

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.

Nia Rodgers: Hey, Aughie.

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

Nia Rodgers: I'm good. How are you?

John Aughenbaugh: Lovely. Thank you.

Nia Rodgers: Yay. When I'm president, there are lots of things I want to do.

John Aughenbaugh: We have discussed a few of those, yes

Nia Rodgers: Although in fairness to Mrs. Trump, she is doing magic things with the Rose Garden, apparently, which is fabulous. That was on my list, so I'm like, "Thank you. She just took that right off my list." I know they had lots of drainage issues and cords running everywhere, and people were going to break their necks, so good for her that she's fixing all of that.

John Aughenbaugh: Yes.

Nia Rodgers: Along those same lines, and it's two or three lines down from that on my list so they're not right there together, fix the Rose Garden and then pack the Supreme Court. But I do have that on my list.

John Aughenbaugh: Packing the Supreme Court is on your list?

Nia Rodgers: It is because I would like to figure out the best technique for doing that. What I'd like is a bunch of people who are neither extremely one side or extremely the other side to pack the court with. I want to pack the court with moderates, which I think is an unusual court-packing technique, is it not?

John Aughenbaugh: Yes. Historically, that would be a rather unusual use of court packing efforts.

Nia Rodgers: Wouldn't it be less likely to be opposed than some of the other efforts?

John Aughenbaugh: Yeah.

Nia Rodgers: If I said, "Hey, I'm going all for middle of the road, blend people who are very neutral and moderate, and eat oatmeal for breakfast every morning." I'm going for the Ben Bernankes of the legal world.

John Aughenbaugh: Listeners, if you don't know the Ben that she was referencing, he was the former chair of the Federal Reserve.

Nia Rodgers: Under the last financial crisis in which he ate oatmeal every day to keep himself from getting ulcers.

John Aughenbaugh: Yes. He liked to joke that he was a regular in all facets of his life.

Nia Rodgers: Did he say that? That's awesome. I would not be asking Supreme Court Justices about their regularity because that's creepy.

John Aughenbaugh: It's interesting you mentioned or expressed a desire for moderates on the court because as we discussed in our Summer of SCOTUS, the most recently completed Supreme Court term saw a little bit for everybody, some rulings for the liberal, some rulings for the conservatives, some rulings that were long overdue, some rulings where we were like, "Wow," and the most recent Gallup poll that was released the week that we are recording this episode-

Nia Rodgers: Although not the week you're hearing it, which is quite a number of weeks later. Sorry, we're taking a break.

John Aughenbaugh: We're taking a break. But nevertheless, the Supreme Court's public approval rating is the highest since 2009.

Nia Rodgers: Do you think that's J. Rob? That's what I'm going to call him from now on, just like he's my buddy.

John Aughenbaugh: Your talking about the Chief Justice John Roberts?

Nia Rodgers: That's right, J. Rob. Don't you think he'd like that? If I left a message on his answering machine, "J. Rob, good job with this last term in there, buddy."

John Aughenbaugh: Again, John Roberts strikes me more of the Ben Bernanke school of public persona. I'm not entirely sure he would go for a nickname, but I could be wrong. I could be wrong.

Nia Rodgers: I'm going to try it out on him when I'm president, see what his face does. Although he's poker faced, so I might not be able to tell him. It might be that later I get a message from one of his minions saying Chief Justice Roberts would prefer if you did not call him J. Rob.

John Aughenbaugh: No. He prefers Chief or Justice Roberts.

Nia Rodgers: Or Your Honor. Yes.

John Aughenbaugh: Yes. But to take a step back, what is court packing? Nia, your explanation of what you would want to do as president mirrors the, if you will, popular conception. That is when a president, or by extension, a president's political party tries to change the ideological makeup of the court.

Nia Rodgers: Wait, pause. I have a question. The reason you can do that is because nowhere in law is the number of Supreme Court Justices prescribed? There's nothing that says the magical number is nine, and nine shall be the number, and there should be no more and no less, which if you get that Monty Python reference, good for you. But there's nothing in law that says that, so I could have a Supreme Court of 216 people if I wanted to.

John Aughenbaugh: That is correct. There's nothing in the Constitution that prescribes a certain number, so we've had as few as five and we've had as many as 10.

Nia Rodgers: It's what the Senate will put up with, is that? If I said I'm about to pack the court with 200 people, the Senate would say, "No, we have other things to do." Even if they were on my side, they might say that?

John Aughenbaugh: This is an example of separate but shared powers. The United States Congress controls the number of Supreme Court Justices, and for that matter, the number of federal judgeships. The only court that is specifically mentioned in the US Constitution is the supreme court.

Nia Rodgers: So we could theoretically not have any other courts?

John Aughenbaugh: Yeah. That is correct.

Nia Rodgers: Although that'd be a heck of a system, wouldn't it?

John Aughenbaugh: Yes.

Nia Rodgers: On my first day as president, I shall say no more courts, and then see what happens.

John Aughenbaugh: If you convince congress to get rid of all of the other federal courts, you could make it happen.

Nia Rodgers: I'm not going to do that, that's silly.

John Aughenbaugh: Indeed, I understand it's a two-step process. Basically, in regards to the construction of the Federal Court System, congress passes a bill, both houses of congress have to do it, and then the president would have to sign it. In regards to nominating people to serve on the federal courts, it is a presidential power first with the advice and consent of the Senate. Basically, court packing exists when a political body has the ability to appoint judges to a court.

Nia Rodgers: Oh, political body, so it's not just the president?

John Aughenbaugh: Well, think about state courts. State courts have five different methods of selecting state judges, there are five different methods. One, which is very similar to the federal nomination system, you have a governor who nominates and a state senate usually who confirms. Then you have legislative driven selection processes like here in Virginia where the general assembly picks who are state judges. You have states who have nonpartisan election of judges. You have other states that have partisan election of judges, meaning that judges run for judicial positions as a member of a political party.

Nia Rodgers: On the ballot, there appears either an R or D or an I.

John Aughenbaugh: Yes.

Nia Rodgers: Or I suppose a G if you're the Green Party or L for libertarian. I don't know if those even make the list, but whichever the major parties are, I suppose you declare it.

John Aughenbaugh: It's either Democrat or Republican. Then the fifth method for state selection of judges, Nia, is known as the Missouri Plan. It is a nonpartisan system, theoretically nonpartisan. Basically, you have a commission that vets potential nominees and then gives a list to the governor, and the governor has to pick from that list. Whoever is picked then serves for a number of years, either 7-10, and then they run for what's known as a retention election. Do the voters want to retain that person?

Nia Rodgers: A vote of confidence, if you will.

John Aughenbaugh: Yeah. For instance, and you and I have discussed this in a previous podcast episode, you don't view it this way, but most scholars do. George Washington was our first president to pack the court because he got to pick all six justices as soon as he became president.

J. Aughenbaugh: Okay.

N. Rodgers: But I don't think that's packing the court because he had to fill the jobs. That's like saying he packed the federal government. No, he hired people because he was the first president. Scholars, I'm disagreeing with you guys. You're wrong and I'm right. Still there.

J. Aughenbaugh: Okay. But what's interesting about George Washington is, Washington never really considered ideology as much. He focused, according to most scholars, on other, shall we say, non-merit considerations. Washington took into account geographical representation, whether justices from the South, from the North, from what was then considered the West.

N. Rodgers: Which is about 10 feet West of Virginia, but yeah.

J. Aughenbaugh: Yeah. Washington also focused on personal connection. You had to remember George Washington before he was president, was well-known to most of the revolutionaries. He was known in the North, the South, the mid-Atlantic. He knew almost everybody. He frequently focused on personal

connections. But early on, we did have a court packing effort that fits your definition, Nia. That's what the federalists attempted to do in 1801.

N. Rodgers: This is the infamous Mr. Marbury?

J. Aughenbaugh: Yes.

N. Rodgers: Which, by the way, if you haven't listened to that episode, you should listen to that episode because many things were found out in that episode by me.

J. Aughenbaugh: Yes.

N. Rodgers: Whoa, this is a whole different.

J. Aughenbaugh: Yeah.

N. Rodgers: But that's the outgoing government attempting to pack,

J. Aughenbaugh: The judicial board.

N. Rodgers: Right, prior to the incoming government so that they could help push judicial rulings.

J. Aughenbaugh: That favored the federalists, if you will, policy preference.

N. Rodgers: Right. That's how I define packing. I agree with you. To me is the first episode. I don't think Washington hiring people is necessarily. I'm not sure how he would have picked people he didn't know. He also didn't live in a time where he could look at their Instagram and see what their life is like. Now, vetting people that you don't know is a lot easier. Back then, you had to ask people. What do you know about Aughie? Is he a good guy?

J. Aughenbaugh: We will get to that, Nia, because the selection process has become much more, shall we say, bureaucratic and institutionalized than what we saw early on in our country's history.

N. Rodgers: Okay.

J. Aughenbaugh: But the Federalist Party lost control of the Congress in the 1800 elections and they lost the presidency. But before the Constitution got amended, the new president didn't take office until March. You basically had from the beginning of November until the beginning of March to have some fun.

N. Rodgers: Is that one of the reasons that inauguration got moved up?

J. Aughenbaugh: Well, the inauguration got moved up in large part because it didn't take three months for a new president to get to Washington DC. You got to remember, even as late as when Abraham

Lincoln was elected as president, it took him a week of traveling on a train to get from Illinois to DC. Right?

N. Rodgers: Right.

J. Aughenbaugh: You think about the late 1700s, it's going to take you a while to get to DC from wherever you are living. Things moved slower. Now, you talked about the number of justices. [inaudible] is the number of justices not included in the Constitution. There aren't even the rudimentary, if you will, qualifications that we have for president or members of Congress. Right?

N. Rodgers: Right, because you have to be a certain age to be president. You have to be 35.

J. Aughenbaugh: Yes.

N. Rodgers: You have to be a natural born or naturalized citizen, and nobody knows what that means. Thank you for being vague Constitution, because that's the thing you want to be vague about. I think that's it. Isn't it like that's it for president? You don't have to have served in office before, you don't have to, whatever, but there are those basic. With congress, there's an age requirement.

J. Aughenbaugh: Age requirement, you have to be citizen, blah blah blah. Whereas for the Supreme Court, there's none of that.

N. Rodgers: Wait, so you can be a non-citizen of the United States and be a Supreme Court justice?

J. Aughenbaugh: There's no limit against it.

N. Rodgers: That opens up a lot of things for me. I'm just saying there's some interesting people in other countries that would be fun to have on our Supreme Court.

J. Aughenbaugh: Well, think about this, Nia. One of the best known Supreme Court justices of the 20th century was Felix Frankfurter. Felix Frankfurter wasn't born in United States. He was born in Austria. He didn't come to the United States until he was 10 or 12 years old.

N. Rodgers: That's awesome. I'm just saying that we could have had Nelson Mandela on the Supreme Court. There would be nothing to keep a peacemaker and a statesman from being on the court, except, of course, he would not have taken the job. But other than that, there's nothing that would have prevented him necessarily from being on court.

J. Aughenbaugh: That's right. Moreover, and this always blows the mind of my students, particularly in my courts and politics class, there is no requirement that you even have to be a lawyer.

N. Rodgers: Yeah. I know you've mentioned that to me before, and I find that stunning. I think that there should at least be the minimum of you should've had to pass the bar. I don't know that you necessarily should have had to go to law school because apparently Kim Kardashian is studying for the bar, but not

going to law school. She's doing as an apprentice, which is a way you can do that legally in California, which by the way, if you're wondering if that's legal, it is. She will never have gone to law school, but she may very well pass the bar. It seems to me that you should at least have to do that. If regular lawyers have to pass the bar to practice, one would think that Supreme Court justices would need to have passed the bar.

J. Aughenbaugh: Fair enough. But again, some of our most prominent Supreme Court justices either didn't go to law school. For instance, Hugo Black received a certificate of attendance from the University of Alabama Law School.

N. Rodgers: He got a constellation trophy. Well, you showed up. Excellent. So we don't know whether he passed anything or not, he got a certificate of attendance.

J. Aughenbaugh: He had to adjourn his studies because he came from a poor family in Alabama.

N. Rodgers: Oh, okay.

J. Aughenbaugh: Robert Jackson, who served in the Roosevelt administration, and another well-known Supreme Court justice of the mid 20th century, read the law. He did an apprenticeship then took the bar exam in state of New York, but he never went to law school.

N. Rodgers: I'm okay with not law school, but I think you should have to pass the bar, because I think there are basics of that you would need to know that the bar would test whether you know those basics or not.

J. Aughenbaugh: So what you end up having is, what scholars referred to as the myth of merit. The myth of merit. Because the constitution doesn't list requirements, what you end up having is 220 plus years of practice to figure out what we are looking for. So to give you an example, with the exception of Elena Kagan on the current Supreme Court, the other eight justices all had lower federal court experience, before they were nominated to be a Supreme Court justice. You could go ahead and argue that having experienced as a judge on a lower court would be a good thing for Supreme Court justice. But that's a recent, if you will, attribute that has been emphasized. Prior to the late 1960s and early 1970s, it was a regular occurrence that people nominated to the Supreme Court who never had judicial experience.

N. Rodgers: That seems weird to me. I know in part it's because I have only been alive during the time that you're talking about. I know people think I'm older than dinosaurs, but I am in fact not. In my lifetime, coming up through the ranks that experience is part of it and going to law school as part of it. Well, these things that they look at are basic the way you hire anybody. These are the qualifications and then these are the preferred qualifications which helps separate you from other people in the list. So it's fascinating. I didn't realize that Justice Kagan did not have, but she was an Attorney General, wasn't she?

J. Aughenbaugh: She was the Solicitor General in the Obama administration, she argued cases in front of the Supreme Court and she was Dean of Harvard Law School. By the way, being a law professor used to be a common pathway to get on to the Supreme Court.

N. Rodgers: I guess, because you're studying the philosophy and the theory of law.

J. Aughenbaugh: Well, in Europe, you're an administrator, it seems you have some experience in developing consensus. Hurting law school professors is like hurting basically all professors is like hurting cats. So if you can get them directed to a particular mission or purpose, that seems to be a good skill on a nine justice small group body, if you will. But again, you had politicians. I mean, Hugo Black's only judicial experience before he was nominated to the Supreme Court was he was a Night Court municipal judge in Alabama before he became a politician. President Franklin Roosevelt nominated him to be his first Supreme Court justice nominee in part because Hugo Black was his most fervent Southern Democratic supporter in the senate. It was political patronage, if you will.

N. Rodgers: I don't like that. I mean, I'm just saying. I'm not a fan of, "You are sycophant, so you get to be on the Supreme Court."

J. Aughenbaugh: But as scholars point out, merit as relates to nominating Supreme Court justices is like beauty. It's in the eye of the beholder. Because some president's focus on demographic considerations, you could plausibly argue have little to do with merit. So whether it was George Washington and other early presidents focusing on geographical representation. I mean, who's to say a lawyer from Kentucky is any good as a judge? But if we don't have anybody from what was then considered the Far West, well, we need somebody from Kentucky or Arkansas.

N. Rodgers: So go find me somebody who's not the worst person in the world and we'll stick him on the Supreme Court.

J. Aughenbaugh: Right. Religion.

N. Rodgers: Although we see now with geography that there's an effect because we saw that this summer with [inaudible] westerner and bringing a different perspective to that.

J. Aughenbaugh: That's right.

N. Rodgers: So there's something to be said for looking for qualified people from all over the nation.

J. Aughenbaugh: Well, in fact, one of the critiques of the current Supreme Court, and it's been a critique for a number of years, is that too many of the justices are from the East Coast. They all went to elite undergraduate schools and they all went to elite law schools.

N. Rodgers: Is that true of both left and right? Is that true of both conservative and liberal?

J. Aughenbaugh: Other considerations that were important historically, religion. We didn't get a non protestant on the Supreme Court until nearly the turn of the 20th century when Justice Edward White, I think, was from Louisiana, was our first non-protestant, he was a Catholic. Louis Brandeis was our first Jewish justice, and he was nominated in 1916. Interestingly enough today though Nia, we don't have any protestants on the Supreme Court that it's populated by Catholics and Jews. We have a very unusual court, but religion used to be an important consideration.

N. Rodgers: Well, it was also an important consideration in the presidency. I mean, you didn't see a non-Protestant Kennedy, right?

J. Aughenbaugh: Yes. Kennedy was our first non-Protestant president, and that was 1960, and it was a huge election issue.

N. Rodgers: Because people thought he was going to be a papist, that he's going to be controlled by the pope. Turns out, he wasn't controlled by anybody.

J. Aughenbaugh: Then you had race. Thurgood Marshall was nominated to the Supreme Court by Lyndon Johnson in the 1960s. He was our first African-American.

N. Rodgers: Yeah. Blows my mind that it was that far.

J. Aughenbaugh: It was that far.

N. Rodgers: Into the Supreme Court. Of course, it's further than that for women.

J. Aughenbaugh: That's right. Sandra Day O'Connor, 1981, nominated by Ronald Reagan. Then you have patronage, and I know you don't like this, but that was the dominant method well into the 20th century. You rewarded party loyalists into a certain extent that's still an important variable. I mean, the last time you had an explicit effort to reach across the ideological spectrum to nominate somebody to the Supreme Court was President Eisenhower when he nominated William Brennan. William Brennan was a New Jersey Democrat. But even that had, if you will, a political consideration. Eisenhower wanted to go ahead and firm up his support among Catholics and William Brennan was an Irish Catholic.

N. Rodgers: [inaudible] see my arms flailing.

J. Aughenbaugh: Yeah, she is like all kind of exercise right now.

N. Rodgers: It makes me bonkers. I love the federal government for the most part, I love the United States, I love the way we work most of the time as far as just how we should work, our ideological selves, not our actual selves, because we still have a lot of work to go on the realities. But the idea that you just give people positions because they gave you money or they hung out with you or they brought beer to the last party or whatever it is that you're rewarding, that makes me bonkers. When I look at somebody who's up for ambassador, and I'm not talking about ambassador of some place that I'm not all that anxious about invading us like Samoa. The ambassador of Samoa should be a chill person and it's

okay with me if it's a chill person who brought beer to the last party, like that, I'm okay with that. But the ambassador to China should not be because we were college roommates. That should be a person who has a history of studying China and understanding Chinese politics. That should be for Russia, that should be Judy [inaudible]. She should be our ambassador to Russia. Although I think she's teaching this fall, so she probably doesn't have time. But I'm saying that those people should be people who know the language, they've studied the history, they know about these places. Instead of they gave my campaign \$100,000 so I'm going to make them the ambassador to wherever, which turns into a hotspot because that's always what happens when you put somebody in that position who's a chuckle head, that's usually where the next war breaks out and then they're like, "Oh, man." Because now we got captain chuckle head over here trying to figure out what to do diplomacy-wise with people where he doesn't even speak the language or understand the culture. I'm done now. I just needed to get that out.

J. Aughenbaugh: Okay. I'm going to play devil's advocate in part because I love to play devil's advocate.

N. Rodgers: Yes, you do. But you're not going to win this time, darn it.

J. Aughenbaugh: Okay. But two, I just love to go ahead and blow your mind. One of the core values in any democratic regime is government responsiveness. If you want the government to be responsive to election outcomes, then those who are appointed to positions to run the government should be responsive to those who have won elections.

N. Rodgers: Okay.

J. Aughenbaugh: Yes, and patronage serves that purpose. I hear this all the time from people on both the left and the right on the ideological spectrum, the government is not responsive to the people. Well, one of the easiest ways to make sure the government is responsive is to practice more patronage, not less. Because the only way you can get a position is if you supported the winner in an election and if the winner in an election picks you to do a job and you don't do that job. Guess what happens? You lose your job and somebody else we put in that position who will do the bidding of the person who actually won an election chosen by the people. That's patronage.

N. Rodgers: If that's the definition of patronage, it's not a good idea.

J. Aughenbaugh: Okay.

N. Rodgers: I don't think you should be able to buy a government job. That's basically pimping out the government, and I'm not interested in that.

J. Aughenbaugh: Okay, that's fine. But again, there's the recognition here that we're talking about two different values. You're talking about the value of good government. You want people into positions where they actually know they have knowledge, skills, and abilities to do a particular government job.

N. Rodgers: I want that in any job.

J. Aughenbaugh: Okay, that's fine. But again, that's one value in a government. Another value, particularly in democratic regimes, is the government is responsive to the people, and the people have exhibited their, if you will, desires, through voting in elections. Now, if you want to go ahead and say that elections don't matter, then vote doesn't matter, and therefore, there can be all kinds of restrictions and limitations on the vote because you're basically gone ahead and arguing that it doesn't really matter what the people's will is in an election.

N. Rodgers: See, and I think you can thread this needle because I think that you can have an election. We're getting off-topic here and we're going to get back. But you can have a person who is elected and they get to pick people. I'm not saying they shouldn't get to pick people. I'm saying they should get to pick from a pool of people who are adequate to the position.

J. Aughenbaugh: But who gets to define the adequacy of the position? That actually does bring us back to this discussion of court packing. Because one of the critiques of court packing is you're not interested in "merit", you're interested in packing the court with people who are going to vote in cases, in ways that further your legacy as a president or further the ideals or policy preferences of your political party.

N. Rodgers: Not when I do it. When I do it, I'm going to go with people who know things, who know the law. I'm going to go with neutral or moderate people who can be expected to take reasonable positions and who can be expected to reasonably apply the law.

J. Aughenbaugh: Okay.

N. Rodgers: So there.

J. Aughenbaugh: But again, and I have this conversation with my students. Because they don't like patronage and they don't like the ideologically driven, if you will, process that has typically been used by Republican presidents, starting with Richard Nixon, but definitely continuing, or if you will, heightened by Reagan and Bush too, and Donald Trump basically outsourced the selection of federal judges to the Federalist Society. If judges met the review or analysis of the Federal Society, then he was going to go ahead and pick them, right?

N. Rodgers: Yes, he's got a list somewhere apparently.

J. Aughenbaugh: Democratic presidents, even Obama and Clinton were much more interested in patronage.

J. Aughenbaugh: Presidents of both parties go ahead and do this. You don't get on the radar of presidential administrations to be nominated as federal judge without demonstrating that you are either a solid democrat or solid liberal for a democratic president or a solid conservative or solid republican for republican presidents. But this all flows from how do you define merit or in your case, how do you define reasonable. You are reasonably competent at the job.

N. Rodgers: Well then, to take your argument, if I am elected president, you're trusting me to pick out what's reasonable.

J. Aughenbaugh: But again, this comes back to if you want to get rid of any elements of patronage or ideological preference or even focusing on democratic considerations. As I pointed out before, you can plausibly make the argument that just because somebody is from Arizona, doesn't necessarily mean they're going to be a good Supreme Court justice. They were just born, raised or living out West.

N. Rodgers: Right.

J. Aughenbaugh: Good for you.

N. Rodgers: I don't want to get rid of ideological standing. I want specifically neutral ideological standing.

J. Aughenbaugh: Okay. Well, good luck with that, Nia. Because what the history has showed is, you're not interested in packing the court, you want to go ahead and do what public administration scholars have been arguing since Woodrow Wilson in the late 1800s. You want, "Neutrally competent bureaucrats to do their job," which is fine. That's a value. But also understand that democratic, what I'm talking about here, is small d, not democratic party. But other democratic values are infused in the nomination and selection process for not only federal judges, but many government jobs.

N. Rodgers: I know, it's who you know.

J. Aughenbaugh: I mean, think about for instance.

N. Rodgers: It's money, its pressure, its influence.

J. Aughenbaugh: I point this out to my students, many of whom self-identify as liberals. They'll go ahead and say, "We need a more objective selection process for a Supreme Court justices. I'm like, "Okay." I said, "I'll ask for a show of hands. How many of you liked the Supreme Court led by Chief Justice Earl Warren?" Many of them raised their hand, because they know that under the leadership of Chief Justice Earl Warren, you got the civil rights revolution, you got the criminal rights revolution, blah, blah, blah. I'm like, "Okay. He didn't get the job necessarily because of merit, he got the job because of a political deal."

N. Rodgers: Right.

J. Aughenbaugh: They're all like, [inaudible] and I'm like, "But it was."

N. Rodgers: Because Johnson wanted to push those things through and [inaudible]

J. Aughenbaugh: No, it wasn't Johnson, it was Eisenhower. It was at the Republican National Convention in the 1952 presidential election. Eisenhower made a deal with Warren. You give up your delegates.

N. Rodgers: That's right. I'll put you on the Supreme Court.

J. Aughenbaugh: That was the deal that Earl Warren struck. The first vacancy was the chief justice position.

N. Rodgers: Which I feel certain, I know that you've said that Eisenhower regretted that deal.

J. Aughenbaugh: Yeah. He said his two biggest mistakes that he made as president were both serving on the Supreme Court. Earl Warren and William Brennan.

N. Rodgers: Well, at the time they thought that Warren was a conservative. He wasn't going to do all the stuff that he ended up doing.

J. Aughenbaugh: Yeah, right?

N. Rodgers: That's the other thing. See, that's the problem with patronage is, you think that this person is loyal and you think they're going to do your bidding or you think they're going to do along the lines of what you want. Then they turn into Earl Warren and you say, "What the what?" Because what is passed his not prologue to future in the sense that they might get on the court and go bananas and do something completely different than what you think should happen.

J. Aughenbaugh: That's why, and you've been seeing a lot of this, a lot of different proposals typically by democrats. But even some Republicans were just like, "We need to continue our efforts to pack the court with insert your favorite ideology." I'm like, "Hey, guys"

N. Rodgers: That doesn't work.

J. Aughenbaugh: It frequently doesn't work.

N. Rodgers: You know why?

J. Aughenbaugh: Yes. Justices have lifetime appointments and they could do whatever they want once they get on the court.

N. Rodgers: Exactly. Do you know when Justice Ginsburg's birthday is?

J. Aughenbaugh: No, I don't know when it is.

N. Rodgers: Yeah, me either. So neither one of us can take it away. Her birthday is coming no matter what. You know what I mean? Once you put somebody on the Supreme Court, they're like, "Knuckle crack. Okay. Let's get in here and do some stuff." What are you going to do to them? Unless they murder someone, unless they do something so egregious that they get impeached, which I know they can be impeached. Does that ever actually happen?

J. Aughenbaugh: One Supreme Court justice was impeached, but he was not found guilty.

N. Rodgers: Not a super common thing to happen. Once they're there, they can relax into their own personal, how they view the law and there's nothing, one person who appointed them can do about it.

J. Aughenbaugh: I discussed this with my students. The most infamous core packing plan was attempted by who?

N. Rodgers: FDR.

J. Aughenbaugh: Yes.

N. Rodgers: Because there had been won by what? Johnson or Jackson? One of a J Presidents?

J. Aughenbaugh: Andrew Jackson. Yes.

N. Rodgers: But it didn't go anywhere either?

J. Aughenbaugh: No, it didn't go anywhere either. In part, because he nominated. Even though the senate was controlled by the Democratic party, they thought so little about the quality of a couple of these nominees that they rejected them.

N. Rodgers: Okay. [inaudible] party. Do not let that guy in, thanks. You can go now.

J. Aughenbaugh: Yeah. FDR comes into office as President. With some regularity, the United States Supreme Court, a narrow majority struck down significant new deal legislation and it upset him. It upset him even more when he won re-election in 1936 by the then largest landslide in our presidential election history.

N. Rodgers: He clearly had a mandate from the people.

J. Aughenbaugh: Clearly had a mandate.

N. Rodgers: Whatever else one may say about FDR, he was beloved.

J. Aughenbaugh: Yes.

J. Aughenbaugh: He goes ahead and pitches a court packing plan and instead of just coming out and saying, "Hey, I want to go ahead and add people to the court because I'm tired of losing at the Supreme Court." He justifies it by saying that a few of the justices were too old and they couldn't do their work.

N. Rodgers: Right. Didn't he say they were over 70?

J. Aughenbaugh: Yes. His pitch to the United States Congress was for every justice over the age of 70. By the way, four of the five justices who consistently ruled against his New Deal legislation were over the age of 70, go figure. All of a sudden he would get four no new positions and what was a narrow losses would all of a sudden be very comfortable victories. That was the thought. The United States Congress, okay, sees through this, doesn't even vote on his court packing plan. Well, what does happen is

N. Rodgers: But was that a Republican controlled or Democratic controlled.

J. Aughenbaugh: It was overwhelmingly Democratic.

N. Rodgers: Okay, so he had the Congress and the Congress gave him side eye and said, "We don't think so."

J. Aughenbaugh: Yeah. But by the time he died, during his fourth term in office, FDR had nominated eight out of the nine.

N. Rodgers: Well, when you serve 12 and a half years, no 14.

J. Aughenbaugh: He was just starting his 14th year as president, but here's the cautionary bill.

N. Rodgers: At that point, you probably are going to [inaudible]

J. Aughenbaugh: But here's the cautionary tale. Even though the Supreme Court, by the early 1940's was routinely ruling in favor of legislation passed by the Congress at the behest of FDR, they quickly divided. You had two or three of his nominees who were hardcore progressive. Any thing that would promote civil rights, the common man, the underdog, will find something in the Constitution to support that. But then you had others like Jackson, like Felix Frankfurter, who were like, "Hey, wait a minute here. We didn't like an activist court when it ruled against the people's elected representatives. Why are we now acting as an activist court to rule against legislation at the state level, at the local government level, at the federal bureaucratic level? We should be restraint."

N. Rodgers: Well, and consistent.

J. Aughenbaugh: You end up seeing a divide there. But you should even take note of the fact that we have had Republican presidents who've nominated an overwhelming majority of the justices since Richard Nixon. I mean think about this, Jimmy Carter had no Supreme Court nominees because there were no vacancies. Bill Clinton had two. Barack Obama had two, potentially three when Scalia died, but the United States Senate didn't act on his nominee, so that's four people, four justices. The rest of them had been picked by the Republican presidents. As the Supreme Court become more conservative, since the Warren Court in that period of time, yes. But it should be even more conservative and they haven't been simply because some of the justices, when they got on the court, ended up voting in ways that conservatives can't stand. Harry Blackmun pick by Richard Nixon, writes the majority opinion and Roe v. Wade, giving women a right to choose. Sandra Day O'Connor picked by Ronald Reagan, ends up being the fifth vote, if you will, to maintain a woman's right to choose. She becomes the infamous swing

moderate vote on the Court. Anthony Kennedy picked by Ronald Reagan. He was a moderate conservative. Now David Souter, he ends up becoming the second coming of William Brennan, if you will, once he gets on the Supreme Court. John Roberts now is disappointing the conservatives, because he's operating in this institutionalist, let's not rock the boat, blah blah blah type of perspective, and the conservatives are like, "No, we want an activist conservative court." Some of the justices are like, "Yeah, hey, thanks for sharing, but I got lifetime tenure and I'll do whatever I want."

N. Rodgers: J Rob and company, they also have to consider where the nation is. There's the idea that there is some protection of the institution, but there's also national zeitgeist that has to be taken into account when either taking cases or dealing with cases or not taking cases. They've done an admirable job of not taking a gun's case yet again. Am I correct?

J. Aughenbaugh: Yes.

N. Rodgers: Because there is not clear

J. Aughenbaugh: Public opinion?

N. Rodgers: Thank you, that's the phrase I want. There's not clear public opinion. There's clear public opinion about certain things like not just get murdered in the streets. Like that everybody can agree on that. But how to achieve those things that's still being worked out. It seems to me at least a lot of times what the Supreme Court does is they say, "Wait a minute, let's just hold on for a little bit and see where public policy takes us, see where public opinion takes us before we jump in here and try to fix it."

J. Aughenbaugh: Nia your comment actually touches upon a body of literature that first started with a political scientist by the name of Robert Dahl, D-A-H-L. But those who study the courts, they've supported his conclusion.

J. Aughenbaugh: If you look at the supreme court, even though the Supreme Court has independence meaning they don't have to run for reelection to maintain their jobs, they have tenure, which frees them up to go ahead and issue unpopular rulings. The one branch of the federal government that has been probably the most congruent with public opinion throughout our country's history has been the court and it's a remarkable conclusion, again, for a body that doesn't have to really pay attention to public opinion.

N. Rodgers: They're not like Congress where they have to get re-elected every 10 minutes?

J. Aughenbaugh: Or a president hoping to win a second term. They don't have to. But they understand that probably their most significant power is not a hard power, it's a soft power, and that is its legitimacy. Because the willingness of the other political branches or the public to comply with Supreme Court rulings is if the public thinks that the court is acting in legitimate ways.

N. Rodgers: Well, it goes back to the poll you mentioned at the beginning of this episode. It's trust. If you trust that the Supreme Court is trying to look at things reasonably or if you don't want to use the

word reasonable, but trying to look at things in as much as they can objective manner, then you're more likely to trust the outcome and more likely to comply.

J. Aughenbaugh: If you don't think that the court is being too political or either side of the ideological spectrum, that usually generates higher public approval, by the way.

N. Rodgers: Hello, Congress. Take note of that. We like it when people are reasonable and work together and try to find moderate solutions. Hello. See how that works? See how their poll numbers are high and your poll numbers are dirt? There we go.

J. Aughenbaugh: It is rather remarkable. The difference in the public's approval of the Supreme Court compared to Congress and the presidency.

N. Rodgers: Yeah. In some cases people would rather get Ebola than vote positively for the Congress. I'm like, okay.

J. Aughenbaugh: I mean, at one Congress earlier this year was doing better compared to the president. But now Congress is back to its usual low teens public approval.

N. Rodgers: How do we even function as a country when our governing body, 90 percent of us don't like them?

J. Aughenbaugh: But the supreme court, in a in a part, you and I have talked about this before. One of the reasons why we just completed a summer of SCOTUS was to, if you will, get a better understanding of how the court does its work, etc. Many Americans don't understand that, right?

N. Rodgers: Right.

J. Aughenbaugh: It is a somewhat, well, comparatively a secretive federal government institution. The Supreme Court justices don't go on Instagram or they don't go ahead and issue tweets to go ahead and say, woohoo, we just announced this ruling and we stuck it to so and so. No, I don't do that.

N. Rodgers: No. Well, and when you ask them that in interviews and stuff, they usually try to avoid the appearance of political. Scalia aside.

J. Aughenbaugh: Well, Scalia or Ginsburg,.

N. Rodgers: They like to put their finger in people's eye but the rest of them have a very much a tendency to say, this was not a partisan decision. The decision here was made purely on constitutional or legal or statutory rules and here's my reasoning they go through their reasoning and very neutral terms, which I think we like those splashy figures. We like Scalia, we like Ginsburg, We like to splashy lens. But if they were all like that, our trust in them would deteriorate massively. Do you know what I mean?

J. Aughenbaugh: Yes.

N. Rodgers: We are only okay with that when we think yet, but the other seven aren't doing that. The other seven or chill and being okay, that's great. You all go out there and splash, but we're going to stay back here and gently dog paddle.

J. Aughenbaugh: Yeah, it's funny. A number of students who have taken me for multiple courses eventually dawns on them and they've remarked this. They're like Aughie, your two favorite institutions to study, the bureaucracy and the courts are comprised mainly of people who, one, don't like the spotlight, two, are extremely bland and boring, and three, would rather never to be heard or seen.

N. Rodgers: Yeah. I would add to that, who honestly deeply believe in the work. The vast majority of people in the bureaucracy and the vast majority of people on the courts believe in the work. If they didn't believe in the work, they wouldn't be there. Because it is not hugely, it's not highly rewarded financially. It's certainly not highly rewarded with public praise or accolade or anything like that. So you have to do it because you believe in it, because you're not getting a lot of [inaudible] in any other way.

J. Aughenbaugh: Yeah. You believe in the work you also believe in service. Think about this. What's going to go head and motivate you as a Supreme Court justice when you are serving, what is it? Clarence Thomas he's been on the court well over 20 years.

N. Rodgers: Is he longest right now?

J. Aughenbaugh: Yeah. He was appointed by Bush 41. John Roberts just finished 15 years as Chief Justice. That just blows my mind.

N. Rodgers: That can't be right.

J. Aughenbaugh: Okay. Ruth Bader, she's already had four or five bouts of cancer, anytime she misses an opinion, she basically knows that about half the country hates her and the other half of the country likes her. But even of that, half the like her probably haven't read the opinion.

N. Rodgers: Well, she constantly gets the crap about are you going to retire? Are you going to die? Are you going to do something like? Every day she's got to get up and think, but I'm doing the work I love.

J. Aughenbaugh: Yeah. Right?

N. Rodgers: Because otherwise, why would you roll out of bed? Why would you put in for that?

J. Aughenbaugh: We're talking about some really talented individuals.

N. Rodgers: Who could have made a lot of money doing something else?

J. Aughenbaugh: Think about this, John Roberts before he was nominated for the second time to serve on the DC Circuit Court of Appeals, was a member of the elite Supreme Court bar. He was pulling down easily. A half a million to three-quarters of a million dollars every year. Now, he's not making chump changes as Chief justice. He's pulling down almost 300 grand a year as a Chief Justice.

N. Rodgers: But nothing comparatively.

J. Aughenbaugh: In the private sector, okay. The due would be just rolling in the cash. Just rolling in it, you think about Elena Kagan.

N. Rodgers: Dean of Harvard Law School, she probably made what she's making as a Supreme Court Justice. But she was in control of that institution as opposed to one of nine.

J. Aughenbaugh: Yeah, one of nine. She basically knows that four or five of the other nine are going to rule against what she would probably prefer. These are people who service matters, the work matters. But once you get on the court packing, yeah, good luck with that. That's why I walk a fine line with my students. Because I want them to dream and I want them to go ahead in reform or institutions that they think need to be reformed. But whenever I hear them talking about court packing, I get this big old smirk on my face. Because the history of the Supreme Court, institutionally, the history of presidents trying to shape and mold the Supreme Court doesn't bode well for court packing in the future. I'm like, okay, thanks for sharing.

N. Rodgers: I'm just saying when I do it, it's going to be different. On that cackle of laughter, thank you for talking to me about this and when I'm ready to pack the court, do you want to be on it?

J. Aughenbaugh: Yeah, I guess, but that would mean that I won't get to be able to teach all my classes. I'm not entirely sure. I'll get back to you.

N. Rodgers: All right. Thanks. Aughie.

N. Rodgers: Bye Nia.

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