

**Reforming Congress Project  
Sunwater Institute  
Interview with James Wallner**

**CHERVENAK:** James, thanks so much for joining us.

**WALLNER:** Thanks for having me.

**CHERVENAK:** Why don't we start with your background, where'd you come from, the arc of your career, and where you are now.

**WALLNER:** Well, let's go back to the beginning. I was born in Columbus, Georgia, a small town on the Chattahoochee River right on the Alabama border, directly across from Savannah. I grew up there. I went to the University of Georgia. I spent some time overseas. I lived in Scotland, where I got a master's degree from the University of Edinburgh in Scotland. I lived in the Middle East for a while, and I came back, and it was clear to me after talking to my parents that I needed to get a job, so I came to Washington, D.C., and found my way to Capitol Hill, and I enrolled in a doctorate program at the Catholic University of America in politics at the same time.

And I worked on Capitol Hill and I studied Capitol Hill in my doctorate program and then eventually I started teaching while I continued to work on Capitol Hill. I worked in the House and then in the Senate for a number of different Senators, so I spent the bulk of my career there. And then after leaving the Senate, I left to go to the Heritage Foundation, where I ran the research department there for a time, and then I'm currently at the R Street Institute, where I'm a senior fellow, where I get to close my office door to read and write and think about Congress and to think about our politics and our Constitution and our fabulous system of government. And then I also teach full-time at Clemson, I teach, Clemson University in South Carolina, I teach classes on Constitutional law, on Congress, and also an American national government.

**CHERVENAK:** So, let's talk about your kind of broad interest in the U.S. legislative system, anyway, so we can go into specific areas that might be of particular depth, but broadly speaking, like what is the thrust of your work when it comes to Congress?

**WALLNER:** Right. I mean I think most broadly I'm concerned with questions like, what does it take to make politics work in a democratic republic like ours, here in America? Where does that activity occur? Where does self-government occur? And how do people reconcile their differences and agree to compromise in the places where that occurs? And so I spent a lot of time thinking about the Constitution, thinking about the venues that were created in the Constitution, to make self-government possible in this country. I spend a lot of time thinking about the activity that groups engage in, that individuals that participate in, to make collective decisions, or our representatives on our behalf to adjudicate our concerns, and I spend a lot of time thinking about what really makes those bodies, those legislative bodies, and in particular

Congress and the House and the Senate, what makes those bodies work and what doesn't make them work, and what accounts for their current dysfunction that we see today?

**CHERVENAK:** So you spent time, you said, both in the House and the Senate. It looks like most of your work these days seems to be focused more on the Senate side. Can you talk about why you took that path and the area of your focus today?

**WALLNER:** Well I mean, the most basic answer is that I spent most of my career in the Senate, and so I was struggling with trying to understand the institution and also to reconcile this disconnect between the scholarship on the Senate and what was happening there before my eyes and what I experienced there. So I think that's the first answer.

The second answer is, I think the Senate right now is much more dysfunctional than the House is. I mean the House isn't doing incredibly well, but it's doing I think much more, it's doing much better than the Senate is currently in terms of its institutional health, at least in my opinion. And then lastly I think it's a lot easier to conceptualize or to identify the dynamics at play in democratic self-government and legislative assemblies in the Senate because it's easier to identify the individual members, the powers they have, how they operate, and the consequences of their decisions, of their actions. And it's a little bit easier I think to do that in the Senate. It's easier to trace the accountability, the chain of accountability, there than it is in the House, and it's also easier to envision a world where the Senate looks different because I think, and I've always said you gave me one or two Senators who are determined to win, to act, to achieve their goals in the institution, and I think the place changes overnight.

In the House it's a little bit different, it's a lot different, to be honest with you. And so for all of those reasons I've focused on the Senate. I also, I mean I'm a Southerner at heart. I have a deep sense of, or I'm a southerner of my birth as well, I have a deep sense of tradition, I have a deep sense of this kind of poetic history, this tragic history. The Senate is just a great institution for storytelling its rich cultural history, and it's just, to me I find it very interesting in a way that the House, while also interesting, doesn't quite rise to that level in my opinion.

**CHERVENAK:** So obviously the Senate and the House are different in a number of ways in terms of the number of individuals, in terms of the size of the constituency they're representing, there's clearly differences, but one of the key differences is obviously in the rules by which the chamber operates, right, and you've done a lot of work as it relates to the rules, the procedures that happen in the Senate. So can you, maybe we can start the discussion on the Senate a little bit through the lens of rules and procedures. What's your kind of high-level view on what are those rules and the procedures? Do they matter? Do they not matter? And we'll leave the filibuster for later, but just generally speaking, can you speak to how the rules work and procedure works in the Senate?

**WALLNER:** Right, if we take a step back and look at the House and Senate together, Article 1 Section 5, Clause 2 of the Constitution gives both the House and the Senate the authority to determine how they're going to operate. It doesn't give the Executive branch that the power, it

doesn't give the Judiciary that power, it gives the House and Senate that power. They can make their own rules, and they use that power to write their own rules. The House and Senate both have a set of rules. They go about it a little bit differently, and those rules are different. They look different based on kind of some institutional realities. The House has a lot of people in it.

I joke around and say the House has like 400,000 people in it. When you work in the Senate and you go over to the House, it feels like there's just a ton of people. There are 435 members in the House today. When you have that many people, you have to rely on rules written down in advance. It's much more rules-bound in terms of its deliberations the ability of individual members to take independent action is constrained because it needs to be by its very nature in a body that big.

In the Senate on the other hand, the rules, it's much more relational. It has some rules as well, but the body is much more relational. It's much more of a give and take in formal negotiations, working things out as they go. So let's take, again, we're still looking at the House and the Senate. Both bodies, what I find very interesting is, they don't really follow their rules very often, but again the ways in which they choose not to follow their rules I think speak to the differences between the two bodies.

So in the House you have the Rules Committee and you have these things called special rules, so when you have really controversial bills, major pieces of legislation, the House instead of following its rules will write a new rule, will write a new set of procedures in the Rules Committee, and then the whole House will adopt it, and then that will create a whole new set of rules that are written down that say, this is how we're going to operate on this particular bill for this particular debate.

The Senate does something very similar. It also never follows its rules, but unlike the House, because it's much more relational, it operates by what we call unanimous consent, where it just scraps its written rules and it replaces them with a new set of rules that maybe aren't always very well specified, but they're still a new set of rules for a particular debate, and it agrees to those rules by propounding unanimous consent request, which is a Senator just goes to the floor and says, I ask unanimous consent, and if no other Senator objects, then that creates a new set of rules for that particular debate.

And so the House and Senate are very similar in that regard, and they're very similar in the fact that they operate on a case-by-case basis and create new rules to do so, but I think the rules are absolutely critical, and I think this is one area where we've seen a huge sea change here in the last couple of decades, because the rules, what are they? I'm one of the only people I think that brings out Hannah Arendt, the political theorist, when talking about Congress, but she, channeling David Hume, is very specific when she talks about rules, and she says they're goalposts of reliability. They're islands of predictability. Political activity, legislative decision making, is inherently unpredictable, it's uncertain, and so you need rules so that you can have a better understanding of how things are going to unfold. And in addition to that, or if you look at this, rules aren't they're not restraints. They don't restrain individuals. They don't limit what

they can do. I mean, I think the better way to look at rules is they're a source of power. They empower legislators. If you're a Senator, having rules gives you a set of leverage. It gives you leverage that you can then use to influence negotiations every unanimous consent request. You can point to rules that the Senate has and say, if you don't work with me on X, then I'm going to do Y, and the other Senators can say, well I can see that you're going to do Y because the rules say you can do it and I believe that you're going to do it, so therefore I'm going to negotiate with you so that we don't have to go through this whole process, let's just cut to the chase.

And that's how these unanimous consent requests are ultimately put together, and, but Senators need to understand that the rules empower them, and they need to use them to empower themselves and to force themselves into these negotiations so that they can try to win more of what they and their constituents want inside the Senate.

**CHERVENAK:** So in the Senate, you have this concept of unanimous consent, which I'm assuming is mostly procedural in nature, right, I mean ultimately they have to vote, so there's this one decision which is of kind of a voting decision, right. The other side you have this decision to have unanimous consent, right, these are kind of two decision points, and then in between is where I would assume a lot more of the written or even unwritten rules of the chamber exist. Where do these written or unwritten rules that are between unanimous consent and the actual vote, where do they play out? Where do they become important? And obviously they have some kind of a distributive impact on power within the chamber, or maybe they don't, I don't know. How does that play out in the actual Senate?

**WALLNER:** Well the thing about the Senate is that all Senators are equal, more or less. The rules kind of empower them all the same way, and I, we can characterize different procedural authorities in the Senate. You have the Constitution, it empowers the Senate to create its own rules. They use that power to write a set of standing rules. There are 44 standing rules. They total about 70 pages in length. They're pretty general, things like the cloture rule to end a filibuster, this is Rule 22. But the Senate doesn't really follow these rules, hardly ever, and, but you have these general standing rules.

Then you have what we call statutory rules, and these are things like the budget reconciliation process. The Congressional Budget Act established this set of procedures, you have the fast-track authority for trade bills, you have lots of different legislative measures that create a new set of procedures that come from, again, that same Constitutional authority in Article 1, Section 5, Clause 2. You then have precedents. Precedents are simply a collection of principles that are derived from what the Senate did in the past, right, so the standing rules are kind of general in nature and they're only 70 pages long. The precedents, there's like more than a million of them, and they total like over a thousand pages.

And essentially what happens is in theory when the rules are vague, when there's something that's not clear about how the rules should be applied in a particular instance, Senators will look to what the Senate has done in the past in similar situations and say, well we are going to follow that precedent, and we are going to operate in that way, and so that's how precedents

operate, and they generally structure the Senate's decisions. And then lastly you have these things called standing orders, which are basically precedents that you write down in a form of a resolution, and a unanimous consent request is simply a standing order that's not written down. It's just something you propound on the floor. The thing to keep in mind is these all have this same authority behind them because they all stem from the Senate's Constitutional authority to make rules. They're all equally binding insofar as the Senate chooses to be bound by them.

**CHERVENAK:** So in this whole process, what's the role of the parliamentarian, because I've heard various stories about the power of the parliamentarian in the Senate. What's ultimately the parliamentarian's role and when do they get in trouble, or when are they really determining in many cases the outcomes of certain discussions or debates within the chamber?

**WALLNER:** The Senate parliamentarian is an incredibly important institution inside the Senate. It dates to the 1930s. Prior to the 1930s, the Senate didn't have a parliamentarian, and even after the 1930s, Senators still were very competent in the area of the rules, they understood them, they knew that they were important, they took time to learn them. Parliamentarians would be there to help them. But the parliamentarian's primary responsibility is to help to keep track of these precedents, to keep track of situations, so that you're not sitting there scratching your head saying, I think somebody three years ago in this debate offered an amendment like this and then the Senate had a vote and they decided that that wouldn't be allowed, so maybe we should do it like that again, and then they go and look for that.

They don't have to do that now because you have a parliamentarian whose job is ostensibly to keep track of all those past decisions. What people fail to understand about the parliamentarian, though, is the parliamentarian is a staffer. It is unconstitutional for the parliamentarian to have any authority because the Constitution doesn't give the parliamentarian the authority to make the rules, it gives the Senate the authority to make the rules. The parliamentarian merely provides advice. The parliamentarian cannot create precedent, the parliamentarian's judgment is non-binding, it is purely advisory in nature. The Senate's precedents even say that.

So I think when we talk about the parliamentarian, it's very important to discipline ourselves to not say that the parliamentarian is the one who makes decisions, or that the parliamentarian has power. That may be the effect of the advice that she gives right now, but ultimately the parliamentarian doesn't have any binding power over the Senate, and one of the greatest sources of dysfunction today, or one of the great examples, kind of like the canary in the coal mine, is that Senators increasingly talk about themselves in the third person, number one. They act like they're weak and powerless. They can't do anything.

And often in big debates they will say, I want to do x, but the parliamentarian won't let me. And that really makes no sense because what they're saying is the parliamentarian, someone they hire and fire, someone without any Constitutional or legislative authority to determine what the rules are, is deciding what those rules are and just telling Senators what those rules are, and

Senators are powerless to change them or to disagree, and that quite frankly is wrong, it's unconstitutional, it's illegal, and it's just flat out wrong.

**CHERVENAK:** So for this concept of the rules in the Senate, and you've obviously studied this in depth for a long period of time, and again excepting the filibuster, are there rules that work well, or are there rules that don't work well? Could you tweak the rules in some way to make the Senate a better place? Are there easy wins on the procedural side, or is it all about the culture of the members from year to year?

**WALLNER:** Right, so there's no silver bullet set of solutions to reform the Senate, in my opinion. The Senate's got rules, it chooses not to use them. The filibuster is a good example, I know we're going to get to that. Rule 19, it's the talking filibuster. There is a talking filibuster rule already. We don't need a new one. The Senate just doesn't use it. The Senate doesn't follow its rules. In fact, the Senate doesn't even respect the idea of rules anymore, and this is the kind of the key problem right now, it's a cultural problem, it's a theoretical problem. We think about the Senate as a factory, we think about Congress as a factory, and we think that its job is to produce widgets, to build things. That's not what legislative assemblies do.

They are places where representatives of the people engage in an activity called self-government. They use persuasion, bargaining, and negotiation, and they have goals there. It's not a means to an end, it's the whole point of the process, that the Senate is the point, the activity there is the point. Rules then become very critical because they allow for people to kind of to jockey with one another, to bargain with one another, to try to persuade one another about different outcomes, and it's always going to look different, and there are lots of different rules, and maybe it's regular order one day, what we call regular order, maybe it's unorthodox kind of rules the next day. The point is, a bill can go on a different path to becoming a law in lots of different ways, and the members are the ones who get to decide that.

If you think about Congress as a factory, though, all of a sudden you look at the Senate and its floor, which is really the only place where the Senate exists in the Constitution, the committees are creatures of the Senate, they don't have any authority, it's just the Senate floor. The Senate floor becomes a factory floor. Senators become factory workers who mindlessly assemble a product according to a blueprint that has been designed elsewhere by somebody else outside of public view, outside of an environment where they can be held accountable, and in that environment you can't upend the process, you can't have Senators deciding what that blueprint looks like if you think about it as a factor. You can't let workers on a factory floor design a Buick. If you do it's not going to look very good, it's going to be a mess.

But the Senate in politics is not a production process, it is not a production process, it's not a means to an end, it's about an ongoing deliberative activity, and so in that environment the rules look a lot different. The rules should be empowering Senators to do what they want to do and to use their own independent action, and so when we go to reform the Senate, the first question I ask whenever people ask me, what do you think about this reform or that reform, the first thing I ask myself is, will this reform facilitate independent action? Will this reform

make it easier for Senators to act? Will it make it easier for constituents to demand that their Senators act on their behalf, or will it make it harder? And if it makes it harder, I think it's just going to exacerbate the current dysfunction that we see. It's not going to make it better.

But we don't think about the Congress like that, we think about it as a giant factory, and we say, well we just need a better set of rules that can more rationally mitigate all this conflict, get rid of it all, and we can impose this rational process on it, and then we can have a very predictable outcome, and that's not how Congress operates, and it can't operate that way. And the last thing I'll say on this is it's really ironic, the moment where we, and this is a deeply ingrained view of Congress today, the moment when we all of a sudden think in terms of productivity, when we think of Congress as this giant factory, and the Senate is this giant factory, it's become the least productive that it has ever been in its history. It's remarkable if you think about it, and so I think that should tell us that the Senate can't be a factory, it cannot be a factory because politics isn't about production. It's about an activity, it's not a means to an end, it is the goal, it is the end itself. That's what self-government is all about.

**CHERVENAK:** Yeah, I think some of that depends on the way you define the machine, right? So if I, if you define it as an information creation machine, right, where that information is coming from different constituencies, right, you might get around that conception rather than thinking about what comes out of Congress or the laws being the output of the machine, right?

**WALLNER:** Sure, and look, the framers referred to the government as a machine in motion, and the Madison and in the Federalist Papers Alexander Hamilton, they talk about what's needed for a competent representative assembly, and that is enough people to kind of disseminate information, right, you have to be there for a time to learn from other people. I totally get that. But I think the problem is, we don't think institutionally about these places anymore, we think in terms of outcomes, what are they doing, what are they building, what are they producing. And if they, and we then structure our reforms to try to get certain outcomes, whether that be a certain kind of legislative process that we think will lead to more appropriation bills passing, or whether it be changing the Senate rules so that this piece of legislation with voter reform and elections reform can pass. Whatever it may be, it's all outcome driven, and the rules become a means to an end. The process itself becomes a means to an end. And the problem with means and ends is that you can change them whenever you want.

And so for instance, we have right now with the rules, you'll have Republicans, Senators, accusing Democrats of tyranny when they use the so-called nuclear option to change the rules, and then when they're in a position of power, they then use the nuclear option and the Democrats accuse the Republicans of tyranny, right, and the question is, are they being hypocrites? No, they're not. Why? Because they have different ends, it's the means don't matter, the only thing that matters is the ends, and so the rule, the idea of rules and legislative deliberation goes flying out the window because you can break the rules whenever you want.

You can rationalize departures from the rules whenever you want because what matters isn't the activity and the rules that make it possible, what matters is the end, and that's the problem,

because the Senate can't work without rules. It can't work without individuals who use rules as leverage to try to do things on behalf of their constituents. It can only work with those rules, but if you think about the Congress as a means to an end, then the idea of rules as goalpost of reliability and islands of predictability go flying out the window, and it's just impossible for them to exist.

**CHERVENAK:** I totally agree with your assessment of the ends versus means concept, and when we think about improving Congress as an institution, the ends are byproducts of these processes. We have to focus on the processes within the institution, we have to focus on creating better information within the institution, right, rather than some kind of value judgment on what's coming out of it. But if I go back to what you mentioned before about the rules empowering individual members, I think that's a good way to conceptualize the concept of rules and not what most people would necessarily gravitate towards. So, when you think about the rules in the Senate today or how they could evolve, what kind of rules do you see that are inhibiting that notion of freedom, and which ones are in the right direction?

**WALLNER:** It's not a set of rules that's the problem. It's the fact that Senators themselves aren't interested right now in being Senators. They have a different capacity. Look, I think these are all good people, I think they're trying to do their best, but when they have a certain view of politics, that makes it very hard for them to operate as Senators. When you see the Senate as a factory, what do you do? Well you need to control the factory, right. If you have a certain set of outcomes that you want, then you have to control the factory. Well how do you control the factory? You control the means of political production. What are those? They're votes, they're chairmanships, they're gavels there's leadership, right.

Well how do you get those things? Elections, that's how you get them, and so all of a sudden, your entire focus shifts from what happens in between elections, and the activities that play out in between elections, to the elections. And elections have always been important, but this is a very different ballgame now, because now it's everything is about the election and everything that happens inside Congress is viewed through the lens of the election, and you end up not doing things, not taking action, because you don't want to expose divides within your party. You don't want to take any action whatsoever that may make it more difficult not for you as an individual legislator to win election, but for you as your party to control the means of political production so that you can then make the factory work.

The problem, though, is that once you get control of the factory, there's always another election right around the corner. And this is the fundamental problem. Mitch McConnell used to say in this Senate, we would have lunches, and I would sit in them for a number of years, and he would always say winners win and losers lose, and it really, I never quite understood it up until several years ago when it was like, wait a minute, winners who win elections win policy, and losers who lose elections lose policy.

I get that, and there is a certain point where you do have to win an election to be in the Senate, but if that's your view, if that is your fundamental view of how public policy is made, then

you're never going to make public policy because the act of making public policy are Senators taking actions, which then can be held accountable. Citizens can reward them and praise them or punish them as they see fit. So what you end up doing is you end up punting issues, you delay issues, you take issues that divide your party off the agenda, like immigration, healthcare, I mean you name it, all the major issues that are at the top of the public's agenda right now divide the parties. You don't act on those issues because they're going to make it harder for you to present a unified front, they're going to make it harder for you as a party to say we believe X and then to win election and then to control the chamber, and so we have this idea of these two very cohesive parties that are battling it out in elections and that the stakes are all-time high and if somebody wins, it's going to, the republic is going to fall into the ocean if you don't agree with them when in reality, and we see this right now with the Democrats, the parties are deeply divided internally.

They do not agree on much, and it turns out that neither party really operates and tries to do things once they're in power. And this is a very interesting thing because at the end of the day, it looks like they're operating a lot the same way, and the Senate can be controlled by Republicans one minute and Democrats the next, and with the exception of maybe judicial appointments, it looks like it's not really that different. Outcomes are still generally going to be bipartisan when they happen, and the Senate's not going to do a lot on issues that the American people want it to act on.

**CHERVENAK:** Well it sounds like what you're implying, and this is a concern overall, is the Senators are identifying more closely with party or the re-election compared to the institution, right. They've, in their hierarchy of interests, personal and party are above the Senate or they're above the proper functioning of the Senate and its role, and so the problem you seem to be saying is the root of everything is this kind of inversion of interest, and maybe in the cultural problem of not wanting to follow the rules to achieve the greater needs of the Senate as a whole.

**WALLNER:** Yes and no. I mean Adam, I mean Madison talks about ambition counteracting ambition, connect the interest of the man with the place, and that certainly should be what's happening now, but what's interesting is that the Senators, it's like the institution doesn't even exist, that it's not even worth fighting over. That's very interesting to me. It's because of this way in which they see politics. If you don't take action inside an institution, the kind of action that it was it was created to house, that institution is ultimately going to die, it's not going to, it's not there for all intents and purposes, and that's what's happening right now.

Two years ago, I think it was about two years ago, there was an op-ed in The Washington Post, there's like 70 former Senators, and they wrote about why the Senate is so broken, and they in this op-ed they're saying it's really bad and these are all the bad things that are happening, but then they say but it's not the leader's fault and it's not this Senator's fault, it's not the committee's fault, and it's—as I was reading this op-ed I scratched my head and I'm like, well who's left? There's literally no one else left inside the Senate. The Senate is broken because Senators broke it, and they broke it by not acting, by not trying to do things, by acting like

victims instead of like legislators who were sent to Washington D.C. by their constituents to adjudicate their concerns and to try to bargain and negotiate and persuade and then try to win a half a loaf at the end of the day.

But they're not doing that anymore, and what's really ironic about this whole thing is that yes people put party above person, but parties don't mean anything anymore. They literally mean nothing. We think about polarization right now, but what does the Republican party stand for? What can the Republican party agree on? I work for Jeff Sessions, Mike Lee, and Pat Toomey, three very conservative Senators, none of whom agree on the major issues, when you get down to the particulars. They're different. They have different views.

What does the Democratic party support right now, what can it agree on? The parties themselves have taken on this like very important meaning, and we think about them as these cohesive blocks when in reality, and we shouldn't be surprised by this. Madison told us in Federalist 10 that it's impossible for a majority over all of these diverse interests even in 13 states, not to mention the fabulous diverse country we have today, to coalesce and to represent one kind of common interest. It's impossible, and I think that the current state of our political parties suggests that Madison was right. I don't think he was wrong in that regard. He was wrong on other things. He wasn't wrong on that, and ultimately I think that we've missed that, and as long as we see Congress is the struggle between these polarized parties, we're going to continue to lose sight of the fact that there is no action in parties.

If you're so polarized, then why aren't you trying to act? And whenever the Senate does act, whenever they do have votes they're incredibly bipartisan. They're incredibly bipartisan. And so I think there's a gap between how we think about Congress, how we think about the Senate, and how it operates and exists in reality, and we have to first acknowledge that gap, that disconnect, and then we have to struggle to understand it and to reconcile theory and practice, and until we do that I think that the scholars in particular are going to be unable and incapable of advocating a certain course of action to help reform this institution, which is absolutely critical to our democratic republic.

**CHERVENAK:** So let's move on to now the filibuster, then, which most people when they think about the Senate, that will be the rule or the procedure or the—that will come to mind for many. So I know you've talked a lot on this subject in the past. Can you talk about your perspective on the filibuster and whether it's a veto, whether it's a delay, whether it's a form of debate, can you give us your perspective on it, and obviously it's evolved over time so if you could tell us how that happened as well.

**WALLNER:** Right, so when we think about the filibuster, it's common knowledge to most people that it's a veto, it's a veto. It stops things from happening. And that may be how it operates in practice, but what allows it to operate in practice that way are Senators, are the majority party all of the Senators. They allow for this, for the filibuster, to operate like a veto. Well what is the filibuster in reality?

The filibuster is merely the ability, the opportunity, to speak. That's all it is, and it operates as a delay mechanism because obviously you can't vote in the Senate if a Senator is speaking or seeking recognition to speak. But the second the Senator, no Senator is speaking or seeking recognition to speak, there's a vote. In fact, the Senate precedents require, they literally require, in no uncertain terms, they spell it out in black and white, that the chair, the presiding officer, the vice president, whoever's sitting in the chair, has to call a vote on whatever is the pending before the Senate when no Senators are speaking, right.

And so you have majority parties that are complaining about the inability to have a vote, but then let's think about this for a second. When you turn on C-SPAN, what do you normally see? You see a quorum call where a Senator will finish speaking, they suggest the absence of a quorum, and then the clerk will stand up or sit down, they'll call the roll, very, very, very slowly. They never get to the end, and then two hours later another Senator will come to the floor. They got, ask unanimous consent to dispense with the quorum call, and then they start speaking.

Leaders tell rank and file Senators to always put the Senate in a quorum call when you're done speaking. Why do they do that? Because the chair can't call a vote when the Senate's in a quorum call, and Senators like order, they like predictability, they want to know when things are going to happen. And so the Senate could be voting on all kinds of stuff, number one, but the leaders and the rank and file operate in a way that precludes the chair from doing that, so that's the first thing to keep in mind.

You'll have the Republican party in the majority, for instance, Democrats do it, too, complaining about the minority filibustering, but then they're putting the Senate in a quorum call to prevent the chair from putting the question, from calling a vote. Like why are they doing that? Like that doesn't make sense if you are—you at that point are the one who's filibustering, you're the one who's engaging in activity that's preventing the Senate for a period of time from voting, right, so how, that's what the filibuster ultimately is. It's not a veto, it's simply the ability to speak, and if you have to ask yourself how long can you speak, how long can you speak? Maybe a couple hours, maybe if you're really worked up, 24 hours, and then if you factor in Rule 19, which the two speech rule, the, it's our talking filibuster, it says you can only give two speeches on any one topic in the same legislative day, and in the Senate a legislative day can be like an hour or it can be two years. This is the Senate, some things don't make sense, and a legislative day can last the entire Congress, and so you can limit how long Senators can speak.

They're physically limited by how long they can speak, they're emotionally limited by how long they speak, and I'll ask people how long do you think you can speak on something that you really care about, and then imagine yourself speaking and then the lights are turned on and the TV is turned on and you're on national television and it's prime time and the news is on and they're covering you. And then that your spouse is at home and they're complaining because you're not there, and your kids are at home and they want you to be home because why are you speaking in the Senate right now? You have plans that week, and your colleagues have plans, they start to get disgruntled with you as well. All of this and then you have all of this

happening, you have the uncertainty, you don't know what the consequences are going to be, or maybe you're filibustering TARP. What if you're wrong? What if four trillion dollars gets wiped out overnight? What if people lose their homes, some commit suicide, whatever happens, I mean all of a sudden these things weigh on you because the idea of standing up and delaying something like that really focuses the accountability on you.

And then, factor into all of that then the certain know— the certain understanding that the second you sit down you're going to lose. And you have to sit down at some point because you can't speak forever. You're going to lose. Now Senators being human beings will work back from all that and say, wow, I'm not going to filibuster. And then you say, well maybe one person will do it, but not all of them. Well maybe a handful of them will do it, but yet that doesn't take that long to wait out these filibusters. And the Senate for a very long period of time in its history up until 1917 had no way at all to overcome and end a filibuster. They had no way to put a vote outside of unanimous consent when Senators were speaking or seeking recognition to speak, and guess what happened? The Senate did a lot of really big controversial things on very narrow majoritarian basis.

And the only time that filibusters were ever successful during this period were at the end of a Congress when the minority of a handful of Senators really could speak until the Congress was over, but that was the only time. In 1917, they have a cloture rule, which is meant to empower the majority, not the minority, and it allows the super majority to vote to set up a process to overcome a filibuster and to get to a final vote, even if a Senator is speaking, and that process has been reformed over the years. It's been slowly made easier and easier for the majority to invoke cloture, and so that's what they use now.

But you don't have to use cloture. You don't have to get 60 Senators to end debate on something. You can do it the old-fashioned way. You can let somebody speak. They're going to stop speaking after a couple of hours. They can't go all the time, right, you could use Rule 19. You could use other rules the Senate has to make it harder for them to do it. And then the chair can be prepared to call the vote whenever they don't speak, but to do that you have to relinquish control. So instead, you use cloture when you can't get unanimous consent, or you ask unanimous consent.

When you object to a unanimous consent request to schedule a vote, you're not filibustering, right, you're saying no, and yes that's a veto, but the other Senators are giving you the opportunity to say no. They're asking for your permission. The unanimous consent request is simply a vote that you have to have all 100 Senators say yes to, and so if you don't want a Senator like Ted Cruz to object to something and say no, then don't ask his permission. It's common sense, just don't ask for his permission. And so when they ask unanimous consent, somebody objects and they say, oh well you're filibustering. You're obstructing. No, you're just saying no. You have every right to say no. Don't ask them if they don't have a right to answer however they choose, right, and so you ultimately are left with cloture. And the majority uses cloture because it is the only mechanism in the Senate that allows the majority to order the business in a predictable way. It is the only one they have.

And so I think the better understanding of this debate over the filibuster isn't about the filibuster. It's not about minority obstruction. It's about increasing the majority's ability to efficiently control the Senate chamber on a predictable basis. That's what it's about, and that's a very factory-oriented view. It's like say, okay, you need to control the factory, we need to create these rules that allow you to more efficiently manage and control the factory, but what's lost in all this, it becomes very difficult to work out really tricky legislative issues when all of the negotiations happen elsewhere, when you simply rubber stamp things on the factory floor, on the Senate floor. It becomes very hard to do that.

One of my favorite authors in the Senate, the best book hands down written on the Congress, I highly recommend everybody to check this out, it's out of print now, like most things on the Congress was written a long time ago that are any good, and it's Bertram Gross. He was a scholar practitioner, much like myself, he well he was a professor of political science, and he worked in the Senate, and he wrote a book in 1953 called "The Legislative Struggle." And he says that compromise emerges out of the legislative struggle. You reveal information. You were talking about information earlier. It reveals information. You get to see where people stand, how intensely they care about issues. Their constituents can take a note of what's happening, the media can cover it. With the conflict, it invites more people in. That then leads to new outcomes. It makes new things possible.

The French philosopher Derrida talks about negotiation much in the same way, and he says, and you negotiate the non-negotiable. That's the whole point. That's the whole point of negotiation is to negotiate the non-negotiable. If it's not, if it's actually negotiable, we don't need to have Congress, we don't need to work this out in the Senate or in the House, right, it's the really controversial things, the really tough things that rise to that level. And you have to have this kind of process that plays out on the floor where people have to extend effort, where people have to make their feelings known. Their constituents can hold them accountable, and over time you drive people towards outcomes, towards compromises.

That's how we got the Civil Rights act of 1964. If we tried to do that today it wouldn't happen. We wouldn't pass it because we don't allow the Senate to operate like the Senate needs to operate for it to do the things that ultimately people hope and want it to do.

**CHERVENAK:** So for the filibuster in particular, it sounds like you you're a fan of the let them talk as long as they can physically talk as being the filibuster that, and have Congress in a serial manner where you can't break it off and say, oh there's a filibuster going on over here. It's all in one line and you let the people talk. Is that kind of your position, or do you—

**WALLNER:** I mean, look, you can, I mean the Senate majority has tools outside of cloture and with closure to make it harder to filibuster. Filibustering itself is already hard enough. That's why no one does it. There are no filibusters, right, and that's why people tolerate, they tolerate this, the threat of filibusters, because it empowers them, they think as well, and it's like they

don't want to really call somebody's bluff, and then they got to be there and it's going to be uncertain.

So I mean the Senate's got all the rules it needs, so far as I can tell. The problem isn't that, the problem is Senators aren't trying to win. They're not trying to win. Kirsten Gillibrand, a former presidential candidate, a Senator from New York, a couple years ago gave a speech on the Senate floor. This was at the former president Trump and his policy of separating migrant children from their mothers at the border. She gave a very impassioned speech, and she's banging her hand on her desk. I'm watching the speech in the office, I'm like just transfixed. She's banging her hand on her desk, she's literally tearing up, she's talking about the darkness is descending, she's talking about how it is absolutely critical for the Senate to act if the President will not act, right, and then at the end of this speech she says, so please co-sponsor this bill that I've introduced with Dianne Feinstein, and then she leaves the floor.

And then you ask yourself, okay well, what, how many times then did Kirsten Gillibrand try to use the Senate rules to force a vote on her bill, to force the administration to change its policy? How many times did she object to unanimous consent request until she got a vote on her bill? How many times did she bring it up as an amendment? How many times did she literally take any action whatsoever after her speech when she said it was absolutely critical for the Senate to act because darkness was descending? Zero. None. No action whatsoever.

Why? Because Kirsten Gillibrand like most Senators today think that the way you stop the President from doing something is to become the President or to have someone in your party become the President, and she wanted to be the President, or she wants a Democrat to be President, and how do you do that? You don't divide your party, you don't force action on things like immigration. Why? Because Democrats don't agree on immigration. Neither do Republicans. And so ultimately you talk about it a lot, but you never act.

Senator Merkley from Oregon, he's a very smart individual, he's a fabulous guy, he was very similar. He left, he issued a press release, he's like, I'm going to the southern border, and I'm going to stop the administration, this policy, I'm going to stop it. We're going to stop [ ] taking away children from their mothers, and yeah, you're like okay I get that, but like why are you doing that? You're a Senator. If you were to stop this, you would stop it by taking action inside the Senate, not on the southern border.

And then you say, well maybe you're going to the border to get a lot of attention so that you can then change the environment on the outside and then get more leverage on the inside by focusing people's attention on it and then you can come back and then you'll act, and then you'll take action. But he didn't do it. He didn't do it either. You have people like Marco Rubio who talk about why the Senate's broken and needs to be changed, but he never takes any action, and that's the problem. That's the fundamental problem. It's not the filibuster, it's not the lack of a filibuster, it's not the rules, it's the fact that Senators aren't interested right now in being Senators, that they think the way to ultimately achieve their goals or their ends in politics is to literally not be a Senator, and as long as that's the case, we shouldn't be surprised when

the Senate doesn't do what the Senate was designed to do because it can't, because you need Senators to do that. You need Senators.

And if you look at the Civil Rights Act and the long, long struggle of Northern liberal Democratic Senators and all the things that they did and how they transformed the institution and they shifted power from committees to the floor and all other kinds of things, it was like day in and day out, it was a constant struggle. And they were constantly looking to do things and they had advocates on the outside pushing them to do things, and they had constituents who were demanding that they act, and they knew that if they didn't act then they were going to be voted out of office. We don't have that today, and that's why the Senate isn't able to do great things anymore because we don't have Senators who are interested in being Senators.

**CHERVENAK:** So one of the reasons you could say that that's the case is there's not a good feedback loop between the voters and the Senators themselves, right? Like if you measured action according to what you just described and then you gave that information to voters and said, here's what your Senator talked about and here's what they actually did and you can see a big disconnect, do you think that kind of thing would move the electorate towards, or at least move the Senators towards back to being Senators, if they had such a feedback loop in place, or do you think there's no hope in that regard, it's just a choice by the Senators?

**WALLNER:** Well I think Americans for the most part think about politics in the same way, and that's, I think that's ultimately the problem. Because the source of institutional change always comes from the outside. It comes from outliers, liberals and conservatives, coming in and pushing for changes, and then the Senate changes pretty rapidly in response. And this has been the case since the very beginning when the Senate first opened its doors and got in the business of legislating in 1789. The key, though, is that the voters don't think in those terms anymore.

Think about AOC, for instance. And AOC I think, and AOC is a House member but it's great, great example. She's, I think AOC is, I don't share her politics, but she's I think a fabulous legislative talent, the first rate natural legislative talent. No prior experience unseats a very senior up-and-coming democrat would-be speaker in a primary. She has a Green New Deal that she wants to see accomplished, and so what does she do? She's, some people would say she's naïve, I'm just like she's got common sense. She's like okay, what is my leverage? My leverage is all these people on the outside, all of this stuff that I can focus attention on, well who's going to be the one that's really going to be critical to me? Where is the decision going to be made right now on the Green New Deal when I get to Congress? So let's give me the speaker.

So what does she do? She starts protesting, before she's even sworn into office, her own speaker. Like that's remarkable, like if you suggested that in the halls of Congress, they would look at you like you were crazy. Why would you do that? To her it's like common sense of course I would do that because she's the one who ultimately I need to support me to win what I want, and I'm going to, and this is my leverage, and so I'm going to use it. She then comes into Congress, she's a backbench Democratic freshman member in the majority but still back bench,

and what does she do? She single-handedly sets the agenda, single-handedly sets the agenda in Washington D.C. She forces the House to act, she gets the Senate to act, maybe not on her particular piece of legislation, but they're responding to her, and then she forces the President to take note of her and to take into the opposite view of her.

That's winning in politics, that's how you do it, and then yeah you didn't win, but it takes decades and decades, and winning in politics looks even worse than baseball. I mean, you maybe win ten percent of what you want after a career of fighting to win 100 percent. That's the nature of politics, but what you have to imagine yourself, what is Pelosi saying to AOC to try to get her not to do this? She says, and this is very similar to what Republicans say and what they say in the Senate, she'll, she says something like, hey, I agree with you, I agree with you, this is an important thing, we absolutely, yes, this is important, we all agree, but if you really want to do this thing, then don't try to do it.

Think about that for a second. If you want to do this, then don't do it. Like that's just, it's ludicrous, but that's literally, that's how this works in the Congress because if you do it, then guess what's going to happen. You're going to divide our party, you're going to make us take tough votes, you're going to put very vulnerable marginal members of ours in tough spots, and they may not win re-election, and we need them to win re-election so that we can control the factory and do this thing that you want to do.

And so that if you even try to do this thing right now, we're not going to be able to do it, so don't do it so that we can eventually do it. But again there's always another election right around the corner. And so you're in a position where you tell your liberals, you tell your conservatives, hey, I agree, but we can't do that right now because if you do it the other party is going to win. They're going to take over the factory, they're going to do all these terrible things, and the Republic's going to fall into the ocean. And so the liberals and the conservatives historically have been the great drivers of institutional reform by stirring things up, are mollified and they become convinced that they have to tolerate the status quo because after all, they need to prevent the bad guys from winning.

But what's really remarkable is there's a lot more agreement between the parties than we think, and neither party is going to do much of anything when they take over because the same dynamic is at play on both sides, and so we are scared of a boogie man that doesn't really exist. And to be honest with you, the Constitution wasn't written so that I can win all the time. The Constitution was written to create venues where I can go, where my representatives can go, and they can debate with other people and ultimately try to win, and if somebody else wants to try to do something, it shouldn't be, let's stop that person from doing it, it should be, let's try to win an argument with them, let's try to out-fox them procedurally, let's try to take all these other actions so that we ultimately defeat what they want to do and then we can do more of what we want to do.

That's what politics is all about. When self-government comes instead, we need to prevent other people from acting and so therefore we're not going to act to give them the opportunity

to act, your whole notion of self-government, the whole idea of people governing themselves, falls apart because we make decisions in this nation by collective action, and when we refuse to engage in that action, then we're not making those decisions anymore, and we transfer more and more power to the executive.

We are now governed or ruled by a bunch of bureaucrats. It's the rule of nobody. It's hard to hold that accountable, and ultimately our system is perverted, and it's perverted not because of some foreign foe, it's not perverted because of some domestic source of terror, it's perverted because we all are no longer interested in doing politics. And I think this is a very deep-seated problem in our politics right now, and it speaks directly to why Congress is so dysfunctional.

**CHERVENAK:** It's interesting you bring up AOC in the House. I mean you would think that that kind of a disruption would be easier to accomplish in the Senate, since it's more individualistic, right, so why is the Senate more conservative in this regard than the House is? Is it just random because of the numbers, or is it because Senators are by definition typically more conservative than House members, the extremes of the House? What are your thoughts there?

**WALLNER:** Right and this is one of the reasons why I think the Senate is so much more dysfunctional. It has nothing to do with Liberal or Conservative or conservative with the small c. It has everything to do with the fact that Senators have kind of imbibed this new way of thinking about politics as production, I think, to a much greater degree, to a much greater degree than House members have. And one of the reasons why is your own individual actions in the Senate, it's easier to relate those to the fate of the caucus in the Senate, it's easier to kind of draw a line from things you do to the fate of your party in an election, for instance.

And your opponents in your party, and particularly your leaders who don't want a bunch of random mavericks doing things on either the left or the right, it's, they're going to definitely draw that line and make it really hard for you to take those actions, and so because of that and also because of this idea of being held accountable, Senators don't want to be held accountable, they don't want to take action because it strengthens the ability of their constituents to hold them accountable, and when you operate in an uncertain environment, that's a scary, scary thing.

And so I think that for a lot of different reasons, the Senate is much, much more dysfunctional than the House right now, but it all comes back to the fact that Senators have this, they've really imbibed this view of politics that is fundamentally incompatible with our system of government in this country.

**CHERVENAK:** Well you mentioned leaders a number of times there. Let's move on to that subject for a minute. So in the House there's obviously a Speaker, and the concept of leadership in the Senate is a little bit more amorphous. Maybe you can talk us through the, what's the role of leadership in the Senate, and does it matter, does it not matter, what are the, what power does it have, and how does it keep? You would think that it would be the one that would want to enforce some kind of rules, but maybe you can take us through that.

**WALLNER:** I mean institutionally if we think about it, the Constitution says that the House will choose its Speaker. The Speaker is a creature of the House. In the Senate, the presiding officer, the Vice President, isn't a creature of the Senate. The Senate can't keep the Vice President from sitting in the chair and presiding over the Senate, and the Senate doesn't get to decide in most instances, maybe if there's a tie, but if they don't get to decide who the vice president is.

Institutionally, the consequence of that is that the Senate over the years has chosen not to empower its chair in the same way that the House has chosen to empower its chair. The Senate also doesn't have to because it's a smaller body, it's more relational, et cetera, the things we've discussed. So right off the bat you have a different institutional environment where leadership is going to operate.

The second thing to keep in mind is this idea of party leaders is a very late development. It happens around the same time as the cloture rule in the Senate. There aren't really party leaders in the Senate for the first kind of hundred plus years in the same way that we think about them today, and then another thing is that the party leaders, they've only very recently gotten to be very powerful. And the way they exercise power is very informal because they don't have any other powers.

I mean, think about that for a second. The party leaders don't really have any additional powers over a rank-and-file Senator, and so what makes a leader powerful? It's because the chair, the Vice President, says I'm going to recognize this leader first, I'm going to recognize this Senator first over all the other Senators. They call it priority of recognition, and it started in 1937 with Cactus Jack, everybody's favorite Vice President nickname, John Nance Garner, Roosevelt's Vice President just said one day, you know what? I'm gonna—Alvin Barkley, the Senator from Kentucky, Democrat, the leader at the time, the majority leader, I'm gonna recognize you first.

But think about that. Anybody in the chair can choose to recognize whoever they want. There's nothing the Senate can do to force them to recognize the Senator. It's a favor the chair is doing to the majority leader, number one. And number two, it only happens if the majority leader and another Senator are trying to get recognized at the exact same time. How often does that happen, right? Hardly ever.

And then after that it's the minority leader. The minority leader gets recognized second, so if Chuck Schumer is the most powerful Senator right now, then Mitch McConnell is the second most powerful because he can get recognized after Schumer, before anybody else if he so chooses, but, which think about the act of leadership. Leadership changes. There's no one way to lead the Senate or to lead a legislative body. It's going to change over time in response to the demands of the members, in response to the demands of the agenda, and the demands of the environment, and if we think about, the way I think about leadership, let's look back to the Senate of the 1950s. Lyndon Johnson, the "Master of the Senate," Robert Caro's fabulous biography, where he's a really major figure in the Senate history because he created the

powerful position of leader by doing, just by taking action, and by doing things that other Senators hadn't really done before in that same position.

And he created a new model for Senators to follow and, but if we think about Johnson, he was much more, he liked to control the Senate. He liked to resolve issues off the Senate floor out of public view. He liked to have scripted kind of debates on the Senate floor, he wanted the Senate floor to kind of rubber stamp things, and it sounds very familiar if you think about it, it sounds a lot like today.

But Johnson was a creature of a certain environment. Johnson was able to do this and to maintain control because you had strong committee chairs at the time that deferred to him, you had a heightened sense of Senate rules and norms, and Senators weren't really interested in using all their power under those rules to upset the process. And there was a lot of agreement within the party, the Democratic party, and there wasn't a lot of divides between the two parties either, but that starts to change in 1958, you have 12 liberal Democratic centers from the North come in to the Senate. 1960 you get more you get more midwestern conservatives coming in in response, and then all of a sudden things start to change. The norms start to change.

These liberal Democratic Senators they're just like, we want to act now, we're not going to wait for 4,000 years till we get a committee gavel, we have to take action on the issues we care about now, and those issues are opposed to what their southern Democrats want in committees. They start going around the committees. They start offering amendments on the floor. The Senate starts to change. Interest groups start to come out and for the first time and really seek champions inside the Senate.

You have new communication technology that's shortening the distance between the Senate and making it easier to hold Senators accountable and for constituents to follow what's happening there. Airline travel is happening. More people are coming to Washington. All this stuff's happening. Johnson leaves the Senate and goes to be Vice President. Had he stuck around I think we'd remember him very differently. I think we wouldn't remember him as this great Senate leader because Johnson's style couldn't lead that new Senate. it couldn't. And you have Mike Mansfield come in in his place, and Mike Mansfield's very different person, but he also had enough humility to recognize that you, the Senate at that point couldn't be led in the same way, nor should it be led in the same way, and that his job was to let go of the reins and to try to facilitate the participation of Senators in the process and if the issues arose then to work them out after they arose, not to try to stop them from arising.

And what happened as a result of this shift was the Senate had one of its most productive periods, legislative periods, in its history, in its history. You had cities burning, race was a major issue, you had the National Guard shooting people on campuses, the CIA is killing people, you have the Vietnam War is happening, the country seems to be unraveling, everybody is upset, violence is happening all over the place, the filibuster crops up for the first time in a major way,

you have the hold process, you have interest groups, you have all of these things that we complain about today.

And what happened in the midst of all of that? It was an extraordinary bout of legislative activity. Maybe we don't like it all, maybe we like it all. It doesn't matter. The point is, the Senate was able to do really great things, really and by great, I mean major things. And if we just look at the Civil Rights Act of 64 and we compare it to the Civil Rights Act of 57, we can see very clearly that it's counterintuitive, but if you let a Senate in this kind of environment just be a Senate and let it be a freewheeling place where there's conflict and it's a crucible of conflict and people are fighting and they're scrapping and they're trying to do everything they can to win, somebody's going to win, and that win is going to be a major thing, and it's going to reconcile losers in the debate to the outcome.

But if you try to keep tabs on everything and ensure that there is no reconciliation through a debate, then you're going to get something like the Civil Rights Act of 57, and I think the big tragedy today is that our Senate leaders are trying to manage Mike Mansfield's Senate, a Senate in a very similar environment to the one that Mike Mansfield managed and led, but they're trying to do it in a way that Lyndon Johnson managed his Senate. And it just flat out can't work. It's not going to work because that kind of leadership isn't equipped to excel and to succeed in this environment.

But when you think about the Senate as a factory, you only go to that kind of leadership. It's insane, a factory foreman is not going to say yeah go do whatever you want and we'll figure it out at the end of the process when the Buick rolls off the assembly line. No. And what's really telling to me is Mike Mansfield gave us a speech where he submitted for the record he was going to deliver this speech. Senators did not like Mike Mansfield at the beginning because he made them work and it was uncertain, and Johnson made everything easy and he gave, he was going to give a speech the day that Kennedy was assassinated.

It was called The Senate and its Leaders, and he ended up going down to the floor the following week, putting it in the record. And he eventually, much, much later in the 90s, gave this speech to a room full of Senators in the old Senate chamber. It's a fabulous speech, and in this speech he defends his approach to managing the Senate and the way he did, but he says the Senate isn't, he's like it's not a factory.

There's no time clock on the wall when you walk in that Senators punch in their time cards on their way to assuming their position on the assembly line. Senators are all equal, they get to decide what they want to do, and if they don't do something that's their decision, and it is not appropriate to blame other people or other forces, right, for that. It's the Senator's decision. All the Senators own the Senate equally, and if the Senate's not working it's because they're not, they broke it. And if they want it to work differently, then it's simple. Just act differently. And I would always say just give me one, or two, three Senators who were determined to try to do something, and guess what's going to happen. They could be liberal, Republicans, Democrats, conservatives, it doesn't matter.

If you try to do something, then someone who's opposed to you is going to try to stop you, and then there's going to be a debate, and you're going to have amendments and you're going to have votes. The American people are going to be brought into the process, and guess what. You're legislating.

That's what it's all about, and until that happens the Senate is going to continue to be broken, and changing the filibuster rule is not going to help that. Getting rid of the filibuster on the motion proceed isn't going to help that. Changing elections isn't going to help that. All of these other things aren't going to solve the fundamental problem, which is we need Senators who are interested in being Senators and who are determined to take action inside the Senate to try to win more of what they want, more often, and until that happens, the Senate is going to stay broken.

**CHERVENAK:** And so it sounds like your vision of the leadership of the Senate is this Mansfield's vision of letting a thousand flowers bloom with a relatively light hand versus a more House style. And trying to encourage individualism within the rule set, right, bring that kind of culture back, and that being a kind of a goal of the leader, is that, am I getting that right?

**WALLNER:** Well I mean that's the whole purpose of the Senate. The Senate isn't a place where there's a ruler in a bunch of subjects. The Senate is a place where the people's representatives go to both rule and be ruled. It's a place where we go to govern ourselves. The House operates in a different way because of, it's the nature of the body, but you have parties now, and they have party caucuses, and they have big debates in those party caucuses, and they're voting on things in those party caucuses, and individuals get to weigh in in those party caucuses.

You have a rules committee that shuts down the floor. If you want to offer an amendment in the House, you go to the rules committee and you very clearly understand who said no. You offer your amendment to the rules committee, they listen to you and then they vote it down, and you know exactly who decided not to allow you to offer your amendment, and you can then choose to mobilize against that person. You can choose to play an outside game and draw more focus to it and try to win in a different time, but there are venues where individuals interact with one another in the House, and that they can still have this type of a process.

In the Senate it's much, much different. You have no real power like that, but it's real amorphous. You're like, well you go to the majority leader, can I offer this amendment, they're like, well no, I wish you could, but like this other Senator may be blocking you, and then you go to the Senator, they're like, well I'm not blocking you, and it's every time you try to identify someone, some concrete person who is making a decision and acting in opposition to you, they melt away in the Senate. Always.

Just go and read about the Senate and who's—I mean it's like, they just melt away. And you can't operate in that environment. It's a very insidious environment, and so in that environment

there's no way for individuals to use the rules to try to bring other people to bear, and because like they just can't operate like that, and so that's the fundamental problem.

It's not about light hands or a heavy hand. I mean, there shouldn't be a heavy hand in the Senate. Johnson had a heavy hand, but not really. I mean Johnson used other people's power to his own for his own goals. They let him do it. The Senate can't be led with the heavy hand because you're essentially saying you, my peer who has the exact same power I have and the only thing that distinguishes you from me is that you get recognized before me, if we both stand up and speak, which incidentally neither one of us wants to do, right, then like that, like you are going to rule me with a heavy hand.

No, that can't happen. And so I think what we need is in this environment where you have a lot of unrest and a lot of angst and a lot of built up frustration and a lot of desire of the people to see their members act on their behalf, it's not a question of leaders, right, and leaders can certainly facilitate and make it easier, but ultimately the Senators just need to act, and they need to ignore their leaders, and their leaders are going to follow them, and their leaders are going to respond to them because after all, their leaders work for them.

The principals are the members, the rank and file, the agent are their leaders. They hire their leaders to do a very specific job for them, and if they don't like the job their leaders are doing, they need to hire new leaders and different leaders, and they need to demand that their leaders operate differently. But ironically we have, we talk about elections all the time in competition, but then if you were to try to run against Schumer in the Senate as a Democrat or run against McConnell, you're treated as like a terrorist.

You are treated by your fellow Senators as something that is beyond the pale because that is so ungentlemanly to do, to challenge another leader, and it's like that's the whole business that you're in is literally running against other people in competition and presenting new ideas and saying this is how we ought to lead the Senate differently, Mitch McConnell or Chuck Schumer. And if, even if you lose and they win, they're still going to probably incorporate some of what you said if it looked like you had a lot of support.

But you can't do that anymore because you're treated as like again, like a terrorist, a legislative terrorist if you will, because you're somehow making it harder for your party to be united and making it easier for the other side to win. And that means it's going to be the end of the world, and I think we've really lost sight of the fundamental activity of what happens in legislatures, and the powers that Senators have and what they're expected to do with that power, and until we get that back we can come up with all sorts of like white papers and long lists of reforms and different things, but none of it's going to work.

None of it's going to work, and it hasn't worked. Just look at the last 30 years. It's not going to work until Senators decide that they want to be Senators or we get new Senators because the voters decide that they want representatives who are actually going to adjudicate their

concerns, bargain, negotiate, try to persuade one another, and then ultimately out of that process, compromise on their behalf.

**CHERVENAK:** Well that's a perfect segue into some of the questions that I ask all of our guests that we can compare the answers at some point in the future, and the first question here is along the one you just mentioned, which is, the question is, what do you think Congressional representation should mean, and by this I mean, are they reflecting the beliefs of their constituents, is it the Burkean making judgments, where do you come down on that on your personal point of view?

**WALLNER:** Right, I mean look, the first thing you need to understand is that Congress is a place, the Senate is a place, where people go to participate in an activity. Now, we can talk about are they agents, are they independent actors, I mean and incidentally Burke doesn't get voted back into office, he gets voted out very soon, and look, they're two sides of the same coin, right. They're two sides of the same coin. We don't have instruction, we don't have recall in our Constitution, legislators are independent actors once the voters vote for them until the next election, and they use that kind of, the information of things they do in between elections to hold them accountable in the next election.

But the legislator is going to, it's going to look different at different times for different people in different ways, but they're not opposed to each other, they're just two sides of the same coin. Congress has a function as a representative assembly. By definition it needs to adjudicate the concerns of its constituents because it is the whole, the heart, the beating heart of American self-government, right. That's where we persuade, that's where we bargain, that's where we negotiate. You don't do those things necessarily in a theoretical sense in the administration, you certainly don't do them in a courtroom, but you do it inside Congress, and so yes, you need to represent the people, your constituents, and you also need to act as an independent actor, and then you need to have your own judgment, and then ultimately you round out those two. You kind of, you recognize those two sides of the same coins with this notion of elections and saying, I'm going to be held accountable for my decisions in the next election, and ultimately you make a case for yourself when you run.

And then if the people like it, then you're voted back in, and I think we shouldn't try to put these things being mutually exclusive. Congress has responsibility to make law because after all that's where we make law. It also has a responsibility to adjudicate the concerns of its constituents. That's how they make law. They're one and the same, and I don't think that we should see them as different, if that makes sense.

**CHERVENAK:** So you come down a little bit on the reflecting the interests or the, sorry, the beliefs of a constituency but also with some independent judgment on the on the part of the representative, right?

**WALLNER:** I mean I think it's a false choice. Look, if you want to win inside Congress in a debate and you're outnumbered because the other members don't agree with you, you have one way

to win, and that's to go outside the chamber and to marshal the environment, to marshal the people, to marshal grassroots, to bring pressure to bear to shape your colleagues' understanding of the environment in such ways that they agree with you either because you persuaded them or because you met them to believe that they wouldn't win election if they didn't agree with you. That's how you win.

You can't do that, you can't win in that way if you don't have a sense of where the people are, and if you have, look at the people with contempt and think, I'm just going to do whatever I want like in a Burkean way, then you're not going to be able to win, you're not going to be an effective legislator, right. And so yes, you have an independent judgment in terms of how do you go about, what do you want to engage on, what do you think is important, how do you want to craft your strategies. You have to have that, but you also have to have a sense of what the people want and need, and you have to be able to tap into that to use it to your advantage at the time, so again I think it's a false choice. I think for too long we've thought in these terms when in reality, there are two sides of the same coin that is Congress. Congress is a representative assembly, and it's also a law making assembly, and if legislators want to be effective in that place, they need to be independent thinkers that have a deep sense of what they want to do, and then they have to have a deep appreciation for what their constituents and their colleagues' constituents want them to do as well so that they can ultimately be effective.

**CHERVENAK:** All right, next question is, how would your ideal Congress allocate its time.

**WALLNER:** Right, I mean this is a function of the current kind of scholarship. We, scholars like myself, we like to think about Congress as a factory and it's like making things like tables because it's easier than to identify a certain kind of behavior that leads to that table being made, that Buick being made. It's easier to diagnose it, to make sense of it when it is a making process, a production process.

When it is this never-ending, uncertain, constantly unfolding activity where no one can predict the outcome because there are human being is involved, then it becomes a much different ballgame, so to answer your question, I don't know. It ultimately depends on the environment and it depends on how members of Congress, what they feel like is important, and that's going to ebb and flow. It's going to change. It's going to adjust itself over time. There is no one magic thing. If they need to pay attention to their constituency, they're going to pay attention to their constituency.

If they're going to need to be focused on the inside game and going to committee hearings and legislative oversight, they're going to do that. If it's a healthy, dynamic place that is operating the way it should, and I guess that's the point, there's no, Congress isn't wired to act one way, it's wired to be a crucible of conflict, and that conflict inside the place is going to look different at different times in American history, and so it's not a trade-off. It's not saying, well where it's not like we're looking for a magic recipe, if you spend twenty percent of your time in the district and you spend thirty percent of your time doing legislative oversight in committees and you do

like, I don't even, lost track now, forty percent of your time fundraising or something, then everything will be great. It might work, it may not work, and because you can't think about Congress in those ways, I think that's part of the problem.

**CHERVENAK:** Well, you mentioned the Senators need to be Senators, and presumably that would happen in the Senate, so there has to be in theory some minimum amount of time they need to spend there in order to do that work of being a Senator, so I'm curious about. There's complaints about the Tuesday to Thursday thing and people fly home, and they don't actually have enough time to be in the Senate, to talk to each other, so you don't share that concern? You think that's a something that'll be like just self-automatic?

**WALLNER:** I would prefer the Senate stay in town more often right now. I think it's not a question of just being there, it's a question of what you do when you're there. I don't think that Tuesday through Thursday is a great thing right now. It makes it harder for them to use the clock to force outcomes. When I was in the Senate we would work until, and when I first started on, during the summer with appropriations, on Wednesday nights we go to like two or three in the morning, and then Thursday nights we'd go even later, and then they would use the idea of leaving on Friday to get people to drive towards compromise, but if they couldn't get to a good place, then they would be back on Friday.

And so I think again it's the question of what you're doing with your time that you're there. We can say they need to be there for three weeks straight, but if they operate like they do now, it doesn't matter if they're there for a whole year, and if you look at the Senate historically, the Senate has been gone for large numbers of years, like long parts, big chunks of years, and it's also then, but when it is in session it's done really big things, really controversial things, had really incredible debates, and so again, it's not a question of what the Senate, what is that magic amount of time that has to be, like the Senate has to be in session for, it's what does the Senate do with the time that it is in session.

And then you let that dictate how long it then needs to remain in session. And it all comes back to the activity and not some sort of thing that we can prescribe as independent observers on the front end and say well, if you're not in session in X amount of time then it's not going to work. And so I think we need to again look more at the activity and less on these artificial prescriptions that we put on the place in terms of how long it has to be in business.

**CHERVENAK:** Well the next question is actually about an activity. So, how should debate, deliberation, or dialogue occur or be structured in Congress?

**WALLNER:** Right, so again, I think it assumes that there's a person or people outside of the Senators themselves that can make that decision. When we talk about amendments, for instance, and we say we have poison pill amendments, this is one of my pet peeves. Poison pill amendment. What is a poison pill amendment? It's any amendment that a Senator doesn't like, and the idea that some amendments are illegitimate and others are not implies that there is a

person or group of people that can decide what is and is not legitimate, and my point is the Senate makes that decision.

How do they make that decision? They make that decision by voting on amendments. They make that decision by saying, we vote on this amendment, we think it's a poison pill amendment, and therefore we choose not to allow it to be added to this bill, right. There's no other way for them to decide, and to have one individual Senator or one group or outside observer say what that Senator wants to offer this amendment but that's just messaging, that's not legislating, well that messaging is legislating from a position of weakness.

It's playing an outside game to try, it's what people in the Civil Rights era did to try to get action on Civil Rights. It's not distinct from legislating, and so I guess the point is the Senators themselves and the activities that they engage in over time will determine what is appropriate for deliberation and debate, and it's not something that can be prescribed on the front end, and it's certainly not something that can be prescribed by anybody other than the entire Senate, and the entire Senate can only make that decision by debating and deliberating and voting. And I think we need to get away from this idea that, here's this magic mix of deliberating and debating and voting and et cetera, and they need to stick to that because that then assumes that we have power over the Senate, and if that's the case, then all of a sudden the Senate is no longer a place where we go to engage in self-government, right. It's a place where our workers go to assemble a product on our behalf according to the rules that we've identified that are legitimate that they have to comply with. And that's not what the Senate is.

**CHERVENAK:** Right, but on the other hand you've been there for a long period of time. Maybe you've seen some things that work and some things that don't, right, like does it seem better if they spend time doing it in small rooms over dinners, or is it better on the floor, or is it better in the committee? Are there any kind of insights you had into watching where the debate or dialogue occurs and how they should do more of that based upon what my experience?

**WALLNER:** Right, so look, some decisions are always going to be made behind closed doors. The problem today is that like all the decisions are made behind closed doors, and the Senators don't try to challenge those decisions on the floor when they ultimately arrive there. The question is, well what works? What I can tell you is the legislative process itself, this is what the former parliamentarian Alan Freeman used to tell me all the time. There's a certain logic to it and it drives Senators towards agreement. Bertram Gross, the 1953 book "The Legislative Struggle." This is the point he makes, the process drives Senators towards compromise agreements.

It always produces outcomes. The problem is, you just can't control what that outcome is going to be in advance, and you have to really engage and hustle and put in a lot of effort to make sure that that outcome is aligned more with what you want and not what your opponents want, but it does drive people towards an agreement.

When I was in the Senate I worked for Senators, and one of my responsibilities on running the Senate Steering Committee was that we would try to stop things that our Senators didn't like. That's fair, I mean Senators try to stop things they don't like and they try to pass things that they do like. And well, how do you stop something? I would hire staff and they would say, hey can you stop this bill? How do you do that? What is that? What do you mean? And the way you stop the bill is, you stop the process. You stop the process. You look for anything you can do to stop the process because the more debate you have, the more votes you have, the more time you spend on something, the more information comes out about that thing, the more people get a better understanding of what's possible, the more it's changed to accommodate that possibility, and then the more likely it is that something's going to pass.

Things don't pass when there's no process. Things don't pass when that doesn't occur, and it's very hard to get it going again the longer it stays stopped, so you look for anything that you can do to throw a wrench in the process. Well how do leaders operate the Senate today? They literally start the process by stopping it. I mean how dumb is that? They start the process on really controversial things by stopping it and saying we can't do anything until we negotiate and get a final agreement that everybody has agreed on, that we can then put on the floor for like an hour and then we can vote on it and then we can be done, because when you're behind closed doors it's a lot easier to bluff, it's a lot easier to say no to things, it's a lot easier to refuse to engage, right. You can call somebody's bluff, but that means you're going to have to go to the floor, right.

And so if you say we're not going to do anything until everybody inside this room agrees to do something and then you can't bring the outside to bear on what's happening inside that room in the same way, there's no process that plays out for people to lose, right, one of the great ways to overcome opposition is to let somebody fight and then they lose. Richard Russell tried to defeat the Civil Rights act of 64. He gave a speech on the floor after they invoked cloture on it, and he urged colleagues in the South and his constituents to agree with it because it was going to be the law of the land, and he said we had our shot and we lost, and there's nothing that takes this fight out of somebody like having a fair shot at trying to win and then losing.

I've seen it time and time again with Senators, and you get reconciled, sometimes perfectly, sometimes imperfectly, sometimes begrudgingly, but you get reconciled to outcomes that way. When you don't have a fight, when you're precluded from doing that, then you never get reconciled to that outcome, and you also make it harder to have those outcomes happen in the first place, and so what works? If the process works. What does that process look like? Whatever they need it to look like.

But a process where people are engaging ,where they're fighting in a very peaceful way, where they're persuading one another, where they're trying to bargain with one another, where they're trying to win, where they're taking action. That's the kind of thing we need to see, and that's going to look different in different environments, but if we try to make it look like it does now, first of all it's there is no it, like that doesn't happen. It's all behind closed doors and that's why we don't do anything. That's why it's very, very hard for the Senate to do anything these

days, and it's the reason why the Senate has had its least legislative productive, that it's ever been in its history.

And that shouldn't be surprising, but instead our response to that is, we need to make this more productive, so let's try to get conflict even more out of the Senate. Let's get rid of conflict entirely. Let's make decisions even more behind closed doors. Let's empower leaders even more. Let's make it really hard for individuals to act. Let's make it really hard for activists outside the Senate to hold their Senators accountable. Let's make it, let's exacerbate in all of the things that we see happening right now, and then that's somehow going to lead to a different outcome, when in reality it's not going to lead to a different outcome. It's going to lead to the same outcome, and that's why the Senate is, keeps being as dysfunctional as it was the year before. If anything, it gets worse.

**CHERVENAK:** So I think you've already told us the answer for this one, but maybe you could just sum it up for us, is what fundamental institutional improvement should Congress make within 50 years?

**WALLNER:** I mean 50 years, it could happen tomorrow. It doesn't need to be 50 years. Senators need to wake up in the morning, put their feet on the floor, look in the mirror and say, I'm a Senator. I'm going to go to the Senate and I'm going to try to win. That's all you got to do. It'll change overnight. Literally it'll change overnight. It doesn't take 50 years. It takes five minutes, and it's really, really easy, but to do that the Senators have to start being Senators.

**CHERVENAK:** Next one is, what book or article most shaped your thinking with respect to Congressional reform.

**WALLNER:** Oh yeah, I love "The Legislative Struggle," Bertram Gross. Hannah Arendt, the political theorist, wrote a fabulous book called "The Promise of Politics" that helps us better understand politics from a theoretical perspective, and that's very on point for I think a lot of the problems that we see right now and how we think about the Congress and the Senate.

Derrida I mentioned is a collection of interviews from a book called "Negotiations," and it's fabulous look at what negotiation is all about, but even just going back and reading the founders and reading what happened in the old debates of the Congress and reading the debates of the federal convention and reading debates from the 50s and 60s, but just reading things, right, you learn to ride a bike by riding a bike. You learn about the Senate and what makes it tick about the Congress and what makes it work by trying to explain things you don't understand, by trying, when you see something that doesn't make sense, when you see a contradiction and you say okay well I'm going to try to figure that out, what's really happening, instead of just taking the conventional wisdom and saying, well that's what's happening.

If Senators are so polarized, why are they not acting on that polarization, right? Presumably polarized Senators who are determined to make their opponents inside the Senate look bad in the election are going to force a lot of votes. Why aren't they forcing votes? That's an important

contradiction. Then try to understand that and explain it. Then go back and look at how Senate in the past periods of polarization has operated and how they behave, and then try to explain it.

That's what we need to do. We need to get away from these abstract quantification of like data sets and this idea of this macro level analysis, and we need to recognize that we're dealing with people in a place with particular goals participating in an activity that occurs over time, and once we see it like that, then we'll draw our attention to the certain text, the certain sources of data, to certain information, that will help us to better understand the Senate, I think.

**CHERVENAK:** All right, well the last question's just about your plans. What's your focus now and where do you see your work going in the next number of years?

**WALLNER:** Well I'm finishing up a book on legislative procedure. It's like a manual, it's like how to ride a bike without a bike. It's for both staffers and members and people on the outside. It's basically how the Senate and the House work, how the rules work, how to use the rules effectively, what are the strategies and tactics that actors use inside and outside their Congress in these places to win, right, and to help them think about the Senate in the House in a more institutional way,

Working on a book on James Madison and his idea of political conflict, which kind of gets this idea, we see conflict as a bad thing now, and I think that's really at odds with the source of our exceptionalism here in America, and our system is built on conflict and Congress itself is a crucible of conflict.

And then I think I've got some ideas about this whole notion of effort and a theory of effort. I mean we talk about the filibuster and we say people will say things like, well the filibuster empowers the minority, and yes it's just, it's a lot harder to wait out a filibuster than it is to filibuster, and it's like, that's not common sense. I mean ask yourself, would you rather be standing up on the floor with the lights on, with the certainty that you can't speak forever, actually speaking for a day? I mean, who wants to speak for a day? Or would you rather be sitting in your office having a glass of scotch waiting for the schmuck on the floor to finish speaking? Which one would you like?

I think most Americans would say the latter, not the former, but if you ask any scholar they're going to say well yeah it's easier to filibuster than it is to not filibuster. It is easier to speak indefinitely than it is to just sit down and relax, kick your feet up on the sofa, have a drink, and not speak. That doesn't make sense, right, and so I think we have to, we need to think more clearly about this place, and we need to think about the role of effort, we need to think about the idea of time, right. We're gridlock right now because we literally can't imagine a scenario when we're not gridlocked because we need to see the legislative process as something that happens like that. It doesn't happen over time.

We can't imagine a future where we pass something and then we work back from that future and say to ourselves, okay what are the steps we need to take now to get to that point in the future? And then to start doing that. That's how Civil Rights reformers passed the Civil Rights Act. That's how anybody who's had a long legislative campaign has won.

Today we look at the Congress and we say, oh well we have these nominate scores and we have these liberals and we have these conservatives, and until, we need more people in the middle, then we can do something, so let's go have an election, and it's all static, and it's all happening, right then. It's like, why even bother? If we have a vote and if you ask people why don't you act? Why don't you Mr. Senator, Mrs. Senator, why don't you act? They say, well because I'd lose. Well so? That's not the point.

The point is don't act until you win? If that's the case, then nobody's ever going to act. The point is that you have to engage in this activity, and you need to participate, and you try to shape the future by your actions in the present as they unfold over time. That's the secret of politics and political success, but we don't think of it in those terms. To the extent we think about the future at all, it's just the next election, and we don't think about the things that we can do in the here and now to shape that, and so I think we need, we're we have a very statically oriented view of Congress right now, and I think we've got to get away from that too.

**CHERVENAK:** All right, well good luck with that, James, it's been a pleasure talking to you. Looking forward to your books and your coming work.

**WALLNER:** Thanks for having me.