



# WTH is going on with the filibuster? Why **Democrats' threat to abolish the legislative** filibuster is a danger to American democracy

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Danielle Pletka: Hi, I'm Danielle Pletka.

Marc Thiessen: I'm Marc Thiessen.

Danielle Pletka: Welcome to our podcast, "What the Hell Is Going On?" I bring a lot of enthusiasm to that question this week.

Marc Thiessen: I know you do.

Danielle Pletka: So Marc, what the hell is going on?

Marc Thiessen: Well, I'm going to go out on a limb and say that this will be perhaps our most important podcast that we have done. I think you'll agree. We are talking about something that is happening in the 2020 election that nobody is paying attention to, but that has the potential to change our country in such fundamental ways that we're not anticipating, that nobody's voting for, that nobody's expecting, and that is that the Democrats, if they get power, Joe Biden has said that he would be open to getting rid of the legislative filibuster in the Senate.

Marc Thiessen: First of all, with most people, when you say the word filibuster, they think "Mr. Smith Goes to Washington," the famous movie, right? The guy standing in the well of the Senate and speaking until he can't stand anymore. Or your eyes glaze over because it's some sort of arcane Senate procedure that nobody understands or cares about. This is literally what prevents us from being a one party state.

Marc Thiessen: There is a movement among the Democrats to get rid of the filibuster. Barack Obama has pushed for it. Harry Reid has got a group together pushing to lobby for getting rid of the filibuster. Joe Biden was against getting rid of the filibuster as recently as 2019. But now, he says that it depends on how "obstreperous" the Republicans are when he comes into office. Dany, what do you think?

Danielle Pletka: So I'll say this. I think that for most people, the filibuster is, first of all, it's when you talk too much and try and shut other people down. When you ask what it is as a tool in the United States Senate, their answer is, "Oh, that's when you want to stop people from doing stuff," and that's basically historically what the filibuster has been. I think what people fail to understand and what I will give the

Democrats full credit for very shrewdly understanding is just what the Senate could do, just what the Congress could do if in fact the filibuster disappears.

- Danielle Pletka: So everybody understands how the filibuster works. You need 60 votes to shut down debate and 60 votes is very hard to get, and because Congress has generally speaking now been divided into 50 something Democrats or 50 something Republicans. In other words, you got to get a couple of guys from the other side on your side. If it's gone, then you really only need your side. That means that if the House is a Democratic redoubt, and I don't think anybody has any doubt that the House will remain Democratic, and the Senate goes Democratic if Joe Biden is elected, and I think again, if you talk to people who are watching the polls, they're all pretty persuaded that if Joe Biden wins, then the Senate will go Democratic. Then what will happen is we will be in a one party state with no checks and balances.
- Marc Thiessen: Yes. So the Republican minority using the filibuster, the requirement for 60 votes, will literally be the only check on the unchecked power of the Democrats, controlling the House, the Senate and the White House, and then the Democrats want to get rid of that check. So as you said, they will have unchecked power. Now what could happen if they do that? Well, start, just basic stuff. Green New Deal, Medicare for All, \$11 trillion in spending they've proposed, all sorts of legislation that they can push through which they're campaigning on, right?
- Marc Thiessen: That's not the real problem, though that is a problem. The real problem is is that they could do much more fundamental things. So they've already talked about this, they threatened to "reform the Supreme Court" and add justices and change the ideological makeup.
- Marc Thiessen: They could pack the Senate. They could add four Democratic senators by admitting Puerto Rico and the District of Columbia into the United States Senate. Now, until I started digging into this, I thought, "Oh my gosh. Well, you have to have two-thirds of the states or something to admit a state." No. Just takes an act of Congress.
- Danielle Pletka: I think that that is what is sort of a black box to a lot of people. I think a lot of things that we think are in the constitution are in fact in the hands of the Congress. Again, on the one hand, I think you can agree to disagree. Look, I think the Green New Deal is a terrible idea. I think Medicare for All is a terrible idea. But I don't think that they are, and I do believe that they are radical ideas as well, but I don't think that they will necessarily change the shape of our republic. What I would-
- Marc Thiessen: I would disagree.
- Danielle Pletka: Right. I know you would. I know you would. I think people can agree to disagree. The point here is, well, first of all, on these pieces of legislation, without the filibuster, you can't temper them.
- Danielle Pletka: It's about this legislation passing without compromise, and those are bad things. But there are things that are much more fundamental, much more fundamental than Medicare for All, okay? You think it doesn't matter that there are nine

people on the Supreme Court. Do you think it matters that there are 100 senators? Or should we take Puerto Rico and the District of Columbia? Of course, we all know the only reason those two causes are of interest to Democrats is because they are in fact, highly Democratic locales.

Marc Thiessen: Well, the irony is they only need 50 votes to get rid of the filibuster. They don't even need their entire caucus. They just need, it depends on how many seats they gain in the election as to whether they can do it without this. This is one of these things, it's like a ticking time bomb in our democracy that nobody knows is there and nobody knows is happening. This is quite literally the most important issue in the 2020 election.

Marc Thiessen: Because look, if Joe Biden were going to get elected and we could be certain that the filibuster would remain in place and you could say, "Okay, that's not a threat to our democracy. The Republican minority will still have some rights. He'll have to compromise. He'll have to negotiate. Nancy Pelosi and Schumer will have to negotiate with Mitch McConnell." If we get rid of the filibuster, it's literally a one party state and they will change our country, not just by legislation on policy issues, but the structures of our democracy. Now, this is the irony is that they say that Donald Trump is this authoritarian threat to our country.

Marc Thiessen: The fact is, this is an authoritarian threat to our country. For better or for worse, Donald Trump has been checked by the institutions of our country. He's been checked by the courts. He's been checked by the Senate, and those checks will go away. Okay, maybe Joe Biden is a nicer, more genial guy, but we don't put our freedoms in the hand of geniality. We put our freedoms in the hands of the checks and balances of our system.

Danielle Pletka: Our institutions.

Marc Thiessen: And our institutions, and they literally plan to change our institutions in ways that are irreversible. When they say democracy is on the ballot, damn right, democracy is on the ballot. This is a threat to our democracy itself. Am I exaggerating?

Danielle Pletka: No, I really don't think you are. I want to read you a quote, Marc, that I saw in reference to this, because I thought it was the most apt warning that I've heard. "The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism." Now who said that? George Washington, who understood that in fact, those kinds of checks and balances and institutions is what keeps us a democracy, what keeps us a republic. So we've got Marty Gold with us. What a score.

Marc Thiessen: Somebody who literally knows more about how the Senate operates than possibly any human being on earth.

Danielle Pletka: He's really fantastic. Marty Gold is a partner with Capitol Counsel, LLC. He's got 40 years of legal experience, of legislative experience. He's not just a recognized authority, he really is the authority on legislative practice on congressional rules, on parliamentary strategy. He spent a long time working in the Senate. You guys

are going to love him.

Marc Thiessen: Well, Marty, thank you and welcome to the podcast.

Marty Gold: I'm very pleased to be here.

Marc Thiessen: So you are one of the preeminent experts on the United States Senate in Washington, D.C. Tell us, just very basic, what is the filibuster and why is it important?

Marty Gold: The filibuster is an opportunity for individual senators, for minority coalitions, for minority parties to influence legislation by making sure that it can use all the procedural rights available so that legislation cannot pass unless it has a 60-vote margin. So essentially, it's a range of procedural opportunities for minorities to put fingerprints on the legislative process, either to influence legislation or in some cases to block legislation.

Danielle Pletka: Marty, thank you for being with us. So the filibuster, I mean, it's not in the Constitution. I actually don't even remember the provenance of the word, but it hasn't always been a part of the Senate rules. Can you just sort of go back and tell us a little bit about its provenance, its history, and some of the changes that have happened with it over the years?

Marty Gold: You can date first filibuster in the Senate to 1841. 1841, there was a dispute over efforts by the Whig Party to create the Second Bank of the United States, and the Jacksonian Democrats in the Senate were opposed to it. The Whigs had a working majority. The Jacksonians wanted to stop it. The Jacksonians would not let the legislation pass because they talked it to death, and that was the first time that that tactic was really used in a major way in the Senate. By that time, the Senate had been in business for half a century. So filibusters were not something that really started in the Senate very early in its existence.

Marty Gold: But once the tactic was used and used to effect, then filibusters began to blossom through the rest of the 19th century and into the 20th century. But again, the first issues were economic. Later on, they dealt with reconstruction. Later on, they dealt with other matters, currency issues and things of that sort. So filibusters really started in the middle of the 19th century, worked into the early 20th century until finally the Senate decided that there needed to be some control over the filibuster and ability of senators to bring proceedings to a close if they could muster a super majority vote, and the cloture rule, which is the rule that helps you to stop filibusters came into effect in 1917.

Danielle Pletka: That cloture limit was 67 votes, right?

Marty Gold: That was 64. We didn't always have 100 senators, but it wasn't even that. It was two-thirds of the senators voting. So if all 96 senators voted, it was 64. If 90 senators voted, it would be 60, that type of thing. It wasn't a percentage of all the sworn senators. It was a percentage of all the senators who voted, which by the way, at that time was not always everybody because there were more absentees on Senate votes than there are today.

- Marc Thiessen: Then when did it change to 60 votes, which is the rule today?
- Marty Gold: It changed in 1975. The rule had been amended several times in the period between 1917 and 1975. Make cloture harder to get, it went up to two-thirds of all senators, back down to two-thirds present in voting. The breadth of what could be subject to the cloture rule changed and so forth. But there was always a tension in the Senate between people that wanted to liberalize the rule and people who wanted to keep the rule, and the great compromise occurred in 1975, which essentially was three-fifths of all the senators sworn. So with 100 senators sworn, that would be 60 votes, and if the vote is 59 to nothing, you don't get cloture. This has been the rule now for 45 years.
- Marc Thiessen: Have there been many instances where a single party has had both the White House, the House, and a 60-vote majority in the Senate?
- Marty Gold: It was very common, not so much in this century, but in the 20th century it was very common. When I first started working at the Senate back in the 1970s, we'll say, Democrats had very substantial majorities, well over 60 votes in the Senate and sometimes they also had the White House. That was clearly true during, for example, the Kennedy and Johnson administrations. It was also true during the Carter administration. The idea of having 60 vote majorities in the Senate, also having control of the House and the White House is a rare idea now, but it was a common idea years ago.
- Danielle Pletka: It's interesting because of course we don't think back then and think of that as the tyranny of the majority, but maybe that's just ignorance. Is it?
- Marty Gold: It's not ignorance because when I started working at the Senate in 1972, it was basically a four party Senate, not a two party Senate. There were what they called liberal Republicans and there were a big collection of those, and conservative Republicans, and liberal Democrats and conservative Democrats. There was not much party line voting then. The liberals in both parties worked with each other and the conservatives and both parties worked with each other, and coalitions would shift from issue to issue. The fact that you had 62 senators, 64 senators, even 68 senators I can remember on the Democratic side, did not mean it was a tyrannical majority, because in many, many cases that wasn't a real 60 vote majority because of the cross-party coalition switching.
- Marty Gold: The first time that I ever sat on the Senate floor was in 1977. We the Republicans opposed a bill for the public financing of congressional elections, a matter that was advanced by President Carter. The Democrats reported it out of committee. They had a 62-vote majority at that time. We filibustered it successfully in that period. It was 1977. We filibustered it successfully because of Democrats not voting on a party line basis and coming over and joining us and denying the 60 votes for cloture. The numbers were there, but the numbers are misleading because it was not 60 votes in a polarized Senate, it was 60 votes in a Senate with a lot of cross pollination between the parties.
- Marc Thiessen: In this modern hyper-partisan era, the last time that there was at least a 60 vote majority on paper was when Barack Obama was elected, right?

- Marty Gold: That's correct. Democrats started out off the election with 58. The Senator Arlen Specter switched parties, that made 59. There was a vote in Minnesota that was finally resolved in favor of Al Franken, that made 60. And they fundamentally had a 60 vote majority for six months, which was the last six months of 2009. Lost it in early 2010 in a special election in Massachusetts, and then they were back down to 59.
- Marc Thiessen: But of course, Ted Kennedy was sick for much of that time and not voting, so in practice, did they really ever have, for any extended period of time, the ability to overcome a filibuster?
- Marty Gold: They did because Ted Kennedy passed away in the summer of 2009, in August. And the governor of Massachusetts appointed Paul Kirk to fill the vacancy until there could be a special election, which was declared for 2010, January. The major legislation that they had to put through in that Congress, of course, was Obamacare. Obamacare came up in the autumn, and when it finally was taken up on the floor late November and through the month of December, Senator Kirk was sitting for Massachusetts and therefore they had an active 60 votes.
- Danielle Pletka: Let's talk about the use of the filibuster, because I think that when people talk about it now they basically view it as, well, as it was intended, which was a tool to slow down the passage of legislation, a tool to slow down the confirmation of candidates or stop it entirely, a tool to make the Senate in essence what the founders intended, which was a break on impetuous policymaking by the House. But if you went out and asked people in the street in Washington, because I don't think anywhere else anybody would know or care, but if you went out and asked people in the street, they would say that the filibuster is used to block and stymie policymaking, illegitimately. Barack Obama called it a relic of Jim Crow. Is that right? Is that what happened?
- Marty Gold: It's terribly wrong, and he knows better, in my opinion. He knows better. Let me say this. Filibuster was used in the '30s and '40s several times to block anti-lynching bills, in that sense a relic of Jim Crow. It was also used for a lot of other things. In the 1950s, the ability of the southerners to filibuster allowed for the watering down of civil rights legislation in 1957 and 1960, watered down so they didn't have to get cloture and break the filibuster because the presence of the filibuster was influence enough to cause the bill to be, in some fashion, diminished. But the 1964 Civil Rights Act and the 1965 Voting Rights Act were major pieces of strong legislation that passed because there was a bipartisan coalition on cloture.
- Marty Gold: Civil rights legislation, which was a celebrated matter in the context of the filibuster was by no means the only purpose for which the filibuster was used. The filibuster was used for a very broad array of purposes over time, and to say that it's a relic of the Jim Crow era is, in my opinion, a very big and a very bad distortion of this.
- Danielle Pletka: Has it evolved to be an illegitimate tool as some have suggested? After all, Marc reminded me the other day, Donald Trump wanted congressional Republicans to abolish the filibuster.

- Marc Thiessen: And they didn't.
- Danielle Pletka: And they didn't.
- Marty Gold: So he could build the wall. So he could build the wall, right?
- Danielle Pletka: Right.
- Marc Thiessen: Yep.
- Marty Gold: Let me give you an example here. The filibuster is used essentially for one of two purposes in broad terms. One is to influence the formation of legislation, the other is to block legislation. You have two very vivid examples of it in 2020. In 2020, we don't have to go back a long time, this year. If you go back to the CARES Act, which is the first big coronavirus legislation that passed in March, it should be remembered that the Democrats twice filibustered a motion to proceed to the consideration of that legislation. The legislation had essentially been written by Republicans. The Democrats blocked the motion to proceed to the consideration of the legislation twice. Did they want to deny the public coronavirus relief? I don't think so. What they wanted to do was to make sure the Democratic input was made in that bill. They wanted to put their own fingerprints on that bill. They had their own priorities that they wanted to see advanced, and they did it, they leveraged that into the bill by saying, "If you don't negotiate with us, we're not going to be seeing a coronavirus bill." They filibustered the bill, not to block it, but for the purpose of having input into the legislation, and they got those negotiations, and they got that input. After it happened, the legislation sailed through the Senate. That's one use of the filibuster.
- Marty Gold: The second use of the filibuster from 2020 is illustrated by Senator Tim Scott's policing reform legislation. Republicans wrote that bill. The Democrats decided that, for whatever reason, they didn't want to see the legislation move forward on the floor. So they used the filibuster and they blocked it outright. Sometimes that's what happens. Sometimes the minority rises up and it's unified and it just stops legislation because the majority doesn't have 60 votes, and sometimes the filibuster is used to influence the content of the legislation after which it passes. Believe me, those were two examples from 2020, there are hundreds more.
- Marc Thiessen: We had Senator Tim Scott on the podcast recently talking about that experience, and he offered them the opportunity to offer unlimited amendments. He offered to cosponsor amendments and vote for some of their amendments. He said, "Anything you want to do, if you want to influence the legislation and make it better, I'm open to it." And they just wouldn't let him go ahead.
- Marty Gold: They wouldn't let him go ahead, and there are going to be people who think that was a great miscarriage of justice. And there are going to be other people who think they did just the right thing. Where you stand on that issue tends to be on where you sit or also what may be said your attitude about the filibuster has a lot to do with who's doing the filibustering, because I could assure you that the people who are agitating today for filibuster reform will stop agitating if they remain in the minority after the election.

- Danielle Pletka: That's for sure.
- Marc Thiessen: That is for sure. But this idea that using the filibuster to block legislation outright, the Democrats, you mentioned police reform, they used it to block funding for the wall. Most recently, they filibustered the Republican's COVID relief bill because they just don't want anything to pass until the election because they don't want to do anything to help Trump. The same people who are now saying that Joe Biden, who for years, in 2005, opposed changing the filibuster in any way, now all of a sudden says, "Well, we'll look at it if the Republicans become obstreperous." The Democrats have been pretty obstreperous on those three issues. Is it a legitimate use of the filibuster to just block legislation?
- Marty Gold: I think it's a legitimate use of the filibuster just to block legislation if the legislation is, for whatever reason, too onerous. It could be too onerous for a lot of reasons, including the fact that perhaps it's just plain unsound. Any piece of legislation that's going to move forward to the floor and have at least a majority has got the support of the majority party, but that does not make it sound legislation. If it is controversial enough so that it's fundamentally unsound and you don't believe it's something that can be fixed with amendments and so forth, then of course it's a legitimate interest.
- Marty Gold: To give you an example, one of the things that could happen if the filibuster is taken away is the expansion of the Supreme Court and court-packing, reminiscent of Franklin Roosevelt's court-packing effort from 1937, which failed miserably in the Senate, but it could come back. You couldn't cure that by amendment. You couldn't, right? What if the bill said, "Well, we think there should be 13 justices." And you say, "No, just 11." Right? You couldn't cure it by amendment. So that's an example of something that you would just have to outright block.
- Marty Gold: Some things can be cured by amendment. Give you an example of it. In 2015, the Senate took up major education reform legislation. It came out of committee on a bipartisan basis, it came to the floor by unanimous consent. They had a week-long robust amendment process on the floor with more than 70 amendments considered. But at some point it was time to bring things to a close. Senator McConnell filed a cloture motion in order to bring things to a close, to get it finished. Senator Reid, who now is all for getting rid of the filibuster, took the floor and said to the bill manager, Lamar Alexander of Tennessee, he said, "We need more amendments. We need more amendments until my senators are protected." Those are his words. "Until my senators are protected, we're not going to have cloture successful tomorrow morning." Alexander said, "Well, we'll keep working on this."
- Marty Gold: The next morning, he made an announcement. They got a unanimous consent agreement for the consideration of additional amendments, at which point the vote for cloture was overwhelming. It's a good example of the minority on a major piece of education legislation that already had broad bipartisan support, deciding that they wanted an even more robust amendment process than they had gotten and using their procedural rights to get it. Anybody that just looks at this as a way of just blocking legislation is badly oversimplifying this topic.



- Marc Thiessen: You mentioned court-packing. What about Senate-packing, in the sense that if they got rid of the filibuster they could admit the District of Columbia and Puerto Rico as states with a simple majority, could they not?
- Marty Gold: They could absolutely do that. They could absolutely do that.
- Marc Thiessen: And that would give them four more democratic senators.
- Marty Gold: Four more democratic senators. Listen, by the way, when we talk about court packing, it's not just the Supreme Court, but how about the circuit courts, for example. Why not expand the size of the circuit courts, neutralize the effect of the Trump appointments that have been made over the last four years?
- Danielle Pletka: My mouth is hanging open. Literally, my God, we hadn't even thought about that.
- Marty Gold: There's more than that. You can't change the Electoral College without a constitutional amendment, but you can by statute change the size of the House of Representatives. Which the New York Times has twice editorialized in favor of doing. If you change the size of the House of Representatives, you will also change the numbers in the Electoral College. Presumably the New York Times is not saying that because they think it's going to work out for Republicans. So I'm only saying to you, when people look at the consequence of abolishing the filibuster, they think immediately of immigration legislation or the Green New Deal or gun legislation or whatever else may be somebody's hot button issue. And that's all legitimate by the way, that they should think about that.
- Marty Gold: It's not just the substance of the issues that people should think about. They should also think about the consequences of structural reform. The structural reform that comes from packing the courts, packing the Senate, changing the composition of the House of Representatives in order to influence the Electoral College. Because all of those things could be done by a simple statute. And if the filibuster is gone, the majority party, unified, speaking in its own echo chamber to itself can pass anything it pleases.
- Danielle Pletka: I guess I'm, you can hear I'm gibbering. For people like Marc and me who have been in Washington for a very long time and who consider themselves pretty well informed, I'm just gobsmacked that some of these things are simple procedural motions in the Senate. I had not realized that. So just could you explain for people who are even less immersed perhaps in this than we are, how does this work? What happens? How do you change the size of the Supreme Court? Is it just a bill? How about the other courts?
- Marty Gold: It's all a bill. The size of the Supreme Court was not set in the Constitution as nine people. Okay. The Constitution gives the Congress the ability to determine the size of the Supreme Court by legislation. And by legislation, the size of the Supreme Court has been set at nine for the last 150 years. But Congress could change that. I mean, as I said, Franklin Roosevelt tried to get Congress to do that in 1937. So Congress could at some point come in and say, "Well, we don't want it to be nine anymore. We'd like it to be 11 or like it could be 13," or any number they please. And if they can do that for the Supreme Court, they

obviously can also do that for circuit courts of appeals, because that's also set by statute. So, people think that these kinds of things are written into the Constitution and take constitutional amendments. There are some things that take constitutional amendments, like abolishing the Electoral College. But most of this can be done by statute.

- Danielle Pletka: Including the House issue where you can change the number of members? Can you explain how that works? What happens?
- Marty Gold: Well, look, the House of Representatives has been set at 435 since the 1920s. So if you think about what the American population was in the 1920s, every member of Congress represented X number of people. If the number of districts remains constant, but the population increases, then of course every district becomes larger. So the same thing that Congress did to limit the size of the House to 435 in the 1920s could be used today, pass a law and say that the house should be 500 people. They can do that, or any number they please. So, you can't abolish the Supreme Court without a constitutional amendment. Can't abolish Electoral College, I said that a couple of times without a constitutional amendment. But when you're talking about fine tuning sizes of the institutions, like how many representatives there should be, or how many justices there should be, you just pass a statute.
- Marc Thiessen: How does that affect the Electoral College? How could they-
- Marty Gold: The way it affects the Electoral College is this. The number of electors is equivalent to the number of representatives plus the number of senators plus three for the District of Columbia. So you have 435 representatives voting in the Congress and a hundred voting senators. That's 535 electors plus three voting for the District of Columbia. That's it. That's the Electoral College. So you're not going to change the number of senators unless you add DC and Puerto Rico. And if you do that, then it will be 104 senators. And that would make 539 electors.
- Marty Gold: But the bigger change in the Electoral College would come if you decided that the House of Representatives should be expanded to, I'm going to make up a number again, 500. Now, all of a sudden you have 65 additional congressional districts that are going to be sprinkled throughout the country. And when you sprinkle them out throughout the country, you're going to change the number of representatives from every state, which is going to change the number of electors in the electoral college from that state. So in every state, the number of electors is the two senators plus the number of representatives. You change the number of representatives, you change the number of electors.
- Danielle Pletka: And the assumption would be if one were doing this for partisan reasons, the assumption would be that those electors would be mostly from California and New York with, I guess an unfortunate few from Texas.
- Marty Gold: Yeah. I mean, again, the New York Times has twice editorialized on this and I don't believe they would be doing that as a neutral matter. So I think that ultimately they will write in their editorial and have written how certain Republican oriented constituencies would also benefit so it's not a purely one

sided thing. But I think if you take it in the aggregate, it is obviously intended to work in the Democratic advantage.

Danielle Pletka: The Democrats made sort of one of the first major changes to the filibuster that we've seen in recent years. And what was that?

Marty Gold: The change the Democrats made was in 2013. And what they did was to establish a precedent of the Senate, that overrode rules governing the filibuster on nominations. At that time, the rule said 60 votes was necessary not only to end filibusters on legislation, but also to end filibusters on nominations. And that's all nominations. Nominations for the courts and nominations for the executive branch. In 2013, Senator Reid, majority leader Reid, led Senate Democrats to establish a precedent that said, "From this time forward, notwithstanding what the rule says, the vote will just be a simple majority of senators voting for all nominations, executive and judicial, other than for the Supreme Court."

Danielle Pletka: And how did he get that done, given that he didn't have 60 votes?

Marty Gold: He got it done. He appealed the ruling of the chair. In other words, he made a point of order. Cloture vote had failed on an Obama traditional appointment. And Reid made a point of order that, "You really only need the majority of senators voting." The chair said, "No, that's not right. It takes 60. The rule says 60." Reid says, "I appeal the ruling of the chair. I appeal the ruling of the chair."

Marty Gold: So when you appeal the ruling of the chair, the question becomes, shall the judgment of the chair stand as the judgment of the Senate? It's a majority vote question. Well Reid had lined up the votes. So a simple bare majority, but nevertheless, a majority of the senators said, "No, it is not the judgment of the Senate. The judgment of the Senate is actually opposite," which is, Reid was right. It only takes the majority. And so in that moment, the rule was overwritten. The rule was not amended. The rule has never been amended. The rule to this day says 60 votes, but because of the precedent, which came later in time than the rule, it overrode the rule. So in 2013, Reid did that. And that ended a filibuster on nominations except for the Supreme Court filibuster on legislation that was left intact.

Marc Thiessen: And then when President Trump was elected and the Democrats tried to filibuster Neil Gorsuch, they extended it to the Supreme Court.

Marty Gold: That is correct. My personal opinion, and one can never prove this, but my personal opinion is that if Reid had not set the precedent back in 2013, McConnell would never have been able to set that precedent to block the filibuster on Gorsuch. And in fact would never have even attempted to do it. But because the door had been opened so widely back in 2013, Democrats who had changed the rules essentially, not amended them, but overruled them to block filibusters on all other nominations were now using the rule text to block Gorsuch. And that was inconsistent. And so therefore McConnell got a precedent established by the same mechanism that closed the loophole. And now there is no filibuster anymore on any nomination to any office. When Antonin Scalia passed away, Justice Scalia passed away, there was a vacancy on

the Supreme Court and it was coming into the last year of the Obama administration.

- Marty Gold: So President Obama appointed Judge Merrick Garland from the DC Circuit Court of Appeals, hoping to get Senate action on the Garland nomination before the end of the President's term. Senator McConnell, who was by that point, the Senate majority leader said, "We're not going to act on this nomination. We're not going to act on it. It's an election year. We're going to defer the matter to the election, the voters can decide whether they want a Republican president or a Democratic president, and we'll leave it to that president to make the appointment."
- Marty Gold: So he said there wouldn't be any action on the Garland nomination. He was reinforced by Senator Grassley, who was the Chairman of the Senate Judiciary Committee who said there will not be committee proceedings on Garland. And so nothing ever happened with that nomination. There were no committee proceedings, no hearings, nothing like that. And obviously because nothing happened in committee, nothing also happened on the floor. Thus, there was a vacancy that lasted through essentially all of 2016. And in 2017, only a few days after taking the oath of office, President Trump nominated Neil Gorsuch to fill the Scalia vacancy.
- Marc Thiessen: So let's say the Democrats do all of these worst case scenarios. They come in, they get rid of the filibuster, they do the standard stuff, pass the Green New Deal, Medicare for All, all these different programs. They also then "reform the Supreme Court," they call it "reform." They pack the Supreme Court and then they pack the Senate, keep the Senate for another few years because they added four senators. And then finally in 2024, the American people have had enough and they put the Republicans back in the majority in the Senate, they put a Republican president back in, could all this stuff be undone?
- Marty Gold: In the case of the Supreme Court, you're not going to be able to throw out of office a Justice that is sitting because of the packing, right? You appointed people, you confirmed people. So ultimately you could take the court back down to nine, but you're not going to take the court down to nine and throw people out of office without impeaching them.
- Marty Gold: So I say, yes, you could certainly pass a statute that says that as vacancies occur, they won't be filled, something like that. But you're not going to make the court immediately smaller, nor are you going to make the Senate smaller. You could go back and tinker with the size of the House of Representatives again. I think the best answer to this very good question is there are some things that it is legally possible to do, but the effect in the first place is going to be deferred. And in the second place may be politically impossible.
- Marc Thiessen: And then we saw how hard it was, the Republicans campaigned for years on repealing Obamacare. And they never did. They never were able to. I mean, this is the difference between the left and the right is that adding government programs is, it's a one way ratchet. It's very hard to take things away once you've given people a new entitlement. So even if technically Republicans could get rid of Medicare for All, they'd be taking healthcare away from people. And wouldn't

be very hard to undo these things?

- Marty Gold: Of course, it's hard to undo these things. How are you going to tell people these you're going to deny them the representation that they think they're now entitled to? Because the congressional districts have been changed, because they voted people into office as a result of the change, and so forth. In other words, it's very complicated. It's easy to just say, "Oh, we're going to repeal things," but sometimes, again, the effect has to be deferred, and in some times, the effect is politically extremely difficult.
- Danielle Pletka: It just sounds like this is the road to banana republic status for us, that we will have either a permanent tyranny of one party, or we will have a pendulum swinging back and forth wildly as each party tries to undo what the other party has done in the moment that they were in power. Am I wrong?
- Marty Gold: You're right. And it's that, plus one more thing. And the one more thing is, every party has their own priorities. So it may be the Democrats' priority to put in the Green New Deal. Republicans have some other priority. And, they get hold of the Congress in a way where they have the two Houses and a Republican president with no possibility of a filibuster in the Senate, and then they rammed through whatever legislation is their big priority. So in some case, it could be trying to undo the work of the other party, in some cases, it's just doing your own work. But you know, there's a really important point here. The filibuster does serve the constitutional purposes of the Senate. The Senate is supposed to be a check on the House of Representatives, it is not supposed to be a miniature House of Representatives.
- Marty Gold: Or, as James Madison talked about at the Constitutional Convention he said, "It is a necessary fence against the passions of the House." It's not a necessary fence against the passions of the House if you take away the procedural protection for the minority party so all of the majority party and a polarized institution has to do is talk to itself. So, having minority rights in the Senate, whether those are rights enjoyed by Republicans or by Democrats, serves the purpose of slowing things down. It is a break on radicalism and it tends to bring things back to the center. If you want to increase polarization in this country, which has already at alarming levels, getting rid of the filibuster is an outstanding way to do it.
- Marc Thiessen: Well, Republicans seem to understand that because they didn't get rid of the filibuster to build the wall. They didn't get rid of the filibuster to pass criminal justice reform. They didn't get rid of the filibuster to pass the COVID relief. They've kept this intact. And you know, it's funny, when you watched the Democratic Convention, the refrain from the Democrats is that democracy is on the ballot because Donald Trump is a unique threat to our democratic system. But this issue, which I don't understand, maybe because it's just so complicated, it hasn't gotten any traction with the public, really makes it the opposite. If Joe Biden is elected, Democrats take both Houses and eliminate the filibuster, we'll have a one-party state, is that overstating it?
- Marty Gold: It is not overstating it. You will have a one-party state that can do a lot of things before there is the check of an election. And the system is based on checks and balances. Not only the branches checking each other, but the Senate checking

the House, the House checking the Senate, and within the Senate itself, the minority checking the majority. Checks and balances are built into that system as a way of stabilizing the system. The more that you put stress against that, and you make it look like a one-party system, the more you're going to get the wild policy swings that we talked about before, and the more you're going to get extreme legislation that we talked about before, and the more you're going to get public alienation, so that whoever happens to be on the losing end of the stick at a given moment will be polarized and alienated on the system because they have very little ability to influence outcomes.

- Marty Gold: So today, if Biden were to come in, this could work for the Democrats. But it won't always. And then all of a sudden they are going to be the aggrieved party here. People need to keep a long view of this. I want to say something else. When the Gorsuch nomination was confirmed after McConnell used this device to establish a precedent. When that happened, the same day or the next day, there was a letter signed by 62 senators. Sixty-two senators. On a bipartisan basis, an equal number, basically, of Republicans and Democrats writing to Schumer and to McConnell and telling them, "We may have our differences about filibustering nominations, but we stand for the proposition that we should not touch the legislative filibuster."
- Marty Gold: Of those senators, 27 Democrats still are in the Senate. Twenty-five Republicans still are on the Senate. We're not talking about ancient history here. We're talking about 2017. In 2017, they felt it was to sign this letter that was led by Senator Collins of Maine and Senator Coons of Delaware, to the leadership saying, "Do not go further. Do not intrude on minority rights in the consideration of legislation." And now we're talking about something completely different.
- Marty Gold: So you'll have to ask yourself, "What has happened since 2017 that would cause that radical a change in opinion?" The consequences of it are immediate gratification for some people, and then they'd come to rue the day very much, I would say, as Senator Reid and the people that supported him in getting rid of the filibuster on nominations came to rue it almost instantly when all of a sudden they were in the minority and they couldn't block Trump nominees.
- Danielle Pletka: Marty, you've been amazing. I thought I knew a lot about how the Senate worked, and I, it turns out, didn't know anything and I'm willing to bet that a lot of people out there will be educated, but also horrified by what they've heard.
- Marc Thiessen: Once you get rid of the filibuster, is it gone forever?
- Marty Gold: Well, it's always possible, of course, to bring it back. You could always reverse the precedent that you would established to abolish it. But I think it's going to be exceptionally difficult to bring it back. There are instances in the Senate when procedural actions were taken that people, what leaders thought were imprudent, and they reversed them. But I believe that once the filibuster is abolished, it will never be revived.
- Danielle Pletka: And on that sad note we will say thank you very, very much. This was really awesome, I loved it.

- Marty Gold: You're very welcome.
- Marc Thiessen: So incredibly informative, thank you.
- Marc Thiessen: Dany, that was terrifying.
- Danielle Pletka: No, it was.
- Marc Thiessen: Wasn't it?
- Danielle Pletka: It was. I mean, I sounded like a kid in school who just was understanding how things could happen. I had no idea you could change the courts in that way. I understood you could change the Supreme Court, but I had no idea you could pack the House, you could pack the Supreme Court, you could pack the circuit courts.
- Marc Thiessen: And change the Electoral College.
- Danielle Pletka: Damn.
- Marc Thiessen: It's the Electoral College. So they could increase the influence of New York and California in the Electoral College, and affect the future of presidential elections. The danger of substantive fundamental change to our institutions is... What has happened to our country that we've come to this place? I mean, literally, this is legislating the cancel culture. That dissent will no longer be allowed. That the minority no longer will have rights. That the majority rules. That the tyranny of the majority that the Founding Fathers warned us about will now be unchecked. That if we don't like the way the courts rule, we'll add justices. If we don't like the way the Senate election is looking, we'll add senators. If we don't like the way the Electoral College is going, we'll increase the size of the House and do that. And if we don't like the fact that the president appointed all these judges, we'll just increase the size of the courts and undo everything.
- Danielle Pletka: Well, this is the road to perdition. And a Republican Senate could stop it because I think Mitch McConnell has the sense. I hope that Republicans are never in the place where they think that this is the right thing to do. Donald Trump was wrong to suggest it, Mitch McConnell was right to oppose him. And, I just hope that not everybody loses their mind. You get the feeling that you are in the midst of a maelstrom, of the unraveling of our country as we know it. And that is horrifying. And when I say that, I don't mean the signs on the lawns. I don't mean the demands for justice in the wake of George Floyd. I don't even mean the riots in our cities, as dreadful as they are. What I mean is that the sense of what the country has stood for, and the temperance that we have brought to governance. And the model that we have been to the world is on the edge of the precipice. What a nightmare.
- Marc Thiessen: Well, everybody gets to vote on it.
- Marc Thiessen: This is not inevitable. There is a choice. And, I have criticized Donald Trump many times in my columns and on this podcast. He seems to me to be the only

thing standing in the way of this right now, because-

Danielle Pletka: Or a Republican Senate would stand in the way of it if there were a Democratic president.

Marc Thiessen: But there's not going to be a Republican Senate and a Democrat president. It is not going to happen. You're absolutely right. But, look, I could see Trump winning and the Democrats taking control of the Senate. I could see Biden winning and Democrats taking control of the Senate. The one option that I don't see happening is Biden winning and Republicans keeping the Senate. If there's a wave to put Biden in, it's going to bring the Senate with it. So, democracy is on the ballot.

Danielle Pletka: Well, folks, you may agree, you may disagree, but one thing I hope we've helped you do today is at least walk into the voting booth or to the Post Office, as the case may be, with your eyes open and a clearer understanding of just what is on the ballot.

Danielle Pletka: Thanks for being with us.

Marc Thiessen: Thank you for having us.

Danielle Pletka: Send us questions if you have them. Complaints to Marc, and we'll see you next week.