the threat of contempt of Congress if you don't comply with a subpoena.

N. Rodgers: Well, and I'm assuming you also are looking at your legal bills and thinking it would be really expensive if they decide to take me to court.

J. Aughenbaugh: Yes.

N. Rodgers: Because it's not cheap now to go to district court and have this fight, right?

J. Aughenbaugh: No. Because in particular, if you want to get yourself a good lawyer in DC to respond to a congressional subpoena, you're probably talking about a lawyer who's charging anywhere from $500-700 an hour.

N. Rodgers: Not cheap.

J. Aughenbaugh: Oh my goodness. No.
N. Rodgers: Well, and you want a really good one, because if you're going to try to afford this Congress then.

J. Aughenbaugh: The institution of the House of Representatives.

N. Rodgers: You can't have me.

J. Aughenbaugh: Yeah.

N. Rodgers: Who graduated from law school 10 minutes ago and I'm like, "Sure, I'll represent you for a buck."

J. Aughenbaugh: You want somebody who's been working in DC.

N. Rodgers: Who knows the players and how things are done.

J. Aughenbaugh: Knows the process.

N. Rodgers: Probably knows all the judges.

J. Aughenbaugh: Yes.

N. Rodgers: Probably has been before them with other cases and done other things. So he gets a lawyer. They get lawyers. They all go to the Court of Appeals.

J. Aughenbaugh: Yeah. The DC Circuit Court of Appeals. Now, for those of you who don't know, we basically have 12 Federal Appeals Courts, 11 are numbered.

N. Rodgers: Yes.

J. Aughenbaugh: The 12th one is the DC Circuit Court of Appeals. It is considered probably the most important/prestigious of the federal appeals courts, primarily because they hear appeals. They hear cases concerning federal government institutions, usually executive branch decisions, and not for nothing, a fair number of our supreme court justices of recent vintage previously served on the DC Circuit Court of Appeals.

N. Rodgers: Well, you make sense. They're doing the federal governments businesses for the most part.

J. Aughenbaugh: Yeah.

N. Rodgers: Okay.
J. Aughenbaugh: So case goes to the DC Circuit Court of Appeals. Now, in an appeals court, the initial panel is comprised of three judges. So for instance, the United States Supreme Court has nine. It's not that nine is some symbolic number, it's we want an odd number to avoid a tie.

N. Rodgers: Right, to prevent a tie.

J. Aughenbaugh: Yes.

N. Rodgers: So it could be five, it could be three, it could be seven?

J. Aughenbaugh: It's right.

N. Rodgers: As long as it's odd.

J. Aughenbaugh: It's odd.

N. Rodgers: I mean, I suppose it could be 19, that'll be a lot.

J. Aughenbaugh: That would be a lot. So a three judge panel heard the case and ruled against the United States House of Representatives, and they did so last week.

N. Rodgers: That was two to one, right?

J. Aughenbaugh: It was two to one.

N. Rodgers: Okay.

J. Aughenbaugh: Okay. It was two to one.

N. Rodgers: It was not a unanimous thing?

J. Aughenbaugh: No, it was not. It was two to one, and they ruled that Don McGahn did not have to comply with the subpoena. Now, the reason why this is a big deal is that as critics of the decision pointed out, where now is the incentive for anybody in the White House to ever comply with a subpoena from either House of Congress?

N. Rodgers: Right, friendly or not?

J. Aughenbaugh: That's right.

N. Rodgers: I mean, in this particular instance, not friendly.

J. Aughenbaugh: Not friendly.
N. Rodgers: But what if it were friendly, and you just didn't want to show up for whatever reason? I got things to do that day.

J. Aughenbaugh: Basically, the two judges that ruled in favor of the president's slash Don McGahn's position, did so for two reasons. The first was they said that this was a political dispute.

N. Rodgers: You have said that the courts have historically wanted to stay out of politics.

J. Aughenbaugh: That's right.

N. Rodgers: You figured out you're the branches.

J. Aughenbaugh: Yes, right.

N. Rodgers: Don't involve us unless there are an actual law involved or in this case, the constitute or whatever.

J. Aughenbaugh: Yeah, and their perspective was, this was a political dispute between one House of Congress, and the president. Historically, and I've made reference to this in previous podcast episodes, historically, this is what constitutional law scholar Keith Whittington calls constitutional hardball. We've had instances where Congress has wanted information from the White House or the executive branch. The White House has said, "No, we're not going to give it to you." The Congress may even issue subpoenas, but before it goes to court to enforce the subpoena, usually some compromise is crafted, which allows both parties to go ahead and say, "I won." But the information is shared, and this has gone on since the first presidential administration of George Washington. The Congress wanted to know how Washington was responding to various uprisings of groups who were like, "This brand new constitution isn't any damn better than the Articles of Confederation, or what it was like."

N. Rodgers: He's awfully much like a king, I'm not interested in that.

J. Aughenbaugh: Washington as commander in chief, would send out some militias, and Congress was just like, "Wow, what's your logic behind sending out militias?" Washington was like, "Well, I'm president, I'm commander in chief, I don't have to explain myself." Congress was like, "You do, if you want any money for any future militias."

N. Rodgers: Can you see the founders? Yeah, huh, right?

J. Aughenbaugh: Whatever. Right?

N. Rodgers: Exactly. As the president speak to the hand, that's the president and them saying, "Yeah huh."

J. Aughenbaugh: Right?
N. Rodgers: I have the purse strings ever here, baby.

J. Aughenbaugh: So the DC Circuit Court of Appeals, at least the majority of these three judges were like, "One, this is a political dispute." Second, they went ahead and said, "Because the House of Representatives did not take a formal vote, you just had a bunch of representatives, particularly on a couple of committees of the House, who wanted this information." The full house never took a vote. So as far as this three-judge panel was concerned, the house didn't have standing to sue.

N. Rodgers: Wow.

J. Aughenbaugh: Yeah.

N. Rodgers: So they could go back, do a vote.

J. Aughenbaugh: They could.

N. Rodgers: By now, I mean, it's now starting to be stale.

J. Aughenbaugh: Yeah, and again, remember the first justification was this is a political dispute. So even if the House had taken a formal vote, these two judges were like, "It's still a political dispute, we're not getting involved." At the end of their opinion, it's almost like they expected their decision to be criticized. They went ahead and said, "By the way, here, Congress is not without tools to force the president to comply, the House of Representatives can go ahead and slow walk legislation that the President wants. The House of Representatives could play hardball in regards to the budget."

N. Rodgers: Yeah, shut down the government.

J. Aughenbaugh: Yeah, nothing more.

N. Rodgers: Shut down the government until Don McGahn comes by to talk to us.

J. Aughenbaugh: That's right. Nothing motivates a president more than a government shutdown because what we've seen.

N. Rodgers: I don't know about this president.

J. Aughenbaugh: But of recent vintage, who gets blamed?

N. Rodgers: The president and whatever the party is in the White House, but I'm not sure that this president because he's a whole different kettle of fish as they say.

J. Aughenbaugh: Yeah, I mean, behavioral norms that used to govern Presidents.
N. Rodgers: Well, and I think we're going to get to that because I have a question for you about something that was said personally on Twitter. Although I have many questions about Twitter, which you can't answer, I feel certain because they're metaphysical, like, why, why does Twitter exist and why do people keep using it they way they do.

J. Aughenbaugh: You're talking to the wrong person because I don't have a Twitter account.

N. Rodgers: I have one that I've never updated.

J. Aughenbaugh: Okay, apparently some folks have created one in my name, which is not very cool by the way.

N. Rodgers: It's not you?

J. Aughenbaugh: It is not me, but nevertheless they occasionally post shit on there, put stuff on there. Please forgive me. So the reason why this is a big deal is that you basically have.

N. Rodgers: Wait. Isn't there another appeal vote? Can't you ask for an en banc?

J. Aughenbaugh: Yes, I was going to get to that.

N. Rodgers: Oh, I'm sorry, I jumped ahead.

J. Aughenbaugh: No, that's quite alright. So the House of Representatives now has a decision. They can either ask the entirety of the DC Circuit Court of Appeals, all those judges, and there's trying to figure if they have any vacancies. I think they have maybe 10 or 11, maybe 12 in the DC Circuit Court of Appeals, they could ask for what's called an en banc hearing where all the judges in the DC Circuit Court of Appeals would hear the case. That's one appeal option, or the house could go ahead and say, "There's very little chance that these, in particular two judges colleagues are going to go ahead and overturn their decision, we're going to file an appeal with the Supremes.

N. Rodgers: Okay.

J. Aughenbaugh: So the House still have a couple of options. Now, you actually indirectly, a few moments ago, pointed out why the House more than likely won't appeal. Because one, you have a presidential election coming up in, what, less than 10 months?

N. Rodgers: Eight months.

J. Aughenbaugh: Okay. Eight months.

N. Rodgers: Yeah, eight months.

J. Aughenbaugh: Okay.
N. Rodgers: Sorry. I was doing it on my fingers. Sorry, folks, that's what the silence was for.

J. Aughenbaugh: I'm glad that you were doing it on your fingers because quite obviously, I'm terrible at math. November is the 11th month. We are now into the third month, 11 minus three would be 8, but, hey.

N. Rodgers: What's a month or two here or there? It's going to feel like eternity for the next day, months anyways.

J. Aughenbaugh: Yeah, right. So you have a political if you will calculation, but then you also have a legal calculation. Does the house ask for an on bank review and then have a majority of all those judges say, yeah, it's a political question, you lose? Or do they file an appeal to the Supreme Court and have the supreme say, yeah, the lower court was correct. The House doesn't want that precedent to come down from the Supreme Court.

N. Rodgers: Right.

J. Aughenbaugh: Okay.

N. Rodgers: Because that really embeds it.

J. Aughenbaugh: Yes. It's one thing to go ahead and have an appellate court say it. But when you have the highest court in the land say, yeah, this is a political dispute and we're not going to get involved. Well, that's oppressive.

N. Rodgers: A completely different message.


N. Rodgers: Much more permanent message.

J. Aughenbaugh: Yeah. In a house we're more than likely want to avoid that.

N. Rodgers: Right. Because if this happens again, they would want to be able to say, "Okay, we now know the arguments they're going to make."

J. Aughenbaugh: Yes.

N. Rodgers: We can counter those arguments when we do our appeal and likely not be turned away and undo this precedent as it were.

J. Aughenbaugh: Yes.
N. Rodgers: Or mitigate this precedent not undo do it.

J. Aughenbaugh: Well, if you look at the current Supreme Court, five of the justices were appointed by Republicans, four were appointed by Democrats. So if you believe political scientists, all nine of them are going to vote the same way as the president who appointed them. So the House which is controlled by the Democratic Party would lose. You also got to know too, if you study the current justices, there’s probably easily three or four of the justices in the conservative wing on the court who strongly believe in the executive branch.

N. Rodgers: Right.

J. Aughenbaugh: Okay.

N. Rodgers: Presidential power.

J. Aughenbaugh: Presidential power.

N. Rodgers: Privilege and all that kind of other stuff.

J. Aughenbaugh: Unitary executive theory, they believe in it. Again, if you’re the Democrats in the House of Representatives.

N. Rodgers: You don't want dig in on that.

J. Aughenbaugh: You don't. So it’s a big deal in the sense that we actually have a court that is saying to the Congress and the president, we’re not getting.

N. Rodgers: Work it out.

J. Aughenbaugh: Yeah. You work it out.

N. Rodgers: Work it out amongst yourselves. Don't come in here asking me if you can go to the movies because you got told no by the other parent, I'm not doing this.

J. Aughenbaugh: Well, or we’re thinking about this, I have two siblings, an older and younger sister. I don’t know how many times my mom said to the three of us, "I'm not get involved with is you guys work it out."

N. Rodgers: Right.

J. Aughenbaugh: All I know is I want all the yelling to stop, all the crying to stop, and all the threats of punches to stop, you work it out.

N. Rodgers: Right.
J. Aughenbaugh: That's basically what the DC Circuit Court of Appeals said. So whatever leverage the house was hoping to gain from the federal courts, they got none.

N. Rodgers: Do you think they should have seen that coming?

J. Aughenbaugh: Hey, like the House whatever ask for my advice and counsel. But if the House had, I would have told them to pause and think twice about going to court to have this subpoena implemented. I thought they got all the mileage that they could have by issuing the subpoena in the first instance and having the president say we're not going to comply.

N. Rodgers: Right.

J. Aughenbaugh: Because that follows the narrative that there are more than likely going to want to bring up in the fall presidential general election, which is, we have a president.

N. Rodgers: Who hides things and doesn't allow people to report to Congress.

J. Aughenbaugh: Report to Congress. His not transparent.

N. Rodgers: His is secretive and sketchy.

J. Aughenbaugh: He's rogue. He's out of control. They could go ahead and bring that up over and over and over again.

N. Rodgers: Right.

J. Aughenbaugh: We issued legitimate subpoena is based on the moral report and they've refused to comply.

N. Rodgers: That's how you win on that particular topic.

J. Aughenbaugh: Again, that's a narrative that motivates your base.

N. Rodgers: Right.

J. Aughenbaugh: It's not going to motivate Trump supporters to vote for you. It's going to motivate your base.

N. Rodgers: It's not going to motivate the independence.

J. Aughenbaugh: Yes.

N. Rodgers: But will motivate your base.
J. Aughenbaugh: Base. That's right.

N. Rodgers: Down you all to heck for not doing what you are constitutionally supposed to do.

J. Aughenbaugh: Supposed to do. All those 20 year at academics talk about consensus, compromise. Well, they're not compromising.

N. Rodgers: Right. Exactly.

J. Aughenbaugh: Okay.

N. Rodgers: So do you think that they will do en banc or do you think that they'll just scuttle away? When will we know what the Congress is going to do, do they have a time limit?

J. Aughenbaugh: Yeah, they do have a time limit. Each federal appeals court has, if you will, operational rules. So when the decision was handed down, basically the attorneys for the House of Representatives know that within the next couple of months they have to make a decision on whether or not they want to have en banc hearing. If they decide not to and they'll actually notify the clerk for the DC Circuit Court of Appeals.

N. Rodgers: If they sent a note saying never mind?


N. Rodgers: But in Latin with legalese around it?

J. Aughenbaugh: Yes.

N. Rodgers: Never es mindes?

J. Aughenbaugh: Yeah. They won't use any emojis.


J. Aughenbaugh: No x's and o's at the end.

N. Rodgers: XOXO, the House of Representatives.

J. Aughenbaugh: Right. But then according to Supreme Court rules, if they decided to appeal to the Supreme Court, they have to do so within a certain amount of time. Please forgive me, I can't remember the precise time. But they can't wait until like three years later and say, oh, yeah, by the way, we want to appeal the DC Circuit Court of Appeals ruling. No, they have to decide here in the next couple of months. Do they want to appeal to the Supreme Court? Even if they did, the Supreme Court would not
hear the case until the next Supreme Court term because the supreme court's oral argument calendar for this term.

**N. Rodgers**: Was set

**J. Aughenbaugh**: Is already booked.

**N. Rodgers**: Right. Don't they set that? They set that pretty early on.

**J. Aughenbaugh**: Yeah. For all the cases that they hear from the first Monday of October through December, they typically decide that the previous spring.

**N. Rodgers**: So deciding that now, I wish.

**J. Aughenbaugh**: Oh, yeah.

**N. Rodgers**: In the next couple of months.

**J. Aughenbaugh**: Yeah. So to give you an example, the Supreme Court is already said they are hearing and appeal to a Fifth Circuit Court of Appeals ruling that says that because the individual mandate tax penalty is no longer being enforced, the Fifth Circuit Court of Appeals now has claimed that the Affordable Care Acts individual mandate is unconstitutional.

**N. Rodgers**: Which was Robert's argument. So that might change how that comes out in the fall.

**J. Aughenbaugh**: So the Supreme Court has said we will hear an appeal of that ruling but in the fall. They've already decided. They are already beginning to fill up their calendar for the fall.

**N. Rodgers**: In the fall post-election?

**J. Aughenbaugh**: Yes. Well, no, they haven't decided that yet.

**N. Rodgers**: So that would be interesting to see what effect.

**J. Aughenbaugh**: Where they put it.

**N. Rodgers**: Right.

**J. Aughenbaugh**: Okay.

**N. Rodgers**: Because I would want to do it post-election.

**J. Aughenbaugh**: Oh, good Lord. Yes.
N. Rodgers: Because that's not something that you would think the Supremes would want to take on during the election season because then they'll be swept up in politics in a way that they don't really like.

J. Aughenbaugh: Yeah.

N. Rodgers: As we have noted they are not a fan of.

J. Aughenbaugh: Yeah. They don't like to be a topic of elections.

N. Rodgers: Yeah. Which I don't blame them. I don't like it either.

J. Aughenbaugh: Yes, because you're frequently a topic of election.

N. Rodgers: You know what? Someday. Someday I live to be that.

J. Aughenbaugh: But to your question of what's next? What I think is going to happen is what I predicted a few moments ago, which is, the Democratic caucus in the House of Representatives will probably say, let's not appeal this.

N. Rodgers: Let's just use this during the election.

J. Aughenbaugh: Yes. Let's just use it during the election. If President Trump wins a second term and we still have a majority of the House. Perhaps we revisit this because more than likely this is their thinking. More than likely he's going to do something else that we're going to want information about. He's going to try to want to stonewall us. At that point, then we can decide whether or not we take this type of issue up to the Supremes.

N. Rodgers: Oh. There's already questions about that with the coronavirus.

J. Aughenbaugh: The coronavirus.

N. Rodgers: So I can see them finding some way to use that. So I guess then what we'll do is just have to wait and see where we go and we'll check back in with listeners when we have something further about what's going on.

J. Aughenbaugh: Yes.

N. Rodgers: But I'm assuming that right now Trump again, is on a beach somewhere having a my tie and thinking, sweet, I don't have to deal with.

J. Aughenbaugh: With the United States House of Representatives. Yes.

N. Rodgers: All right. So we'll talk about that later then. Thank you.
J. Aughenbaugh: You’re welcome Nia.

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