

Before the opponents realized what was happening, Pomeroy declared the report passed by acclamation, and Trumbull moved to consider a different bill. The habeas corpus bill thus slipped past a filibuster in the final hours of the Thirty-seventh Congress.

The use of filibustering to demand the right to debate and amend legislation was not unique to the habeas corpus bill. For example, the House minority party used similar tactics when faced with an 1866 bill requiring loyalty oaths for officials of the federal court and an 1870 resolution revising the government's contract with the Northern Pacific Railroad. In 1878, the *New York Times* suggested that this was common practice in the House: "The tactics resorted to by the [filibustering] Republicans . . . are by no means new. They have been resorted to whenever the majority has sought to crowd its measures through without giving the minority the right to be heard. The right of the minority to debate, and to offer amendments, has been insisted upon and maintained scores of times, not only by refusing to vote, and thus breaking a quorum, but by dilatory motions, in the nature of what is called filibustering" ("The Deadlock Continues" 1).

Perhaps the most significant filibuster of the era was its last. The presidential election of 1876 was a critical event in American history, with a House filibuster at the center of the dispute. The contest between Rutherford B. Hayes and Samuel J. Tilden hinged on the electoral votes of Louisiana, Florida, and South Carolina, with each party claiming victory in these Southern states (for overviews, see Morris 2003; and Woodward 1951). If Hayes proved that he was the rightful winner of all three states, then the election was his; otherwise, Tilden would win the White House. Congressional leaders hammered out a compromise solution: an independent, bipartisan commission to investigate the elections in the three states and recommend which candidate won each state. The recommendations of the electoral commission would be sustained unless both chambers voted to overturn them. The commission recommended that the electoral votes of all three states go to Hayes.

This result was unacceptable to a determined faction of about sixty House Democrats (Woodward 1951, 201). Beginning on February 24, they made repeated dilatory motions and offered gratuitous resolutions to delay the counting of electoral votes (*New York Times*, February 25, 1877, 1). Even after the electoral votes of the three contested states were accepted as valid by Congress, the obstructionist Democrats manufactured challenges to the electoral votes of other states, for example, Vermont and Wisconsin.

Behind the scenes, there were negotiations to end the filibuster. It is unclear whether the result was an explicit quid pro quo (see, e.g., Hoogenboom 1995, 274–94; Morris 2003; Peskin 1973; and Woodward 1951). However, it is clear that the Democrats' bargaining chip was the threat of continued House obstruction and that the end of the filibuster was tied to several political

and policy concessions, including the removal of federal troops to maintain order in Southern states, the appointment of a Southerner as postmaster general (or, more broadly, control over federal patronage in the South), and support for economic reconstruction in the South, including the Texas and Pacific Railroad (Woodward 1951; but see Peskin 1973).

This drama came to an end on March 1. Two events led to the end of the filibuster. One was the announcement by William Levy (D-LA) that he had been assured by leading Republicans that the Hayes administration would cede political power in Southern states to Democratic forces and, hence, that further obstruction was reckless (Hoogenboom 1995). Second, Speaker Samuel Randall (D-PA), who days earlier had vowed to block the presidential vote count (*New York Times*, February 28, 1877, 1), refused to recognize any motions he considered dilatory. Randall's defiance of a sizable faction of his own party was rightly considered an act of political courage and essential to the resolution of the crisis ("Mr. Randall in 1877" 1883). Despite his opposition to the filibuster, however, the presidential count was not concluded until after 4 A.M. on March 2 in a tense, sleepy joint session of Congress (*New York Times*, March 3, 1887, 1).

The Hayes-Tilden contest was a critical period of American history, and the congressional debate illustrates some interesting features of filibustering. First, in this case, obstruction may have literally been a proxy for violent conflict. Some Democrats had announced that, if Tilden was denied his victory, they would take up arms (Woodward 1951, 110–11; but see Peskin 1973, 73). By dragging out the conflict and extracting policy concessions (real or illusory), the obstructionist House Democrats asserted the case of angry and disappointed Democrats across the nation. Second, to the extent that the Compromise of 1877 shifted Reconstruction policy, this change is the result of a filibuster in the U.S. House. Even with the procedural deck stacked against them (the House Democrats could not successfully challenge any state's returns unless the Republican-dominated Senate concurred), the ability of House Democrats to credibly threaten a descent into chaos empowered them to extort an apparent shift in federal policy toward the South.

Finally, this filibuster led to an innovation in congressional rulemaking. The first known statutory limit on filibustering was an 1887 law establishing guidelines for counting electoral votes for president.<sup>11</sup> During the close and often corrupt presidential elections of the Gilded Age, it was entirely likely that there would be more disputed state elections thrust before Congress. As enacted in January 1887, the bill generally gives presumption to the votes submitted by state authorities. It includes, however, a provision for challenging electoral votes as they are counted, with challenges guaranteed an immediate vote in each chamber.<sup>12</sup> This was the first statutory restraint on filibustering on a specific topic.

10. The cross-party antislavery majority held against the Democratic proslavery members; the message was referred to a special investigatory committee appointed by the Democratic speaker, James Orr, which was also stacked with proslavery members.

11. Obviously, this predates the 1939 executive reorganization bill discussed by Binder and Smith (1997). In both texts, the earliest known case are presented; further research may unearth an even earlier statutory restriction on filibustering.

12. Challenges must be made by a member of the House *and* a senator. In 2000, several challenges to the electoral votes from Florida failed because no senator cosponsored the challenge. In 2004, Senator Boxer (D-CA) joined in a challenge to the electoral votes from Ohio that was rejected by both chambers.

13. Earlier, Hayes vetoed an army funding bill with a more explicit ban. The House sustained his veto (Burdette 1940, 36).

14. Readjusters were a faction in Virginia politics that sought to reduce state debt.

15. Green (2007) and Jenkins (2007) argue that these election cases were part of a broader Republican strategy to enforce voting laws through election challenges.

16. On election cases as party questions, see Alexander (1916, 323), Jenkins (2004), and Polsby (1968).

17. This filibuster is ably chronicled by Wawro and Schickler (2006, 76–87), so I limit my discussion of it.

## CHAPTER 5

1. For each session, I arranged the votes from earliest to last, then assigned a percentile ranking so the first vote was a 1, the last vote was a 100, and all other votes were in between. Then for each era, chamber, and session type, I calculated the mean attendance rate for each percentile, yielding a series from 1 (earliest) to 100 (latest). The last step was to smooth the results using a polynomial trend line of order 4.

2. To calculate these scores, I first identified every vote that pitted most of one party against most of the other party; these are known as *party votes*. Party unity scores for a session are the mean of party unity across party votes.

3. The model also predicts an increase in filibustering as Pro increasingly reverts to closure. This is more relevant to the twentieth-century Senate, in which we often observe some signs of filibustering before the majority attempts cloture or can at least distinguish between Senate cloture and ordinary agenda-setting motions. The closure techniques adopted by the House in the 1890s, e.g., increased use of special rules and ignoring dilatory motions, generally limit filibustering *ex ante*, so there is little observable evidence of filibustering. For decades after the 1890s reforms, however, newspaper articles occasionally refer to filibustering in the U.S. House.

4. An alternative approach is some sort of event count regression, which is appropriate for integer data clustered near zero. Both Tobit and negative binomial regression models yield similar results in this case; Tobit had the additional advantage of being easily combined with instrumental variable analysis.

5. I use STATA 9.1's *ivtobit* procedure.

6. Table 5.1 below displays the results for all 270 sessions, including special and Senate-only sessions.

7. I estimated the same equation with a dummy variable for the special session of the Forty-seventh Senate (1881), which is a significant outlier. While this new variable was significant, all other estimates were essentially unchanged.