



Congress, the Filibuster, and the Constitution

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[00:00:00] Jeffrey Rosen: Hello friends. In honor, of the 234th anniversary of the ratification of the US constitution, the National Constitution Center has launched an exciting crowdfunding campaign. I'm thrilled to report that right now we have 554 donations from 48 states. The only states that are yet to join us in the cool embrace of constitutional reason are Oklahoma and Wyoming. So dear friends, if you are listening in Oklahoma or Wyoming, as I'm sure that some of you are, please give a donation of any amount, \$5 or \$10 or more. It is so urgently important that the National Constitution Center have participation from all 50 states in our glorious union.

[00:00:46] And in fact, if you are not in Oklahoma or Wyoming or have friends in those great states, please email, call or text them immediately and encourage them to donate so that we can reach our goal of participation from all 50 of the United States of America in the podcast of the National Constitution Center. And remember every dollar is matched. So please go to constitutioncenter.org/wethepeople, that's all one word, all lowercase. Now onto today's show.

[00:01:22] Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. Earlier this month, President Biden voice support for eliminating the filibuster in an effort to ease the path of voting rights legislation in Congress. Uh, Senators Joe Manchin, and Kyrsten Sinema opposed the change. And today on We the People we are going to examine the history and constitutionality of the filibuster. Joining us for this important conversation are two of America's leading experts in congressional power and practices and in the history and constitutional dimensions of the filibuster.

[00:02:15] Josh Chafetz, he's professor of law at the Georgetown University Law Center. He also served as a member of the American Political Science Association in presidential task force on congressional reform from 2019 to 2020. And he joined us for a great episode on the filibuster a few years ago. Josh, welcome back to the show.

[00:02:34] Josh Chafetz: Thank you so much for having me. It's a pleasure to be here.

[00:02:36] Jeffrey Rosen: And Jay Cost is the Gerald R. Ford Nonresident Senior Fellow at the American Enterprise Institute. His newest wonderful book is James Madison: America's First

Politician. Jay, I'm learning so much from your book and it's a pleasure to welcome you to We the People.

[00:02:53] Jay Cost: Thank you so much for having me. It's a real pleasure to be here.

[00:02:56] Jeffrey Rosen: Jay let's begin with you and James Madison. In expressing support for retaining the filibuster, Senator Joe Manchin, as he has in the past cited James Madison, to make his point. He said, "Madison said, 'The purpose of the Senate was first to protect the people against their rulers. Secondly, to protect the people against the transient impressions into which they themselves may be led and that the Senate serves as a necessary fence against such danger.'" Was Senator Manchin right to quote James Madison. And what would James Madison have made of the filibuster?

[00:03:31] Jay Cost: Wow, those are great questions. Madison is easily invoked, uh, but I would say his thinking is often more nuanced than you often will get from one or two quotes. And, and I would say that the James Madison of 1787, when the constitution was drafted, would have been vehemently, staunchly, implacably opposed to the filibuster because Madison detested the design of the Senate itself. Madison was at his heart, a majoritarian. And I'll, I'll elaborate on that in a moment. And the Senate is a fundamentally non-majoritarian institution.

[00:04:14] Madison as people who have encountered his recordings of the constitution convention know that it was really Madison more than anybody else who dragged the proceedings through July, the hot, awful sticky month of July on the proportionality versus equal representation in the Senate. And if Madison had known that the filibuster would be in the mix, I think he would've been even more opposed because he makes a point in those proceedings when he's talking about the Senate is how is it fair? How's it just? How's it Republicans, smaller Republican, for a minority in the Senate to essentially extract concessions from a majority, which is what he envisions the Senate would be able to do.

[00:05:02] So the Madison of 1787, I would say, no, unequivocally. The Madison of 1836 at the end of his life. I'm not sure. His political thought developed over the years. And I would say Madison also among many of the founders at the end of their lives retained an optimism about the American project and a belief that the American project had been successful. And I think that insofar as... I would say this, if, if Madison saw the filibuster as a tool for generating consensus, I think he would probably be more disposed to favor it as opposed to not. And so a lot of it gets down to what would he read about our current political situation? I mean, I doubt he would say everything's going fine. He would say it's dysfunctional, but it would depend on how he identified its dysfunctions.

[00:06:01] Jeffrey Rosen: Josh, do you agree with Jay's analysis of Madison's thought and what do you think James Madison would've made of the filibuster?

[00:06:07] Josh Chafetz: Um, yes, I think that's, uh, fantastic, uh, sort of exegesis of, of Madison's change over time. Um, and Jay knows, uh, far more about Madison, um, and, and his sort of life trajectory than, than I do. Um, you know, obviously there are sort of several, uh, important stages in Madison's evolution from sort of, uh, you know, Madison at the

constitutional convention, through Madison as a major participant in early partisan contestation, which clearly changes his thought in the 1790s to Madison, uh, actually having to sort of be, uh, you know, in power when he becomes president to sort of, uh, you know, post presidency Madison looking back on, on things. So there, there are a lot of stages, uh, in, in, in Madison and evolution. And I think, uh, Jay has, has captured them, them well.

[00:06:52] And I think he's also captured the, the sort of baseline fact that Madison did care about, um, simultaneously about majority rule and about a certain amount of sort of, uh, virtuous governance by, by, uh, one of the things he meant by wi- by that being, um, this idea that, that sort of, to the extent that consensus can be built. That's, that's a good thing.

[00:07:15] You know, I think, um, maybe later in the conversation, what you can talk more about the extent to which today's filibuster actually has much or anything to do with, with building consensus. Um, I guess the only thing I would add is that when we're talking about the sort of history of the Senate and talking about what the Constitution's drafters or ratifier thought about the Senate, it is also important to remember, uh, the 17th amendment. The Senate radically changes, um, in the 20th century. And there's a sort of evolutionary process where a lot of states in the, in the starting in the mid to late 19th century started having sort of non, non-binding elections for senators, but until the ratification of the 17th amendment, the, uh, formally the, the election of senators was placed in the state legislatures and that was central to the original design of the Senate.

[00:07:58] And so I think if we're talking about today's Senate, to whatever extent we do care about the, the views of people, uh, in the 18th century, we also need to care about the fact that, um, that there has been a radical alteration to, uh, how the Senate is composed since then. Uh, and that might sort of change their thinking and it might or might, might change our thinking about it. And it might sort of lessen our reliance on, uh, what people in the late 18th century thought they were, were designing.

[00:08:23] Jeffrey Rosen: Thank you so much for calling our attention to that important change in the nature of the Senate. And let's now move through the 19th and 20th centuries. The first recorded usage of the tactic dates back to the first session of the Senate 1790, when senators from Virginia and South Carolina, tried to use extended speeches to block a Senate vote that approved the temporary location of Congress in Philadelphia and scholars give Aaron Burr the credit as the father of the filibuster, uh, of, of all people, uh, because it was Burr who told the Senate in 1805, that it could eliminate a rule that automatically cut off floor debate. That was called the previous question motion, uh, cuz Burr thought it wasn't needed. It didn't didn't seem like a considered constitutional judgment. It just, that it wasn't necessary to be, to, to call the previous question and, and bring things to a vote.

[00:09:17] Uh, Jay, tell us about that history. Why did, uh, the Senate eliminate the previous question motion? And once it was up and running, how is the filibuster used in the 19th and early 20th centuries?

[00:09:30] Jay Cost: You know, the Senate, as it evolves over the course of the 19th century, at least the early half of the 19th century becomes the great forum for, um, debating, um, the wide

ranging debates. And I mean, that's really sort of the elimination of the previous rule question is what facilitates, um, the evolution of the Senate into really what we see of it today and where, and I think the key operating sort of essence of the Senate is if the House operates, the essence of the House is, you know, partisan centralized control through the rules committee and the speaker, the Senate on the other hand is organized by emphasizing the individuality of each Senator and allowing senators to speak at length is part and parcel of its identity.

[00:10:26] And, you know, it's interesting because when we look at the second party system, as it develops after Jackson's presidency, when we see the Senate being forum for the great debates of that time and senators would use their opportunity to speak at length. It's an interesting phenomenon. It's something that we sort of take for granted today, the power of, of debate in the Senate.

[00:10:52] Um, you know, nowadays with C-SPAN and the senators, frankly peacocking for, uh, the television cameras with, you know, pictures and one off lines, you know, the Senate was the venue by which people like Daniel Webster and Henry Clay could speak to the entire nation. Uh, Websters, for instance, his responses to Hayne were really designed, uh, for national audience because what happen is that newspapers would run his speeches at length. So this is how, you know, people like Webster and Clay basically become national celebrities.

[00:11:26] We do see, and, you know, the, the filibuster is in the 20th century becomes a, a tool of the, uh, segregation of south we, which makes sense from the perspective of the segregation of south being a minority in the face of, uh, the north and the west. But, you know, in the, in the latter half of the 19th century, we see an early sort of pointing towards that when the Republicans get total control of the government. And after the election of Benjamin Harrison is the first time in 15 years that they'd had the trifecta and the Republicans have this ambitious agenda. It's one reason why, you know, North Dakota, South Dakota are added to the union, cuz they're sort of trying to pad their position.

[00:12:14] Um, they also have the McKinley Tariff and then they have what the south derisively called the force bill, uh, from Henry Cabot Lodge senior. And it was the south that actually filibustered that and forced the Northern Republicans to basically bail on it because the session was running, uh, close to an end and the for the Northern Republicans, the tariff was more important, um, to them at the time. So we sort of see an early kind of illustration of the power of the filibuster to facilitate the maintenance of the segregated south.

[00:12:49] **Jeffrey Rosen:** Thanks so much for that. And for reminding us that the filibuster gained increase importance in the later 19th century with opposition to the force bill. Josh, what can you tell us about the 19th century history of the filibuster? Tell us about its etymology, which stems from a Dutch word involving pirating and also, uh, the different path the House took in the 19th century where it limited debate by establishing a rule that limited speakers to 60 minutes, uh, on the floor. Why did the House and Senate take different paths and uh, why did the filibuster gain importance in the later 19th century?

[00:13:30] **Josh Chafetz:** You know, I think it's worth starting with something that you mentioned, um, uh, a few you minutes ago, Jeff, which is the, um, the 1790 incident. And I think

what's interesting about what happens in 1790. So, so what happens there is the first Congress, as you mentioned, is, is debating, uh, where to locate the, the national capital. Um, and the House had voted to locate it in Philadelphia. The Senate refused by a vote of 13 to 11, uh, to locate in Philadelphia.

[00:13:56] Um, but one of the senators, uh, Samuel Johnson of North Carolina, uh, was actually so sick at the time. He had to be brought to the Senate in his bed, uh, in order to participate in this vote. Um, uh, and he's, uh, you know, 13 to 11, so he's the decisive vote. Two days later, the House takes up, uh, another resolution again, trying to locate it in Philadelphia. And what happens is essentially members of the House, uh, who don't wanna locate it in Philadelphia debate long into the night in order to allow Samuel National Johnson to attend the Senate debate the next day.

[00:14:27] So in other words, the first filibuster thing that we often refer to as the first filibuster, first of all, doesn't take place in the Senate. It takes place in the house of representatives. It is a temporary sort of one day delay of a vote. And the reason for the delay is actually a sort of pro majority rule reason, which is that a sort of nefarious majority in the House was trying to sort of take advantage of the illness of a Senator to try to sort of sneak the something through the Senate, right?

[00:14:53] Now, what I think is really sort of interesting and important about that is primarily that it takes place in the House. And that, that points our attention to the fact that actually for almost the entire 19th century, it was the House of representatives, not the Senate that was understood to be the most obstructive chamber. And if you're trying to think about structural reasons for that, you know, I think about the fact that it's, uh, sort of large it's, you know, larger institutions are harder to control. There's perhaps less comedy in them.

[00:15:17] So actually in, in 1884, at the end of the century, Richard Cook a Senator, uh, Democrat from Texas, uh, says on the Senate floor, uh, he says, "It is well known that bills are passed much more rapidly and with with much more facility through the Senate than through the House, on account of the difference in the constitution of the two bodies, the one small and compact and the other large and unwieldy."

[00:15:39] So the tradition that Jay was talking about of sort of unlimited robust debate in the Senate is very much there. That's, that's certainly true. Um, but it wasn't, uh, effectively as a tactic of sort of indefinite obstruction. In fact, um, when it does, when, when things, uh, do get filibustered in the Senate in a way that actually sort of results in killing the measure that's being considered like the force bill that Jay mentioned it's because, uh, you're dealing with something towards the very end of a Congress and basically they can run out the clock, but other than at the end of a Congress, basically in the Senate filibusters more or less led to, to sort of short delays, uh, rather than to bills actually dying, whereas in the House, it was widely understood, uh, that that bills were killed all the time by obstructive tactics.

[00:16:27] This begins to come to an end in the House at the very end of the 19th century. Um, first of all, with change in, uh, 1883, which is the rise of the House rules committee as, uh, essentially the gatekeeper to the House floor. Uh, and this is the, the way the House still works

today. That essentially, if you want to bring something to the floor, you get what's called a special rule passed by the House rules committee first. And that allows you to sort of set the agenda in any at the majority wants to, so that's a creature of the 1880s.

[00:16:56] Uh, and then in the 1890s, uh, you get, uh, the, the Reed rules named after Republican speaker Thomas Reed, who essentially, uh, the, the Democrats are trying to stall proceedings by, by depriving the chamber of a quorum. Um, uh, so that even though they're there, they refuse to vote. And under the rules at the time, that would mean the is no quorum and read basically rules from the chair. You know what? I can see you all in the chamber, I'm counting you for purposes of a quorum. Um, uh, and that allows business to go forward.

[00:17:23] And more generally Reed sort of lays down a principle that, um, uh, that as he says, sort of the object of a parliamentary body is action and not stop it of action, right? So he says anything that's being used simply to stop action has to be stopped, uh, uh, or can't be tolerated. And so, uh, after the sort of, uh, uh, rise of the rules committee, the, and the, and the Reed rules in the 1890s suddenly, uh, business becomes sort of much more easy to transact in the house of representatives.

[00:17:49] And it's really at that point that you get this idea, the, the, the rise of the idea that the Senate is the obstructive chamber, um, in part, because of the sort of rise of congressional business in the aftermath of the civil war, um, uh, and in part, because the House, all of a sudden in the 1890s becomes so much more efficient.

[00:18:05] Um, now that changes again in the 20th century, and we can, and, and, and perhaps we can, uh, talk about that in a few minutes. But I think, you know, what's, what's worth noting here is that if we're talking about the, the, the history of congressional obstruction as something that's sort of relevant to, to present day debates, um, it's not a continuous history, right? You can talk about the importance of unlimited debate in the Senate, in the 19th century, but that was used, uh, as Jay said, as sort of a, a mechanism of debate as a mechanism by which various prominent senators were laying their vision, uh, before the country.

[00:18:35] It was only very seldom used as a sort of purely obstructive tactic in the Senate. It really was frequently used as an obstructive tactic in the House. And that fact alone should give us pause in thinking about there being some sort of necessary reason why the Senate is the, the slower of the two chambers or some idea that there's a sort of unbroken tradition of obstructive tactics in the, in the Senate going all the way back.

[00:18:58] Jeffrey Rosen: All right, let's turn to the 20th century. 1917 is an important date in the history of the filibuster, uh, group of senators successfully filibuster, a bill allowing president will Wilson to arm us merchant ships and Wilson condemns the group as what he calls a little group of willful men. And based on this condemnation, uh, where he continues the Senate of the United States, the only legislative body in the world, which cannot act when a majority is ready for action.

[00:19:30] The Senate meets in special session on March 5th, 1917, and passes a new cloture rule known as Rule 22, uh, a compromise between those who want a simple majority to end

debate, and those who wanna retain the filibuster. And it requires two thirds of those voting in the Senate to invoke cloture. Jay, tell us more about that important watershed and what happened after that 1917 rule to the filibuster in the 20th century.

[00:20:03] Jay Cost: Yeah, that's a great question. I, it's interesting cuz Wilson himself in the 1880s, I think held the opposite view about the importance of debate. Um, so it's always sort of interesting, um, to see... You know, it's an interesting trap that it, we can fall into, uh, in politics when we're thinking about political questions. It's hard to separate procedural questions from the policy outcomes that we desire. And I think, but Wilson sort of flip flop is illustrative of that.

[00:20:37] Um, now I, I would also point out as well, um, that the rise in the Senate of the filibuster being more dilatory in nature, uh, intended to slow things down and corresponds to two changes. I mean, we had talked a moment ago about the 17th amendment. You know, the origins of the 17th amendment are really intended to clean out the corruption that had been festering within the Senate. And it, it had created a kind of, ideological homogeneity to many, to, to a great extent in the United States Senate where you have these Republican machine bosses in the north and these bourbon Democrat senators in the south who were basically committed, um, to the gold standard, for instance, and at least in the north, uh, protective tariffs.

[00:21:26] There's a number of times between, uh, the end of the Civil War and the Wilson-Gorman Tariff, where efforts to reform the tariff, get through the House, but they end up getting cut to shreds in the Senate. The 17th amendment by facilitating, uh, the popular election of senators begins the process of the tearing down these old time state machines, although it doesn't happen right away, the Pennsylvania machine lasts until 1930s, if you can believe that. Um, that, so, says one difference.

[00:21:58] And, and the other difference, which I think is interesting, um, that it happens during Wilson's era is we see the emergence of ideological politics that more closely scan, uh, to the current divide where, uh, particularly by the 19 teens, the Republican party is becoming more, um, at least in Congress' is less inclined to progressivism, progressive reforms. Um, and also isolationism is a important value within the Republican Party. And, you know, moving forward, we're gonna see, you know, Wilson in not all respects because of course you, it's a continuum, you know, Wilson to FDR, to LBJ.

[00:22:42] We see the sort of, kind of emergence of ideologically oriented parties as opposed to deep graphical parties, which is really what we have, um, in the 19th century, after the Civil War, you know, where the party lines are basically ethnic, uh, you know, Catholic, Protestant versus, you know, that would be one demarcation line and another would be north versus south. We begin to see an emergence of, of ideological politics and perhaps not coincidentally, when we see the Senate moving away from this idea of debate, seek, seeking consensus towards a more dilatory, uh, you know, uh, use in the filibuster. And of course, we see that most prominently, um, in the 20th century with the Southern efforts to gut civil rights enactments.

[00:23:32] Jeffrey Rosen: Many, thanks for that. And for reminding us of the evolution in Wilson's views and the evolution in the filibuster culminating in those Southern efforts in the 1960s. Josh take us from 1917 through the 1960s. Uh, and, um, what's your thought about why

Wilson changed his view and, and what was the significance of that 1917 Rule 22, uh, which required a two third vote for cloture?

[00:24:03] Josh Chafetz: First of all, it's, uh, worth noting that even the 1917 filibuster against the armed ship bill was only effective because it occurred at the very, very end, uh, of a Congress, right? And, and, and so that's the reason that this little group of willful men could, uh, you know, led by, by Robert LaFollette, could, could, uh, sort of hold the Senate, uh, floor, um, because Congress was coming to an end. Now what happens as soon as the new Congress reconvenes, in fact, so this happens on, you know, that filibuster happens on March 4th, 1917, right? So the la- basically the last day of a Congress.

[00:24:36] As soon as the next Congress reconvenes, they not only pass the armed ship bill, but then they also introduce this cloture rule. You know, I think in some sense you can see what happens in the Senate in 1917 as being a, a sort of parallel to what happens in the House, in the, in the, um, 1880s and 1890s, which is to say you have a chamber where, um, uh, over time obstructive tactics have sort of built and built. And at some point it becomes sufficiently intolerable to the majority that it sort of, that the majority sort of snaps back and takes away, uh, at least some of the mechanism of obstruction, right? So it happens in the 1880s and 1890s in the House. It happens in the 19 teens in the Senate.

[00:25:14] Uh, and then I think there's, you know, there's a sense in which this comes in sort of waves in both directions, right? So actually starting, you know, the House becomes more and more centralized from the 1880s to, to 1910. Uh, in 1910, um, uh, is so centralized that everybody basically treats, uh, Speaker Cannon as a sort of absolute dictator. Um, but at that point, there's a sort of cross partisan re revolt of progressives in, in both parties against the Cannon speakership. And the speaker starts to have a lot of power sort of taken away from him.

[00:25:43] Uh, and the House actually begins to devolve in terms of, uh, centralization of power for much of the 20th century. So from, uh, uh, starting in about 1910 through about 1970, the, um, uh, increasingly it's the, the chairs of committees in the House of representatives, uh, who have power, uh, that's being, that's been sort of drained from the speakership. In the Senate, what you have, uh, uh, again, is a sort of slight decrease power of individual senators as a result of the, the, the 1917 introduction of cloture.

[00:26:13] Um, but importantly, you know, cloture remains incredibly rare for, uh, much of the, the sort of early 20th century. Uh, as Jay mentioned, it's almost entirely, uh, used, uh, that, that is to say the filibuster is almost entirely, uh, used by, uh, Southern Democrats against civil rights measures as one sort of, uh, example of this it's worth noting that the, um, uh, even though Democrats didn't have, uh, a filibuster proof majority in Congress, uh, during, uh, the, the, uh, passage of the programs of the first new deal, uh, none of those, uh, major pieces of legislation actually required cloture, uh, because the Republicans didn't filibuster any of them, right?

[00:26:54] A filibuster just wasn't a, a routine thing in the Senate for much of the 20th century. It really was reserved for things about which, uh, so sort of minority of senators felt especially, uh, powerfully. And what that meant in practice was it was reserved for civil rights bills and voting rights bills almost exclusively until about the 1970s. And then that begins to change, uh, in the

'70s for a variety of reasons that, that we can get into. Um, but, you know, even once cloture is introduced in the early 20th century for much of the 20th century, it remains the case that the filibuster doesn't look like what it looks like today.

[00:27:28] It's not at that point, a sort of, um, you know, what you might describe today as the 60 vote Senate, the, the, the requirement that just almost any piece of legislation simply requires 60 votes to pass.

[00:27:42] Jeffrey Rosen: The National Constitution Center relies on support from listeners in all 50 of the United States to support constitutional education for Americans of all ages. Every dollar you give to support We the People will be doubled with a generous one to one match, thanks to the John Templeton foundation. We have participation right now in 48 of the 50 states and are looking for donations in particular from Oklahoma and Wyoming to reach our goal of participation in all 50 states. But of course, in any of the glorious 50 states, we would be so grateful for your participation and support for We the People and the meaningful work of the National Constitution Center. Please go to constitutioncenter.org/wethepeople. And thank you so much for your crucial support. Now back to the show.

[00:28:35] Many thanks for that. And thank you for introducing the final watershed date in our, uh, history of the filibuster. And that was 1975 when another rule change in the Senate, uh, to Rule 22, reduce the number of senators needed to invoke a cloture or end a filibuster to 60 members from the old requirement of two thirds, and also allowed a new two track legislative system allowed the Senate to conduct business without obstruction from a filibuster. So ended the old style speaking filibuster.

[00:29:09] Uh, Jay, tell us about those two crucial rules in 1975, why they happened and what their effect has been on Senate deliberation since 1975.

[00:29:19] Jay Cost: I think to Josh's point that after, you know, the, the tumult of the 1960s, there was a sense that the filibuster had been abused, that it had gummed up the works of the Senate, that the minority that was using it was very small. Um, so that explains both of the, both of these changes. It explains the reduction of the filibuster or the cloture rule from being, uh, two thirds to three fifths. So we go from, you know, reduces that from the original rule in 1917. But the two track system I think is, is probably the more significant development in the sense that, you know, it used to be, as, as you mentioned, Jeff, it used to be that if you wanted a filibuster, you had to hold the floor of the Senate, you and your colleagues had to hold the floor of the Senate.

[00:30:09] Um, and now they, now you don't have to do that. And, and I think that, that, if there is... I'm being speculative here, uh, but it it's, it's something that I've given a lot of thought to. I, I think that probably the greatest flaw of the filibuster right now, um, if it is still a useful mechanism, which, which I think it is, but the, the flaw now is that the minority that wishes to obstruct something doesn't have to pay a penalty. They can just, filibuster is just basically, there's a vote, and minority effectively filibusters by implication. They take a vote, they all go home.

[00:30:47] Whereas it used to be that if you wanted a filibuster, you and your fellows had to hold the floor indefinitely. Um, and I think that that's had a bad effect on the Senate for a couple reasons. One, as I mentioned, and I think this probably explains the spike in the use of filibusters, um, is that it's a cost free mechanism for the minority. The minority doesn't have to do anything really, except say we filibuster. Um, the other thing is that insofar as the filibuster could still be conducive to debate discussion, because you actually have to talk. Um, you know, a, a, a talk free filibuster doesn't do anything like that. So the filibuster goes...

[00:31:27] The filibuster today with this two track system, I really think violates the spirit of the original rule of talking, uh, being central to the identity of the Senate, um, and the, the sort of the collegiality of the Senate and its search for consensus. Um, you know, they don't even have to talk about things anymore. They just have to say I object. Um, and, and as Josh noted, uh, even in the last couple of sessions of Congress, it has been, if you track the number of times cloture has been invoked, it, it looks like an exponential graph.

[00:32:01] And you see this in other aspects of American politics. You know, you see, for instance, after the Supreme Court in *Buckley v. Valeo* sort of strikes down portions of the Federal Elections Campaign Act, you see the parties kind of feeling their way through different paths towards soft money. Um, and so even though soft money was allowed, it's really only by the 1990s that it gets used very aggressively. Um, and then the Bipartisan Campaign Reform Act, McCain Feingold strikes that down. The Supreme Court allows for the retention of independent expenditures. And you see the, the two, not so much parties anymore, but the coalition sort of figuring out that, oh, well, this can facilitate super PACs.

[00:32:47] And I, I think there's probably a parallel here where, um, the rules are sort of explored and poked around in and, and sort of angles are discovered. And, and so we get this sort of development relatively recently of this explosion of, of filibustering.

[00:33:06] **Jeffrey Rosen:** Thank you for describing what you aptly call an explosion of filibustering and the numbers bear out your observation. From 1917 through 1970, the Senate filed about one cloture petition a year. Between 1971 and 2006, the number rose to about 26 cloture petitions a year, and finally between 2007 and 2014, the numbers rose again to 80 cloture petitions a year. Uh, Josh obviously, as Jay says, the filibuster has been used much more ever since, uh, the elimination of the talking filibuster. What do you make of this rise of the use of the filibuster and how would you describe the effects of the post 1975 reforms?

[00:33:52] **Josh Chafetz:** Yeah, absolutely. I, I, so I agree with, with basically everything that Jay just said. The best way to describe the Senate today is as the 60 vote Senate, at least when it comes to legislation, which is to say that what the filibuster is, and, you know, this is something that Jay got at is no longer something about debate or talking or anything else. It is simply a requirement that for any piece of legislation, with a few exceptions, but with, for any piece of legislation, uh, to, to move forward, you need to have 60 votes.

[00:34:18] Um, and I think Jay is so absolutely right to identify the move to the two track system as a, as a sort of major, uh, culprit in this. Um, the, the political scientist, Greg Koger describes this as a move from, uh, attrition to cloture as the way of ending filibusters. It's also a great case

study in unintended consequences. So, so majority leader Mansfield, when he introduces the two track system, basically thinks this is a sort of good governance measure. He thinks look well, you know, there are a few things that are gonna get filibustered and rather than allow those things to tie up the Senate for weeks on end, we can just move them onto a second track, and then the Senate can get on with its bus- with its sort of less controversial business.

[00:34:57] Of course, the unintended consequence of that is that it lowers the cost of filibustering zero. Um, and I would just note that there's sort of two distinct costs to having to hold the floor that are, that are worth noting, right? One is the sort of obvious one, which is that it requires stamina, right? You know, if the majority wants to keep the Senate in session around the clock, then you basically you and your colleagues who, who support you have to hold the Senate, you have to stay on the floor around the clock talking, right?

[00:35:21] So there's the stamina point, but there's also the point that, um, uh, when you had to hold the floor, it meant no other Senate business could get through. So if you are filibustering for weeks or months, first of all, there's the possibility that, you know, we're in appropriation season and you might actually defund part or all of the government by simply making it impossible for the Senate to pass appropriations bills. But also, you know, somebody wants a, a post office in their state named, somebody wants a federal judge confirmed, and these may be your co partisans, right? And so, um, by holding the floor, you're really annoying, sort of all of your colleagues who can't get anything, even uncontroversial things through the Senate.

[00:36:00] Once you don't have to hold the floor filibuster anymore, both of those costs go away, right? It doesn't require the stamina and it doesn't hold up any business that other people care about. And so of, you know, it's just, it just, it, you know, in retrospect is obvious that that's going to then lead to a massive increase in use of the filibuster. And that's what we see today, right? I mean today, the number isn't just 80 or 90, uh, uh, bills a year it's it's, uh, cloture petitions a year it's hundreds. And, you know, we see this even, you know, with things that are gonna wind up passing almost overwhelmingly, it's still the case that very commonly, uh, unanimous consent will be denied.

[00:36:33] And therefore, it has to go through the cloture process, which not only requires 60 votes, but also slows things down significantly and decreases the, the sort of overall amount of work that the, that the Senate can do. Jay brought up campaign finance. I would also add increasing partisan polarization, which is related to campaign finance. I think it's also related to changes brought about in part by the Voting Rights Act of 1965 in, in terms of the ideological composition of the two parties. Um, but it is simply the case that it's, um, uh, when you have two ideologically polarized parties, it's harder to build cross partisan coalitions on a lot of issues. Uh, which also means that the filibuster becomes a, an attractive tool, uh, for the party in the minority.

[00:37:13] So you put all that together and you have a sort of perfect storm that leads to a situation where, where, um, that, because the cloture mechanism requires 60 votes, basically everything requires 60 votes right up until the point where that becomes completely intolerable to the majority, right? And this is a sort of, you know, recurring themes and things I've been

saying, right? You see it in the 1880s, 1890s in the House, you see it in the 1917 in the Senate, and then you see it in the, in the 21st century in the Senate as well where, um, the so-called nuclear option or constitutional option, depending on whether you dislike it or like it, uh, is invoked, uh, first in 2013 for all nominations, other than Supreme court nominations. And then in 2017 for Supreme court nominations as well.

[00:37:51] So at some point, the majority simply becomes unwilling to tolerate indefinite minority obstruction, and it clears the path and is probably where we're going next. But I suspect that the legislative filibuster is at least in its current form is not too long for this world, by which I mean sometime in the next decade or so, I wouldn't be surprised to see it, uh, to see it seriously reformed, um, for precisely the same reason, right? At some point minority obstruction simply becomes too overwhelming for majorities to, to put up with indefinitely.

[00:38:21] Jeffrey Rosen: Thank you so much for that. Uh, thanks to you, both for walking us through the 19th and 20th century history so thoughtfully, and that does indeed prepare us to address the crucial question today is the filibuster a good idea? Should it be reformed legislatively, and are there constitutional objections to it? Jay, you have written, uh, in a piece with Randy Barnett called Fix the Filibuster that whatever it's origins, the filibuster does a role in ensuring that minority interests are protected. Uh, but at the same time, you've argued for a reform of the filibuster, uh, ending it for appropriations bill. Tell us, uh, more about that really thoughtful argument. What, what role, if any, do you think the filibuster plays today and in what would, is, should it be reformed?

[00:39:16] Jay Cost: Well, I think to be clear, I would not defend the filibuster in its current form. I think one of the points that Randy and I really argue is that the filibuster in its current form has deranged so much of the legislative process. I mean, Josh pointed out some of that, but it, it also, because appropriate bills can be filibustered, you tend to see this brinksmanship and you get these omnibus or the continue, you know, what they call omnibus bills, the continuing re- you know, re- resolution omnibus bills really undermines in my opinion, the capacity of Congress to consider what it's doing carefully, when legislation is put into these massive bills.

[00:39:59] I mean, they're still they're stitched together from actual work by committees, but it's still... You know, the filibuster, I will say at the very least, the filibuster has undermined the regular process of budgeting and appropriating and authorizing existing programs, not talking about new programs or new debates, but things that are already in existence. And that in theory, there is consensus for at least in the broad brush strokes. That is a problem. The value of the filibuster as a tool for minority input into the government, um, is important for a couple of reasons.

[00:40:39] I would say from the perspective of the goal of the United States of America, the constitutional system, I think at its core is not really about majority rule as a good in and of itself. It is about majority rule as a way to achieve broad based consensus. I think that is really the sum total of the separation of powers. Madison's extended Republic, that the point of it is the facilitation of consensus. And I would defend the filibuster, even in its current form against an absence of any filibuster or dilatory tactics. Um, for conditional reasons, namely we have two

major political parties that have over the last 30 years only acquired the narrowest, slenderest of majorities, both of which are intent on enacting sweeping changes.

[00:41:37] Uh, the ideological base of both parties is not interested in consensus. Um, in my book, I talk about Madison's sort of view of politics as the facilitation of consensus, a way to drive consensus. I like to think about the American parties today, at least their activist wings, which in my judgment hold far too much sway. Uh, the activist wings of both parties hold way too much power over our political process. And I liken them to similar to, uh, Teddy Roosevelt's famous line before the 1912 Republican convention, "We stand at Armageddon and do battle for the Lord." uh, where the activist wings of both parties, um, see politics, not as the way in which consensus among diverse interests is discovered through a process of mutual compromise, but almost as a version of holy war.

[00:42:36] And I think we've seen again and again, over the last couple of years, a kind of holy war in Washington, DC, and the contempt that the two signs have for each other, and oftentimes their interest in using the political process, not just to enact their own agendas, but to destroy the other. Um, and I think the Senate has, for a variety of reasons, the Senate was more resistant to that through the '90s and probably the early 2000s. But I think the Senate has been infected with this illness as well.

[00:43:09] Um, and so I shiver at the idea of eliminating the Fili or not, because I think the filibuster is a good in and of itself or a good at all times in all places, but because in our current environment, without the filibuster, I worry about the prospect of narrow fleeting majorities enacting sweeping ideological changes. I think that is, uh, dangerous for the, the country regardless, you know, I'm on the, I'm a conservative and there's conservative things that I would wanna do that, you know, all else being equal, but you know, all else isn't equal when the country is, is divided, intensely, divided on things. Um, so you know, the idea that Randy and I were getting at in our article was the, of retaining the filibuster as a way to ensure that the minority. And again, it's, it's a majority within asterisk and a minority with an asterisks because what we have seen since the 1980, since the election of 1980 is a consistent, you know, regular, predictable, almost, flip, uh, in who controls the Senate.

[00:44:18] So one Senator can go from being a majority to... I mean, Mitch McConnell is a great example of that. He's flipped back and forth. He's been in the majority, he's been in the minority since he was first elected in 1986. You know, the idea though is facilitating the inclusion of the minority in the policy making process, but separating it from, in some way from the appropriations process so that the Senate can take care of its regular business, that the regular process of appropriating is not sort of rolled into this holy war of politics, but also Randy and I also advocated, uh, a talking filibuster.

[00:44:56] The minority should be made to pay a price for filibustering, that they should have to... Not just in terms of, you know, the stamina issue, but the country, knowing that they are holding up business in the Senate to prevent this action would actually, you know, they might have to pay a political price for their views of things. I think a talking filibuster would do that, but again, I, I, I, I prefer some mechanism in the Senate such that the more moderate elements of

the minority party get to play a continuing role in policy making as a way to moderate the ambitions of what I think are increasingly hyper ideological majorities.

[00:45:42] Jeffrey Rosen: Thank you so much for that. As you say in your book for Madison, the essential problem of government, it is the rule of self-interested passion over public spirited reason. And for Madison, the solution is a politics that force factions to argue, debate, broker and compromise with each other and for you, the filibuster, uh, imperfectly, but meaningfully today can promote compromise. Josh, what's your response to Jay's argument that the filibuster in some form can promote Madisonian compromise and deliberation, and you predicted that the filibuster would be reformed in some way over the next decade. In what ways do you think it will be reformed?

[00:46:26] Josh Chafetz: You know, I would start by saying, I think it would be, uh, a step in the right direction if, um, appropriations bills couldn't be filibustered that said, I, I also think it would be a, a, a highly unstable equilibrium. So one of the things we've seen, uh, in recent decades is a rise in what the political scientist, Barbara Sinclair called unorthodox law making. Uh, this is something that Jay, uh, gestured towards, right? The, um, uh, increasing use of omnibus bills, the increased and use of continuing resolutions.

[00:46:53] And I would add the increasing use of reconciliation, uh, bills as well, precisely because, uh, reconciliation bills, aren't subject to the filibuster, um, uh, in the case of, of omnibus appropriations bills, it's largely because, um, uh, even though they are currently subject to the filibuster, uh, the cost of defeating them is so high that, um, uh, that it's so sort of forces a certain amount of, of compromise. But that in itself comes with its own pathologies because you're sort of jamming everything into these large bills. I think to the extent that you create sort of more and more carve outs, uh, from the filibuster, it becomes increasingly unstable because you give, uh, the majority party increasing incentives to use those carve outs, right?

[00:47:31] So that's what we, we've seen, I think with the rise of reconciliation in the last, uh, couple of decades. A couple of, uh, just sort of other responses, you know, one thing that we haven't really talked about, but I think one pathology of the filibuster as a sort of purely obstructive mechanism is, uh, that it actually has inter branch implications, which is to say, I think it's at least to some extent responsible for an increase in power in the executive, uh, and in the courts, um, uh, and a corresponding decrease of power in Congress, which is to say, um, and we've seen this with presidents of both parties, um, that when something is held up due to a filibuster, they use that as a public rationale for doing things through, uh, a unilateral executive action, right?

[00:48:13] So this was president Obama's We Can't Wait Campaign, right? Where he talked, not just about the fact that things weren't getting through Congress, but he expressly used the fact that, well, these things aren't even being brought up for a vote in the Senate, right? So he was using the filibuster as a rhetorical play to make an argument for increased executive power, saw the same thing in the Trump administration. Um, and I think we've seen the same thing from courts in certain cases as well, where they say, well, you know, of course we, you know,

Congress, uh, is, is dysfunctional. We can't trust Congress to pass things. Uh, and so the courts then take for themselves as sort of freer hand in, in statutory interpretation.

[00:48:47] Um, uh, I think the filibuster sort of gives these other branches, uh, an excuse, a rationale to irrigate power to themselves. I also think on this point about the filibuster as an important mechanism of minority input, there is a sense in which it is a mechanism of minority input, but I would also add that our system has a lot of mechanisms of minority input, right?

[00:49:07] So if we're talking about the creation of a, a new law, right, so it needs to pass the house, it needs to pass the Senate. It needs to be signed into law by the president. Technically a presidential veto can be overridden, but that almost never happens. And then it needs to survive the courts, right? So there are four different institutions already whose approval is necessary for sort of statutory regime to come into play. Those institutions have different constituencies, right? So, uh, they have different electoral timelines. All of which means that unified government is really quite rare, right?

[00:49:42] So, um, uh, you know, you could talk about unified government in terms of control the house, the Senate and the presidency, even that is pretty rare. If you bring the courts into play, it's even rarer. And so these are all checkpoints that guarantee a fair amount of, of minority input into the, the legislative process. I think once you, uh, uh, sort of account for that, to then say that there's a case for adding yet another super majoritarian, uh, layer on top of that becomes somewhat weaker, right?

[00:50:10] The, the, the two parties have a lot of different purchases from which they can exercise power. Um, it's just not clear to me that giving a, you know, a minority of 41 senators the ability to prevent anything from becoming law is actually adding sort of a, a useful, additional incentive towards consensus. I'm also little bit more skeptical than Jay is that, that returning to the talking filibuster would actually accomplish much. And the reason for that is actually a reason that that Jay himself just gave, uh, which is, um, a sort of increase in not only partisanship, but, um, what we, we sometimes call negative partisanship. That is the, the idea that what we, uh, uh, really care about is stick it to the other guys.

[00:50:52] So, you know, I think if you had a minority on the floor, you know, doing a talking filibuster, uh, they might in a sort of hyper polarized partisan environment. This might actually be a really effective way of them playing, uh, to their own electorates, right? That is to say, um, it might well be that it's not a cost to them in holding up the Senate business, but rather that the Ted Cruz's of the world will, you know, are sort of able to fundraise off it, able to increase their own electoral base, increase their own national prominence, um, uh, simply by refusing to allow the Senate to do anything at all, right?

[00:51:25] So I'm not sure that moving to a talking filibuster in the current climate would actually have the salutary effects, uh, that, that Jay suggests, uh, if, if anything, it might even sort of point in the other direction. Overall I, I think that, you know, as I said, we have so many sort of choke points for actually creating change, uh, in our political climate. That to say that you need a super majority in one chamber strikes me as, as a bridge significantly too far. Um, the, one of the analogies that I like to use is, um, you know, if we had a, a sort of rule in determining

elections that, um, the incumbent was automatically reelected, unless the challenger got at least 60% of the vote, I think most of us would find that to be, uh, problematic. We would find it to be too status quo, uh, enhancing. We would think that it was putting too much of a thumb on the scale in favor of the status quo.

[00:52:16] In my mind, that's exactly what the current filibuster does, right? It says that the status quo endures, unless you can get 60% of the Senate, uh, to agree to change it. In my mind that there's, there's, there's simply a, not a sufficiently strong rationale for that. Um, and as I said, I, I, I think that we've seen the underpinnings of the filibuster beginning to crumble, both with the rise of reconciliation, but also with the use of the nuclear option for, for appointments. I would not be at all surprised at just as a predictive matter, uh, if sometime in the next decade, uh, we see it collapse entirely on the, or, or at least be significantly reformed on the legislation side.

[00:52:52] Now, what that would require is the same party to control the house and the, and the presidency, as well as the Senate. And it would require a big enough Senate majority that you could potentially afford to lose one or two of your own members, the sort of and cinemas of the world. Um, uh, but I don't think it's at all out of the question that one party or the other will have that at some point in the next decade. And we'll decide, uh, again, that sort of this indefinite minority obstructionism, uh, simply is ha- has become intolerable.

[00:53:18] Jeffrey Rosen: Thank you so much for that. Well, it's time for closing thoughts in this wonderful and illuminating conversation, Jay, uh, first to you please share with We the People listeners, whether and how you think that the filibuster should and might be reformed in the future.

[00:53:35] Jay Cost: Well, thank you so much for having me. It's been a great joy to participate in this conversation. Um, I, I guess I have a few thoughts. I think, um, to return to something Josh pointed out about, about choke points. I think so in the last 30 years, um, we've had, and this is just my scratch pad work, in the last 30 years, we've had divided government, uh, for 18 of those years and we've had unified government for 12 of those years. The Republicans have had four years of unified or excuse me, six years and six years of peace.

[00:54:06] So each party can expect to get at the trifecta once a decade or thereabout. And I, and I think that even though generally speaking the choke points, um, of our separated power system, um, do a good job and sort of render, you know, the, the minority has a role somewhere else. I think when you combine it with the hyper ideological nature of the parties, and also the idea of negative partisanship in those handful of years, where one party acquires the trifecta, the ideological extremists within that party, or maybe not extremists, but the most ideological activist within the party have said, you know, push, we have to make hay while the sun is shining, um, and push and push and push and go big and go big and go big, even if it's gonna facilitate our rebuke in the upcoming election.

[00:55:02] Um, and that is the moment where I think the filibuster is remains useful in some form. I think that overall my view of the filibuster is grounded in my disdain for the nature of party politics right now. Um, and I've said this again and again, I, I don't, I think the parties, both parties are dis functional at just about every level of operation. And the question and to my

mind is, do we want these parties actually being able to enact their ambitions? Is that good for the country's whole? As somebody who over the years has grown less ideological in his politics, it makes me nervous. Um, and I would say that for that reason, I like the filibuster or would keep the filibuster.

[00:55:48] I would say that whatever we do with respect to the filibuster, though, there is an enormous danger in not doing it through the process of compromise and consensus. And we haven't really talked about this, but you know, the Senate still on a day to day basis functions, um, on the principle of unanimous consent for many, many, many things. When the majority takes away minority rights, the minority threatens a rebuke or, well, we're gonna, we're gonna hit you back next time. And they really they're obliged to in many respects, otherwise the threat will be seen as non-credible.

[00:56:24] So we saw this with the, uh, elimination of the filibuster for appellate court nominations during Obama's era. You know, Mitch McConnell said, "We're gonna get you back for this," and, and they did. And, you know, if you eliminate the filibuster for, uh, in general, one side eliminating the filibuster for, um, everything, Mitch McConnell has promised what he calls a nuclear winter in the Senate, and you can envision that happening because the core of the Senate, I think the, the essence of the Senate is really Rule 19, right? The right of senators to speak is infused throughout the rules and understanding and ideas of the Senate and in its day to day basis.

[00:57:06] And if one sign changes Rule 22, the cloture rule on its own, then you know, that's gonna have downstream unpredictable effects throughout the Senate. Similar, I mean, similar to what we saw in the 1970s. So I think we should be careful, and I think we should be cautious. And I mean, I, it, this isn't gonna happen. Uh, but I would like to see the two sides come together and find some common ground. Like, what do you think that if you're in the... You don't know if you're in the majority, you don't know when, if you're in the minority, you're gonna probably be in, but both you want the majority to be able to enact public policy, but with meaningful input from the minority, what does that look like in an abstract level?

[00:57:51] And let's redesign the filibuster or redesign the rules of the Senate to facilitate minority input in those years that come and then, and go almost as soon as they come. What that looks like, I don't know. And again, I, I absolutely agree with Josh that the current filibuster is profoundly deranged, but I, I guess for me ultimately is our politics is now deranged. And I, I sh- I don't like the idea of one of these, frankly, what I think, or deranged, ideological coalitions, getting that much control over the machinery of the federal government.

[00:58:31] Jeffrey Rosen: Thank you very much for that. Josh, the last word in this great discussion is to you please share with We the People listeners, what you think the future of the filibuster, uh, should be and will be.

[00:58:43] Josh Chafetz: Uh, well, thank you so much. Uh, uh, Jeff and, and Jay, this has been a, a wonderful discussion. I'm really, um, uh, thrilled to have to have been able to participate in it. Um, I guess a, a couple thoughts. So one is, uh, Jays mentioned several times that without the filibuster, you would have the empowerment of the ideological extremes in the parties. I'm not

quite sure that's that's right, right. What you, I mean, the real question is who is the pivotal voter in the Senate? Is it the 51st vote or is it the 60th vote?

[00:59:11] So for example, um, you know, the filibuster doesn't apply to the Build Back Better bill, the reconciliation bill that's the Democrats have put forward. Um, and yet, uh, of course, as we all know, they've been unable thus far to pass through the Senate because even with the pivotal vote at 50 Democrats have exactly 50 senators and two of those senators are, are blocking at the, the contents of that bill, right? So it's still not going to be the, the sort of extreme wings of the party that's gonna be empowered. Now it depends, of course, on the size of the majority, right. If Democrats had 70 seats... Well, if Democrats had 70 seats that the filibuster wouldn't matter.

[00:59:44] If Democrats had 58 seats, right, then it wouldn't be Manchin and Sinema would be empowered. Someone else would be the sort of, uh, uh, uh, pivotal vote. Um, but that probably makes sense, right? You want the parties, uh, uh, to, to be empowered sort of, to the extent that they have more support from the American people, rather than less. You can see the same thing in 2017, right? Where, um, uh, Republicans, uh, were trying to repeal, uh, portions of the Affordable Care Act. Um, and again, trying to do it through reconciliation. So it didn't, the filibuster wasn't in play there.

[01:00:13] Um, they had a majority in the Senate, but they were unable to do it. Why? Because, uh, uh, a couple of pivotal Republican senators, uh, Lisa Murkowski, John McCain, uh, didn't want to do it. Um, so again, it's not, it's still going to be, um, in most situations, the most centrist members of the party in the majority, uh, who will be the pivotal voters, the issue is just, right, should it be the most centrist members of the party in the majority who are the pivotal voters, or should it be some of the party and the minority who are the pivotal voters?

[01:00:42] I will say, in terms of thinking about how the filibuster could be changed going forward. You know, I think Jay is right in some sense that, that it would be ideal if it could be some sort of consensus based reform. You know, one way to think about that might be through, uh, what you might call sunrise mechanisms, uh, which is to say, uh, try to create some kind of reform that wouldn't take that, that wouldn't take effect for say two or four years, right? So, um, uh, both parties would be operating behind a veil of ignorance as to whether they'd be, uh, in the majority or in the minority when they took effect.

[01:01:12] Um, and I should say, I don't think that, um, getting rid of the filibuster as its practice today requires either getting rid of cloture entirely or going to straight majority cloture. There are things like a declining filibuster or a suspension filibuster that is to say allowing the minority to delay things for a certain amount of time, but no longer, or, um, allowing cloture to be invoked with an increasingly small, uh, super majority over time until you get perhaps down to a bare majority, which would guarantee, um, uh, minority input, would guarantee robust debate, but would not allow indefinite minority obstruction. I think those would both be potentially sort of acceptable reforms.

[01:01:49] Again, what I think is, um, and perhaps things that both parties could agree to behind a, behind a veil of ignorance. Um, but I think what is, uh, sort of intolerable and just, again, as a

predictive matter long term will not be tolerated is to allow the minority party to obstruct indefinitely even when the majority party, you know, has, uh, control of the house, controlled the presidency, you know, a majority in the Senate, um, uh, nevertheless to allow, um, uh, 41 senators to, to prevent that party from enacting sort of important parts of the platform that it was elected on, I think, and at some point that becomes, uh, intolerable.

[01:02:24] And what we've seen again, repeatedly across the history of Congress in both chambers, is that when that happens, eventually the majority decides that it can no longer live with it and it, and it removes those obstructive tactics.

[01:02:36] Jeffrey Rosen: Thank you so much Jay Cost and Josh Chafetz for a superb discussion of the past, present and future of the legislative filibuster. Jay, Josh, thank you so much for joining.

[01:02:50] Josh Chafetz: Thank you.

[01:02:51] Jay Cost: Thanks for having me.

[01:02:55] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by Greg Scheckler. Research was provided by Kevin Closs, Ruben Aguirre, Sam Desai, and Lana Ulrich. Please rate, review and subscribe to We the People on Apple and recommend the show to friends, colleagues, or anyone who is eager for a weekly dose of constitutional illumination and debate. And remember that the National Constitution Center is a private nonprofit. We're in the middle of our crowdfunding campaign, and we are still looking for donations from Oklahoma and Wyoming in order to ensure representation from all 50 of the United States in our glorious union. It is so important that the National Constitution Center unite all 50 states to bask in the cool light of reason. So if you're from Oklahoma or Wyoming, or have a friend in one of states, please immediately email them and tell them to, uh, join our great crusade for constitutional education, and remember every dollar is doubled thanks to our great match. Thanks for listening and on behalf of the National Constitution Center, I'm Jeffrey Rosen.