

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, Aughie.

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

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

J. Aughenbaugh: Good. I just had an eye appointment and apparently they told me that my eyes are fine.

N. Rodgers: Yay! For listeners, I can see that you have two of them, not one. You're not like a cyclops or anything, which would be so awesome. Wouldn't that be great?

J. Aughenbaugh: Oh God bless me, yes.

N. Rodgers: It'd be great if you had glass instead of glasses. You just had one big one and then two things to go over your ears.

J. Aughenbaugh: Well, they always ask me if I want to go ahead and change my frames or this, that, the other and I'm like [inaudible].

N. Rodgers: Oh my gosh. You are the least fashionista person that I know. You would say to them, "Yes, what frames go well with t-shirts and cargo shorts?" I don't mean that as a slam. I like that you're consistently sort of, is that guy a student or is that guy a professor?

J. Aughenbaugh: Yeah, the number of times that when people ask me what I do and when I tell them I'm a college professor, they give me the once or twice look over and say, "Really?"

N. Rodgers: Awesome. Honestly, we dress in the library. We have a minimalist dress code in the sense that you're supposed to look reasonably professional and stuff, but we're allowed to wear jeans and that kind of thing. A lot of people don't. But I'm not entirely certain that students care. I don't think they notice and I don't think they care. I don't think they care what you wear. I think they care what you know. Speaking of things you know, we're on the last couple of cases for the summer of SCOTUS and this one is a big one, because this is about the DREAMers. This is about DACA.

J. Aughenbaugh: That's right.

N. Rodgers: There is a whole lot of machinations involved in this. It's not a simple case of yay DACA, we're done. It's not even like that. There's a whole bunch of layers to the same.

J. Aughenbaugh: Yeah, there is a whole bunch of layers. Again, the way the popular press reports Supreme Court rulings, and I understand they have various constraints, they have various imperatives they have to respond to.

N. Rodgers: They have 120 characters. They're tweeting and we have a lot more time to handle it.

J. Aughenbaugh: Yeah, and they got to fit it at the bottom of the screen.

N. Rodgers: The running scroll at the bottom of the screen.

J. Aughenbaugh: But the case we're talking about here is the Department of Homeland Security versus the University of California. It was a Supreme Court ruling that was handed down in the month of June of this year. Nia, as you pointed out, it concerned a program that was created during the Obama Administration. In 2012, the Obama Administration created the DACA Program, which is the acronym for Deferred Action on Childhood Arrivals. Basically, it was a program that would give legal status with two-year renewable work permits for those young people who through no decision or fault of their own came to the United States illegally.

N. Rodgers: Your parents cross the border, they bring you with them because, hello, you're their kid, and you're seven or eight years old, you don't get to say, "Oh, is this breaking the law? We probably shouldn't be doing it." It allows them a way to legally stay here by showing that they're working or in college. There's a set of rules. You don't just get to say because I want to. There's actually criteria you have to meet, right?

J. Aughenbaugh: That's right. It was a pretty standard, if you will, in terms of how it was set up, bureaucratic program. You had to have a job, or be enrolled in college. You had to avoid committing criminal offenses that led to either a felony or serious misdemeanor, arrest and conviction. It was not a path to citizenship. It was stopgap measure because the Obama Administration wanted Congress to pass a proposed legislation that was known as the DREAM Act, thus, listeners, Nia's reference to the DREAMers because those who would benefit from the program received the label, or, if you will, title, "The DREAMers". Now, what was unusual about how the Obama Administration created this program was that the Obama Administration did not go through the informal rule-making required by the Administrative Procedures Act. They just went ahead and created it.

N. Rodgers: Am I correct that there only two rules in a federal government, that there's the Commerce Clause and the APA? Pretty much that's it. There's no other real rules in the American government. Everything else is just a guideline.

J. Aughenbaugh: I believe other scholars would suggest otherwise. Unfortunately for you, Nia, you record a podcast with a constitutional and administrative law scholar and the two dominant, if you will, pieces of either constitutional law or federal law that affects so much of what I teach, and for that matter, so much of what the federal government does, is actually the Commerce Clause, which is the constitutional basis for so much legislation passed by Congress. But yet, once they pass the legislation, then the bureaucrats have to at minimum follow the Administrative Procedures Act.

N. Rodgers: I'm just saying, for those listeners who want a shortcut to understanding pretty much everything about how the federal government works, learn those two things and you're off to a huge start.

J. Aughenbaugh: No doubt about it.

N. Rodgers: Obama just created this thing. What we mean by that is he did not put it out for review. He didn't ask for public opinion. He didn't do any of that. He just like poof, there it is.

J. Aughenbaugh: Yeah. The argument made by Obama is one that the Obama Administration is one that we're pretty familiar with in regards to the current presidential administration, which is, I have this authority and I'm going to use it.

N. Rodgers: Combined with Congress' gridlocked in and capable of doing anything. That's usually the secondary reason that they say, or that's the primary reason that they say they're going to use the power that they have is because Congress won't do it.

J. Aughenbaugh: Yes. Nia, you are correct. The Obama Administration, particularly during his second term, stated a number of times. We're going to go in alone because Congress refuses to work with us.

N. Rodgers: They're basically saying, you're making me do this?

J. Aughenbaugh: Yes.

N. Rodgers: The way kids pass off things to their siblings. My sibling made me do it, as opposed to I have autonomy. I didn't want to, but they made me.

J. Aughenbaugh: Mom, when I went ahead and broke one of your cardinal roles, I didn't really want to, but my older sister made me. Of course, my mom would roll her eyes and say, yeah, that never worked. But nevertheless, many presidents say that. The logic of the president is, hey, I was elected by the entire country. You as a member of the House of Representatives represents a little tiny district in the middle of nowhere, pick your state, or you are one of two senators from a state, and by the way, that's one of 50 states. So my mandate is the entire country, your mandate is to represent a little small pocket of a state, or one of 50 states.

N. Rodgers: Less than two percent, or less of the population at maximum for senators.

J. Aughenbaugh: Now, this program was created in 2012 and since then, according to most estimates, well, over 650,000, it's somewhere between 650,000 and 700,000 residents. Okay. They're considered illegal because they didn't come here legally but they have these permits. It's not a path to citizenship. That still has not been yet worked out and by the way, if you want to know why a president just can't create a path to citizenship for these people, it's because Congress has that authority.

N. Rodgers: Our citizenship is determined by the Congress?

J. Aughenbaugh: That's right. Congress has that authority. It's in Article 1 Section 8 of the Constitution. It would have to be a law to make this permanent. This is not a permanent path to citizenship. Now, Donald Trump is running for president in 2016. He makes it very clear that if he's elected President, he's going to rescind DACA. He makes that very clear. Now, some people believe that he wanted to rescind DACA because he's anti-immigrant. He said a number of times, "I'm doing this because I want Congress to actually pass legislation to give them a path to citizenship."

N. Rodgers: Can I say, I don't disagree with that. I mean, there's something to be said of "all right, well then I'll make you do something". If you won't do it on your own, then I'll shove you far enough into a corner that you have to do it. I'm not sure that I disagree with President Trump on that.

J. Aughenbaugh: Yeah. Even if I don't like necessarily perhaps his motives.

N. Rodgers: Right, or how he did it.

J. Aughenbaugh: Yeah. Let's face it. There are advocates on all sides of the immigration policy issue in this country, that have long argued. This country is overdue for immigration reform. We've not had significant immigration reform since the Reagan administration.

N. Rodgers: Well, and we need to answer the question for these kids. We need to answer the question.

J. Aughenbaugh: Yeah.

N. Rodgers: If you're going to be booted, then you need to be booted.

J. Aughenbaugh: Booted.

N. Rodgers: Come back in whatever we consider to be a proper way, or we need to make a provision that allows you a path to citizenship so that you can be done with this and not have it hanging over your head. I know a lot of people who are in this situation probably worry about it. They worry consistently.

J. Aughenbaugh: Nia, I have students who are in this country because of the DACA program. Every two years, they got to renew their permit. They don't know if they're going to be deported, if their parents are going to be deported. If we're going to say to them, "Yes, you are deported because you came here illegally." Then, we need to take the official step and say it.

N. Rodgers: Right.

J. Aughenbaugh: Say it so that the country can go ahead and consider the fact that, nearly all of these dreamers didn't do anything wrong on their own.

N. Rodgers: Well, a huge number of them were quite young when they came.

J. Aughenbaugh: Yes.

N. Rodgers: So when somebody says, "Go back to Mexico," they're like, "I don't know Mexico. I don't know anybody in Mexico. I don't speak Spanish." Like, I can go somewhere, but it's not going back there in the sense that I have any real idea about how that culture plays out within its country.

J. Aughenbaugh: As some advocates point out, the country needs to go ahead and say to these young people, notwithstanding all the contributions you make, we're still going to deport you. Do you have the guts to say it?

N. Rodgers: Right, and do you have the kindness to end people's in-between status?.

J. Aughenbaugh: Yes.

N. Rodgers: Just settling one way or another. If that's really his reasoning, I'm actually not opposed to that. Make somebody do something.

J. Aughenbaugh: So, Trump comes into office and while he was running for office, there was a related case dealing with another program that was created for the parents of these children. It's called DAPA, Deferred Action for Parents of Americans and Lawful Permanent Residents. Now, that was challenged in Federal Court and the Fifth Circuit Court of Appeals held that the DAPA program violated not only the 10th Amendment, i.e, Federalism/states rights, but also the APA, the Administrative Procedures Act. When that court ruling was appealed to the United States Supreme Court, the court could not come to an agreement on the outcome. I believe that, that Supreme Court case occurred when there were only eight justices because, Justice Scalia had died. So that meant that the lower court ruling stood. So Trump wins the presidency, his then Attorney General, Jeff Sessions. For those listeners who pay attention to elections in various states, Jeff Sessions-

N. Rodgers: Jeffrey Beauregard Sessions.

J. Aughenbaugh: Was the attorney general. He gave up his long-standing seat in the Senate representing the state of Alabama. He ran for the Republican party nomination for the election for his old seat this fall and he just lost the primary against the former head football coach of the University of Auburn, Tommy Tuberville. So Jeff Sessions who once was part of the Trump administration inner circle, now looks like he won't have any government job in the foreseeable future. Yes. It was that Jeff Sessions. Sessions, rules or issues and then makes a decision. He comes out and says, that based on the logic of the Fifth Circuit Court of Appeals in the DAPA case, then DACA, also has to be both unconstitutional and illegal. The Department of Homeland Security takes that finding by the Attorney General and says, "We are rescinding DACA," but the Department of Homeland Security doesn't immediately go through notice and comment. That gets challenged by various interest groups, but also the University of California, because the University of California has a pretty significant number of students enrolled in their various universities who are recipients of the DACA program.

N. Rodgers: The University of California, just as a side note for listeners who may not know this, is the largest university.

J. Aughenbaugh: System in the country.

N. Rodgers: In the country.

J. Aughenbaugh: Yeah.

N. Rodgers: Like by far, it has by number of schools but also number of students. It's just a huge-

J. Aughenbaugh: Huge. Yes.

N. Rodgers: Huge program. When the University of California decides a thing, it reverberates through other universities all over the nation because of the sheer size of it. It's like when Texas adopts a textbook for its middle school. There are more kids in middle school in Texas than in any other state except California, so it tends to be that then everybody else adopts that textbook too. It's a similar idea. These huge systems can have an effect on the entire nation.

J. Aughenbaugh: Yeah, because a lot of other university systems in a lot of other states are like, hey, if this is what California is doing for all of its students, then perhaps we ought to go ahead and look at doing the exact same thing. Now, the University of California's challenge was basically twofold. One, they argued that the Department of Homeland Security and the Trump administration acted in an arbitrary and capricious manner. For you faithful listeners, in a previous podcast, we talked about the arbitrary and capricious standard, that's part of the APA.

N. Rodgers: Yes. We're thinking about getting merge for that.

J. Aughenbaugh: That's right. Yeah. You got to need some good swag that you guys could order online.

N. Rodgers: We'll figure that out at some point.

J. Aughenbaugh: Yes. By the way, these would be proceeds that would not go into our pocket.

N. Rodgers: Right. That would definitely go back into the Library and PoliSci departments.

J. Aughenbaugh: Yeah. But basically, the argument here was because the Department of Homeland and Security and the Trump administration didn't follow at least immediately the APA, the decision to rescind DACA was arbitrary and capricious. The second argument that the University of California made was a constitutional one, which by the way the Supreme Court did not focus on when they ultimately took the case. That was the rescission of DACA would violate the Constitution's if you will, value or liberty of equal protection under the law. That these students would be treated differently simply because they came to the country in an illegal manner. The court didn't focus on that.

N. Rodgers: Is that Amendment 14th?

J. Aughenbaugh: Yes.

N. Rodgers: Okay.

J. Aughenbaugh: Which interestingly enough, they were actually, the University of California, was arguing applied to the Federal Government via the Fifth Amendment's due process clause. It's the converse of what has been historically argued about how the 14th Amendment actually applies the rest of the Bill of Rights to the states. But nevertheless, the Court followed what's known as the rule of strict necessity. Why decide a case on constitutional grounds when you can decide it on statutory grounds? Because when the Court rules on a case on constitutional grounds, it makes it so much more difficult to overturn what the Court did because the Court is the last word on constitutional interpretation. If you rule it on statutory grounds, you basically leave it to the political branches to say, "Hey, we disagree with you, you being the Court, and thus we're going to change the law." It's easier to change a law than it is to change the constitution.

N. Rodgers: By about 900 percent.

J. Aughenbaugh: Yes, right? One of the reasons why we've only had 27 amendments to the US Constitution is that the process is so darn difficult.

N. Rodgers: Well, and the first 10 were zipped. I mean what we've really had are 17 amendments to the constitution and those 17 have taken 250 years, it's 220 years, but still, the first 10 were easy peasy, but after that, man, it took on.

J. Aughenbaugh: Yeah, the first 10 were decided by the first Congress in our country's history. It's taken the subsequent 200 plus years for the remaining 17. By the way, we haven't had an amendment approved since the early 1990s.

N. Rodgers: We, you and I, had planned to talk about that at some point in a future podcast, why we don't change the constitution more often and what that means for us as a country? But in this particular instance, they said, rather than going out and changing the constitution, you could just apply APA properly and do what you want to do.

J. Aughenbaugh: That's right. Because Congress has delegated huge amounts of legislative authority to the executive branch to control immigration. We know this. It's not just Trump, it's not just Obama, presidents have historically had huge amounts of legislative authority in the policy area of immigration, delegated to the executive branch. We know this, right?

N. Rodgers: Well, and neither Trump nor Obama is responsible for DHS, that was President George Bush.

J. Aughenbaugh: That's right.

N. Rodgers: The second George Bush, 43.

J. Aughenbaugh: Yeah, 43.

N. Rodgers: That was post 9/11. There are reasons that all came together as one organization.

J. Aughenbaugh: Yeah, and in one of the sub units, as you well know Nia, because one of your master's degrees is in Homeland Security and Emergency Preparedness. One of the units of the Department of Homeland Security is ICE.

N. Rodgers: Ice, ice baby.

J. Aughenbaugh: Yes, Immigration and Customs Enforcement, right?

N. Rodgers: Right.

J. Aughenbaugh: You also know this, and scholars pointed this out when the agency was being created or contemplated, the Department of Homeland Security has huge amounts of Legislative authority delegated to it.

N. Rodgers: The USA Patriot Act basically said, "Here, do whatever you want."

J. Aughenbaugh: Yes.

N. Rodgers: Here's a whole bunch of money to do it with. There's amazing levels of things in there that people really don't, I think, know about. We've talked about FISA Courts and we've talked about other things in the past, and we can go into more depth at some point if somebody really wants us to do that. But taking a deep dive into DHS, you will suddenly realize they have enormous power. They have enormous influence over, not just federal agencies but state agencies. Part of what the fight with the sanctuary city issue comes back to all of that as well, and so yeah, there's a lot of power and a lot of legislative authority there. Is this another one of those cases where the Court basically said to Donald Trump, "If you would just hire lawyers that understood the APA, you could be doing all kinds of stuff that you keep trying to do and not being successful."

J. Aughenbaugh: Yes.

N. Rodgers: You would think that this message would take after a while.

J. Aughenbaugh: Yeah, hey, we're three-and-a-half years into his term as president and the Court still is reminding them. The Supreme Court's not the only Federal Court that has said this to the Trump administration. But you're right. Chief Justice John Roberts joined the four liberals and said, the Trump administration did act in an arbitrary and capricious manner because they didn't follow APA.

N. Rodgers: Basically, what you're saying there is, two wrongs don't make a right.

J. Aughenbaugh: That's right.

N. Rodgers: Just because the Obama administration did that, doesn't mean you get to do that too.

J. Aughenbaugh: That's right. Because you now have 670,000 people who have grown to rely on DACA. To take that away from them, you have to follow the Administrative Procedures Act. Now what's interesting to note here, and we can discuss this a little bit further in regards to the implications. Roberts' majority opinion, and by the way, even those into dissent, particularly those in the dissent. But four out of the five justices in the majority agreed with Roberts' point that Trump could rescind DACA.

N. Rodgers: This was a reprieve.

J. Aughenbaugh: Yeah, this was not a, "You get to stay in it and the program can never go away." No, what Robert said was, the program could have been rescinded if the Trump administration had followed the Administrative Procedures Act.

N. Rodgers: Which basically gives them, as he's done before in other rulings this summer, gives them a road map of, if you do it properly, this is how you can do it and it would stand up constitutionally.

J. Aughenbaugh: Yeah. Well, but also stand up legal.

N. Rodgers: Or statutorily, I guess to be more [inaudible] .

J. Aughenbaugh: Statutorily, constitutionally.

N. Rodgers: They didn't answer that question.

J. Aughenbaugh: No, they didn't answer that question.

N. Rodgers: You said, they didn't answer that question so I shouldn't have, that was me misspeaking.

J. Aughenbaugh: No, but you raise a larger point here, which is, there are some justices on the current Supreme Court who would like to tackle the issue of whether or not Congress can delegate so much authority to the executive branch, largely unchecked. But Roberts didn't go there.

N. Rodgers: Am I guessing that one of those Justices is Alito?

J. Aughenbaugh: Basically, it's the other four conservatives.

N. Rodgers: Yeah. Because I can see Alito saying, "Okay, you know what? This is a mess and we need to figure it out and we just need to rule constitutionally and tell people how to do it and how to do it properly."

J. Aughenbaugh: Yeah. Because their logic is, when Congress delegates huge amounts of authority to the executive branch, but with very few guidelines on how that authority should be exercised, that violates the nondelegation principle i.e, separation of powers. Because in the constitution it doesn't say, the executive branch gets to go ahead and make regulations which have the effect of law. The only law making body in our Federal Constitution, according to at least four of the justices, is Congress.

N. Rodgers: I agree with that. They're the representatives of the people, the theory is that they make the laws that govern the people who they represent.

J. Aughenbaugh: Yeah.

N. Rodgers: I would be in line with that, although I'm not in line with some of the other stuff they've said, so I don't know where I would fall. I would be John Roberts, if I were on the Supreme Court, because he goes with his heart. Not with his heart, that's not accurate because it's not an emotional decision. He goes with where he really thinks the law lands. He looks at what he thinks the principle of the law is. He voted with the liberals in this particular instance, not because he has the liberal position, but because he looked at the letter of the law and said, "You didn't do it right. If you had done it right, we would be upholding it."

J. Aughenbaugh: As a number of commentators about this case pointed out, the majority's ruling in this case is a very narrow, technical ruling. He basically went ahead and said, "Yes, Mr. President, you have the authority to rescind DACA, if that's what you choose to do. But if you choose to do that, you have to follow the rules." The rules were laid out in the Administrative Procedures Act.

N. Rodgers: Can I just comment that it seems a lot like the Supreme Court rolls up a newspaper and bats somebody across the face with it. Sometimes it's the executive, sometimes it's Congress, sometimes it's a State.

J. Aughenbaugh: Yes.

N. Rodgers: Like, "Hey Georgia, come here." Like they did this summer earlier with the annotations case. It's like they keep a rolled-up newspaper on the bench. They say, "All right, here we are going to smack across the face with this thing." This is also another one of those give or take it the way things that we talked about before. Because right now those kids are safe.

J. Aughenbaugh: Yes.

N. Rodgers: But if August 1st, the President put in the Federal Register that he wanted to get rid of DACA and he had an explanation and he explained why he wanted to do that and gave a comment period, which I think is 30 days, in as early as September 1st, it could be done.

J. Aughenbaugh: Sure.

N. Rodgers: If they were organized and got it in.

J. Aughenbaugh: According to administrative law scholars, Nia, typically, in formal rule making, notice and comment rule making takes about a year and a half. Takes about a year and a half.

N. Rodgers: Is that because it takes awhile to write the regulation to start with?

J. Aughenbaugh: You got to do the research. You got to demonstrate that you just didn't come up with it over the weekend.

N. Rodgers: Like I would do.

J. Aughenbaugh: That you vetted it with the agencies that have substantive authority.

N. Rodgers: You looked its feasibility, you looked at the cost, who looked at all that stuff.

J. Aughenbaugh: Because there's another federal law that says the Office of Management and Budget has to do a cost-benefit analysis of every proposed regulation that affects so many people.

N. Rodgers: Even if you're rescinding one, you still have to do a CBO report?

J. Aughenbaugh: Yes.

N. Rodgers: No, CBO report?

J. Aughenbaugh: No, and OMB report, cost benefit analysis. But again, federal agencies know how to do these things. These are checking boxes. You do all that, then you issue the proposed rule in the federal register. In a previous podcast episode, we talked about what that's like. You give the interested parties 30 days to respond, and everybody in the response could dislike the proposed rule.

N. Rodgers: You can say, "I'm sorry, I can't hear you over the sound of me doing it anyway."

J. Aughenbaugh: That's right.

N. Rodgers: Because you don't have to take their advice. You just have to ask for their advice.

J. Aughenbaugh: Advice, that's right. "Thank you for sharing."

N. Rodgers: "How nice that you have feelings. Moving on."

J. Aughenbaugh: "Moving on." On average, it takes about a year and a half. Theoretically, if the Trump administration wanted to go ahead and check all the boxes in the infamous acronym for bureaucrats, CYA.

N. Rodgers: Yes.

J. Aughenbaugh: Cover your butt. You do that, one, this could have already been done. But two, let's say, hypothetically, Donald Trump wins the second term this November, January he issues a proposed rule rescinding DACA. Because he would have had 6-7 months since the Supreme Court ruling to already study the issue, give it 30 days. At some point in February, the comment period ends. A month later, you go ahead and say, "Here is the final regulation rescinding the DACA program. And even with the subsequent court challenges to it, by the end of 2021, DACA could be rescinded. That's the scary thought for DACA recipients. That's the scary thought.

N. Rodgers: The happy thought is that the Trump administration does not seem to have gotten itself together on these issues previously. It seems like they take a shot, they don't get it, and then they kind of give up and move on to the next thing. That, I'm going to venture an opinion, has to do with lack of experience. A huge number of them lack the experience to say, "Oh, there's a way we do this, and then when we do it that way, we're Teflon. We can actually do what we want to do." That is in part because a huge number of the people in Donald Trump's administration are new to working in government.

J. Aughenbaugh: Working in government.

N. Rodgers: Jeff Sessions aside, who have been in government since dinosaurs roamed the earth, there are few secretaries that have been in government for a long time. But generally speaking, he has chosen people from the private sector. This is one of those instances where an insider would've been helpful to his cause.

J. Aughenbaugh: There are three set of phenomenon here that probably should give quite a bit of hope to DACA recipients. One, you just mentioned. President Trump has picked a significant number of people with very little government experience. Two, even when he's picked those individuals for cabinet positions, it appears as though he, with some regularity, ignores them.

N. Rodgers: That's true.

J. Aughenbaugh: Then third, he's done something that you and I have talked about, that a large number of public administration scholars have identified; he has hollowed out the federal bureaucracy. There are so many positions, middle and upper management positions, people who would be tasked with implementing regulations. Those positions are vacant. They are vacant. Because they are, sure, you can go ahead and claim the federal bureaucracy is the smallest it's been in decades. But the problem is, in terms of implementing his policy choices, there just aren't people there to go ahead and implement them. They're just not.

N. Rodgers: I'm going to ask a separate question, but it's a followup to this idea. Let's just say that President Trump's administration begins the work now, and they actually manage to get something in the Federal Register in late November. Let's just pretend. They haven't won the election. Can the new administration remove something from comment?

J. Aughenbaugh: Yes, they can. Yeah

N. Rodgers: Okay. You have no way of effecting that once you're post your presidency?

J. Aughenbaugh: That is correct.

N. Rodgers: Other than to stand up and publicly say things, which ex-presidents do sometimes. Although they don't seem to do that hugely. They seem as a group to not be people who speak negatively against the current occupant of the White House

J. Aughenbaugh: That's correct.

N. Rodgers: That does seem to be the tradition. It would be interesting to see what Donald Trump does post his presidency, whenever that is, whether that's in 2020 or 2024. It will be interesting to see if he follows that tradition of for the most part, you stay out of things that the current president is dealing. You don't venture opinions, for the most part.

J. Aughenbaugh: Yeah. Because most former presidents understand how difficult the job is. They understand that whoever is the next occupant doesn't need former presidents.

N. Rodgers: Nagging or making fun, or doing anything other than being silently supportive of them as a person.

J. Aughenbaugh: That's right.

N. Rodgers: Even if you're opposite what they believe in platform, they're still a person and they're still under an enormous stress. It's interesting when they do speak out because it is so rare.

J. Aughenbaugh: Yes.

N. Rodgers: Right now, if you were a DACA recipient, you're okay. You just have to make sure your two-year paperwork mark is filled out? You can continue to go to school, have your job, stay in the United States. What happened with the parents?

J. Aughenbaugh: Well, right now, with the parents, the Trump administration, if they had probably more money and more staff, could be deporting many more of them out of the country.

N. Rodgers: It's, at this point, a staffing and financial issue?

J. Aughenbaugh: Yes. Again, this was one of those times where, how Trump has treated the bureaucracy and how Trump has negotiated with Congress in regards to the budget has actually impacted his ability to probably affect the policy change that he's wanted.

N. Rodgers: I think that it must be very hard for Donald Trump to adjust to the idea, and he hasn't seemed to adjust to it yet, that being a CEO is very different than being the president. Just because you say you want something as the president, it doesn't make it happen. You're better off in that instance being Kim Kardashian, then you are being the president, if you want your word to just carry you through a thing. I think he's so used to being, I say a thing and somebody makes it happen. Then I think maybe it's been hard for him to adjust not only to the fact that you don't get to just say a thing and it magically happens, but also that the sheer volume of people that it takes to run something is large as the federal government. This goes to the idea too of, there are many people in this country and it's not just one side or the other of the political spectrum, but on both sides of the spectrum who would like to see a smaller more effective government. If you were going to have that, he would need to be not in any way arbitrary about which positions you didn't fail. You'd have to really sit down and focus on. If I want the work of DHS to get done, who do I absolutely have to have in those jobs? I'm not entirely sure that happened either.

J. Aughenbaugh: Oh, no.

N. Rodgers: It's to understanding that bureaucracy takes a long time, that's a year's long. I've been studying government documents and government stuff for 28 years, and I still discover agencies where I say, "What the heck is that?" Then I realize it's six people in this grouping that do this thing, and if they don't do this thing, then a bunch of other people can't do their jobs. If I've devoted that much time and effort to it, and I'm still behind, there is no way for.

J. Aughenbaugh: Somebody who's not been in government, who gets elected president is going to have a steep learning curve.

N. Rodgers: Yes.

J. Aughenbaugh: Yes.

N. Rodgers: Yes. I don't have sympathy for that because that's hard. That's really hard.

J. Aughenbaugh: There are a couple of phenomenon that your comment touches upon. One, people who become presidents who have not worked in government previously struggle with the fact that if they want to get major policy change written into law, they have to convince Congress to do it, and that's a difficult. Even if Congress was not polarized like it has been over the last 2-3 decades, that's still difficult. But then second, you talked about the bureaucracy. I've been studying public administration for a couple of decades now, and you and I have talked about this book before and I encourage readers to pick it up if you can. It's not a long book, and it's written by a pretty well-known former reporter, Michael Lewis. It's called the Fifth Risk. So much of the book is about the Trump administration's transition from the campaign to actually taking over the executive branch. Even my students, many of whom are public administration students, their concentration is public administration, are just mesmerized. They are just all odd by what they end up learning about the federal bureaucracy in that book. For instance, the Department of Commerce would seemingly be about trade.

N. Rodgers: There is so much under the commerce.

J. Aughenbaugh: But exactly Mia. For instance, the the National Weather Service is part of the Department of Commerce.

N. Rodgers: Weights and measures is part of commerce.

J. Aughenbaugh: Commerce.

N. Rodgers: Which has almost nothing to do with commerce now because we hardly ever sell anything by weights and measures, but the census is under commerce.

J. Aughenbaugh: Commerce department. I mean, and many of my students are like, "What the heck is the census." That's like, "well, hey, that's where we bought it." It made sense of one point, the federal government's largest loan program is actually in the Department of Agriculture.

N. Rodgers: People think it's Fannie Mae and Freddie Mac and, it's like housing and student loans. I'm like, "Oh, no, it's farm lands, it's farm subsidies."

J. Aughenbaugh: In small business. They're just like, "What the heck has that got to do? " The Department of Agriculture is the biggest lender in the United States. If my students who are interested in this stuff are just blown away. Imagine if you are somebody who's never worked in government before, and Donald Trump had never worked in government. All of a sudden, he becomes president, and he's getting in a daily briefing where somebody says, "Hey, Mr. President, what do we want to do about the Small Business Administration Loan program?" He's just like, "Oh, what? "

N. Rodgers: I think we should keep that. Sorry, that it's not really what I was asking. I mean, then there's the whole idea of competing interests, the entire government is competing interests.

J. Aughenbaugh: Yes.

N. Rodgers: The loans that are given in Ag aren't given in some other department. They're not given in energy, they are not given in whatever else, so you have to decide when the budget is in just about, will these people need a couple of trillion dollars so I'll just throw it their way? It's taking all of those competing interests into account and saying, "Well, I want to balance this with this, and I want to give a certain amount of energy loans, and a certain amount of Ag loans, and a certain amount. Then there's things in the constitution where it says, "Thou shall have a census", and it doesn't give any more information than that. It doesn't tell you how you're supposed to do it, how much it's supposed to cost, what information you're supposed to gather. So all of that's competing interests, and we saw earlier with the court case about whether to have the citizenship question.

J. Aughenbaugh: Citizen question.

N. Rodgers: There's huge competing interest in that. I'm not trying to be ugly because it's not just Donald Trump, every CEO is self-interested first. That's how you get to be a CEO.

J. Aughenbaugh: Because your job as CEO of a corporation is to make shareholders a whole bunch of money.

N. Rodgers: But I would say that it's to look after yourself first. How did you get to be CEO? You have to put your own personal interests before everybody else. He's used to doing that, so is Jeff Bezos, so was Steve Jobs, so was Lee Iacocca, if you want to go back at billion years. That's a thing that's natural to people who rise to that position. Then somebody says to them, "Oh, well, if you're president, you put yourself last because the American people have to come first." Talk about a gear shift. I would think it would be a really hard gear shift to make, and especially if the people you've hired around you are similar to you, their interests have a lot to do with their own personal achievement. I think that would also be difficult as well, and I think that's one of the reasons he's struggled with people who have long served in the government, whose worldview is "No, the people come first."

J. Aughenbaugh: We got to follow this process, which may not necessarily lead to the outcome, the end goal that you want. To your comment a few minutes ago of how people on both sides of the political aisle frequently struggled with this, I have students who are activists, progressive, liberal, and they want change now. Then I remind them, in this podcast where I go ahead and weird things up, complicate things. I'm like, "Okay, but you understand you have to go through this process", They're just like, "Yeah, but". I'm like, "Yeah, but there's no but here."

N. Rodgers: Because if we run on feelings only and yours is in the loudest voice in the room, are you going to appreciate being under someone else's worldview?

J. Aughenbaugh: You're drawing it.

N. Rodgers: The whole point of that is to protect the minority, is to protect the small shout a voice that saying, "No, my needs aren't being met." If you start deciding by the volume of the voice.

J. Aughenbaugh: Or the immediacy. I mean, the reason why the Administrative Procedures Act has this process that we've described in this episode is to avoid arbitrary and capricious behavior. You don't want to be subject to arbitrary and capricious behavior.

N. Rodgers: No, you don't.

J. Aughenbaugh: No.

N. Rodgers: Anybody who's ever been ruled by a toddler? Remember Mackenzie's toddler years where you were like, "Oh, at some point I'm going to be able to say no, and she's not going to burst into a screaming fit of tears and sobbing." You remember those days when you were like, "Give it to her, whatever it is, so she will stop screaming." You don't want to be ruled by a toddler. You want to be ruled by a person who has reason and who, whether you disagree with their argument or not, actually has an

argument and can say, "I don't want to see these kids thrown out of the United States." I will state openly for the record, I don't think it was their fault they were brought here and I think that they need to be given a path to citizenship in some way. I don't think that it should be just a magic wand, I think they should have a clean record. The things they have now, they should have a job or be in college. They should be productive members of society. But beyond that, I say, yes, we should come up with something. So if that really is the motivation, I'm in. I'm in with Donald Trump. I'm in with saying, if the way I have to force your hand is to scare the snot out of people and say, "In six months this is going away. Congress, you've got six months to fix it." Which is what I hope he would do. I would hope that they would say, "We've rescinded it, but we're giving Congress six months before we actually start throwing people out of the country to get together and figure something out." I would be totally behind that because I think that that's a good legal way to do it that gives everybody a voice at the table. No, I don't want somebody to just be able to say poof and then the next day, this ground that I've thought that I was standing on no longer exists because that scares me for groups like this group of people. But it also scares me for groups that aren't vulnerable but could be made vulnerable by someone's lunacy.

J. Aughenbaugh: Well, or another president just comes in and says, "I'm going to emphasize this instead of that in immigration policy." I mean, you could have a president comes in and says, "I'm going to go ahead and give a permit program for people with certain job skills that we don't have enough of in our native population but everybody else has to get deported."

N. Rodgers: Yeah, see, no, that would be terrible.

J. Aughenbaugh: But that's the basis of one of our visa programs. Do you have a job skill that this administration believes is important to our economy?

N. Rodgers: I don't mind if we have that up front. But if what we do two years later is say, no longer we need those skills. So you have to go away, now we're going to bring in people with a different set of skills.

J. Aughenbaugh: But again, under current immigration law, the authority to make those determinations, it rests with the executive branch and that can vary depending on who's in the White House.

N. Rodgers: Which is why we need the APA.

J. Aughenbaugh: Yeah, that's why we need the APA. Also maybe members of congress should get off their duffs and actually pass meaningful immigration law that says, "These are our priorities, by the way, in the 21st century." What worked in the 20th century doesn't seemingly work anymore in regards to immigration policy. So we might want to update this because nobody believes that immigration's going to go away as a policy problem.

N. Rodgers: Us not addressing it for 40 years is pretending that the world is not the place that it is now.

J. Aughenbaugh: It's the DREAMers, it's the DREAMers' parents. It's the acknowledgment that, hey, our borders might need to be addressed. I don't know if the wall is the appropriate way, but are we

concerned? But right now everybody's locked into their position, they're not coming to the table to negotiate. So we are left with, well, whoever wins the presidency gets to go ahead and decide the fate of, as in the case of DHS versus the University of California, 670,000 people. I don't know about you, but that's a lot of people.

N. Rodgers: Yeah, that's a lot of people. I'm not interested in us just arbitrarily doing something to those people. I would like there to be something that they understand and something that we understand, I don't know. I would like for us to not have that be arbitrary and capricious. It turns out me and John Roberts, we're right in there together in that sense.

J. Aughenbaugh: I have students where I don't know what to tell them because they're just like, "What do you think is going to happen?" I'm like, "I don't know." All I want to do is be able to go ahead and tell them, "Hey, guys, this is the law, this is the process, this is what you can expect." It touches upon another podcast episode that's going to be released either next week, in a couple weeks. We're at a point to where this is almost the definition of lawlessness. It will depend on who's president?

N. Rodgers: Yeah, now we need to stop that.

J. Aughenbaugh: I'm not comfortable with it.

N. Rodgers: I'm not comfortable with that either because it's so arbitrary it will change from president to president to president. We need to fix it.

J. Aughenbaugh: I understand that's the basis of so much of the modern administrative state, but as somebody who teaches it, I'm not comfortable with it.

N. Rodgers: Well, and not having predictability is bad for a society, it's just bad for us.

J. Aughenbaugh: Yes. I mean, the law should be able to, if you will, encourage reliance. Can you rely on what is the meaning of x? I know that sounds really boring.

N. Rodgers: Oh, man, you know what we sound like? We sound like old people, "You kids get off my lawn." We want predictability, we want reliance. But those values help everybody.

J. Aughenbaugh: But, Nia, think about all the students that we work with whose performance, whose ability to do good work is affected when other parts of their life they can't rely on, when they're not secure

N. Rodgers: Homeless students truly struggle in college to do anything because they're so stressed about finding a place to sleep that's safe.

J. Aughenbaugh: That they're worried about whether or not one of their family members is going to get deported. That's not good. We should aspire to be better as a society. I don't know what the answer is to the rather complicated large immigration problem but what's going on right now isn't good. Whether

or not John Roberts, in a narrow majority of the court, went ahead and slapped Donald Trump on the nose with the newspaper, that isn't the way to go ahead and run a significant federal government program, it just isn't.

N. Rodgers: Well, and it's not tenable. It's got to be handled at some point. You can only run so far before you've run around in a full circle. Well, normally we end on a happy note and we're not this time. Sorry, listeners, it's complicated, it's nuanced, it's hard. What we would encourage is that if you have commentary about this, make it to your senators, make it to your representatives. Try to reach out and say, "Hey, let's get working on this, this thing is important." It may not directly affect anybody in your life, but it probably indirectly does. So we would encourage you to get involved if you have feelings on this. Thank you so much for talking to me about this, Aughie.

J. Aughenbaugh: You're welcome. I'm glad we did.

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