THE ELECTORAL COMMISSION OF 1877

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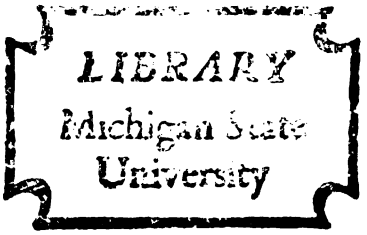

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ABSTRACT

THE ELECTORAL COMMISSION OF 1877

By

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The presidential election of 1876 between Rutherford B. Hayes and Samuel J. Tilden resulted in a dispute over twenty electoral votes. Florida, Louisiana, South Carolina, and one vote from Oregon were claimed by both political parties. Tilden had 184 undisputed electoral votes while Hayes claimed 165. If the Democrats and Tilden could gain one vote the New York Governor would be the new president of the United States.

The House of Representatives was Democratic, while the Senate belonged to the Republicans. Neither party was willing to surrender their claim to the disputed states. From the outset the most important question was, Who should count the electoral votes? The Constitution is vague about the counting procedure, mainly because the founding fathers never envisioned dual returns from the states. The election of 1876 produced duplicate certificates of election, one representing each party. Both parties realized that whoever counted the votes possessed discriminatory power--that is, the power to choose one certificate over the other--and thus elect the candidate of his or their choice.

Republicans maintained that the Constitution gave the President of the Senate the right to count, but the Democrats argued that no vote could be

counted without the approval of the House of Representatives. The failure to decide this controversy was compounded by the spectre of civil war. If the Houses could not agree radical Democrats spoke of taking the Presidency by force.

Both parties wisely agreed to a compromise which placed the decision in the hands of a special tribunal, the Electoral Commission, composed of five Representatives, five Senators, and five Associate Justices of the Supreme Court. The Commissioners were to hear legal arguments from both sides, weigh the evidence, and make a decision which could be reversed only by the concurrent vote of both branches of Congress. To strengthen their cause the Democrats wanted the Electoral Commission to go behind the state returns, that is, to investigate the actual vote cast rather than accept without investigation the results of state returning or canvassing boards. If the Commission decided to go behind the returns, the Democrats were confident of victory. But the Republicans maintained that the Constitution gave the several states control over elections, and that the federal government had no authority to question the decision of a state returning board. Thus both parties reversed their traditional roles regarding state rights and became completely opportunistic about gaining the Presidency.

The most significat materials used for this study were the Proceedings of the Electoral Commission and the manuscript collections or memoirs of the Commissioners. By examining the correspondence and records of various politicians throughout the country, one finds that the disputed election threatened to divide the country along political rather than sectional lines. The papers of Hayes, Tilden, and the Commissioners were indispensible. Supporting evidence was gleaned from the Congressional Record and various articles both of a primary and secondary nature.

Southern Democrats were the motivating force behind the drive for a compromise. Having experienced the devastation of the Civil War, they realized that war would only destroy the nation. Southerners viewed the election as an opportunity for the withdrawal of federal troops and the establishment of home rule, which were the basic goals of Southern representatives. To achieve these goals, compromise was necessary. Before the curtain dropped on the disputed election, the South also gained economic rewards and federal offices for their support of Hayes. The entire agreement is known to history as the compromise of 1877. Fundamental to that compromise was the establishment of the Electoral Commission, itself a product of a compromise. The agreement to establish the tribunal led to a solution of the election crisis, permitted the South to achieve home rule, and made possible a final settlement, the compromise of 1877.

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TO SUE AND JACK

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In a student's graduate career numerous people have played an influencial role. It is impossible to mention all those who deserve acknowledgment. Nonetheless, it is indeed proper to single out the most important. The hand of Professor Frederick D. Williams is to be found in every page. It was his inspiration, understanding, and humor which made the dissertation a joy. To Professor Williams belongs the title, "A Teacher's Teacher." I also owe a great debt of gratitude to Professors Robert E. Brown and Thomas Bushell for their courtesy and guidance over the past few years. Likewise I owe a great deal of gratitude to the Department of History whose financial aid in the form of a fellowship made this work possible.

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PREFACE

The presidential election of 1876 between Rutherford B. Hayes and Samuel J. Tilden resulted in a dispute over twenty electoral votes. All of the votes from Florida, Louisiana, South Carolina, and one vote from Oregon were claimed by both the Republicans and the Democrats. The resulting discord produced talk of civil war and threatened the very existence of the nation. Basically, the controversy was over who should count the electoral votes. On that point the Constitution was vague, leaving each party the opportunity to interpret the pertinent clauses in their own favor. Republicans claimed that the President of the Senate possessed the counting power while Democrats argued that the power resided equally within both Houses of Congress. The solution was found in a political compromise.

In order to avert civil war and to elect a president under the guise of law, moderates from both political parties created a special tribunal composed of five Senators, five Representatives, and five Justices from the Supreme Court. The Electoral Commission was to sit as a court of arbitration and decide who was the legally elected president. Under the Electoral Commission act of January, 1877, their decision would be final unless overridden by both Houses of Congress, a possibility highly unlikely as each party controlled one House.

The importance of this measure was that it permitted a peaceful settlement of an explosive question and, at the same time, unknowlingly opened the way to the much broader compromise of 1877. The relationship between the Electoral Commission and the compromise of 1877 has never been explored. Hopefully this work may at least open the door to further avenues of research and, ultimately, to a clearer understanding of the Hayes-Tilden disputed election and the resulting settlement.

TABLE OF CONTENTS

CHAPTER I

THE ORIGIN AND DEVELOPMENT OF THE ELECTORAL COLLEGE

The process by which the chief magistrate of the United States is placed in office encompasses the Constitution, the laws of Congress, and the laws of the individual states. It is a decentralized procedure in which the duties and laws are vague and overlapping. Originally, the electors voted for the candidate they thought best suited for the presidency, but with the introduction of political parties, the Electoral College has, over the years, changed considerably. Yet what has not changed is the significant fact that the votes of appointed electors, rather than the votes of the people, elect the President.

Criticism of the electoral system usually arises every four years, traditionally on the eve of a presidential election. The critics generally call for a total revamping of the election procedure, and then, after the election, the idea suddenly dies. Yet many books in American History, especially studies of the Constitution, contain a great deal of such criticism. The Electoral College has been called a "rubber stamp" and a group of party marionettes whose death would disturb no one.[1]

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[1]This criticism was voiced by a Federal Court in Ray v. Blair, 343 U.S., 214, 232, 234 (1952). Further criticism may be found in almost any work on the Constitution. Cf. Edward Dumbauld, The Constitution of the United States (Norman: University of Oklahoma Press, 1964), p. 264. Edward S. Corwin, The Constitution and What It Means Today (Princeton: Princeton University Press, 1954), p. 242.

The election procedure is one of the most discussed issues in the nation during a presidential campaign. Newspaper articles, reports, and talk on the street cover the electoral system over and over again. Despite all of this discussion the system remains and continues to confuse a great portion of the population.

The delegates to the Constitutional Convention found that one of their most difficult tasks was to formulate a procedure for electing the chief executive. In total, seven different methods were proposed, of which four gained support. James Madison, in his Notes, discussed election by the people, state legislatures, state executives, and election by electors chosen by the people.[2] Before reaching an agreement, the members of the Convention carefully considered each of these four proposals.

Election by the people was, almost at once, dismissed. It was effectively argued that the people could not become familar with the qualifications of the various candidates and, therefore, could not make an educated and wise choice. More importantly, the argument centered around the question of the small versus the large states. With direct election a preponderant voice would be given to the large states, which, it was feared, could be controlled by "a few active and designing men."[3] On July 17, 1787, the Constitutional Convention defeated a

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[2]James Madison, Notes of Debates in the Federal Convention of 1787 (Athens, Ohio: Ohio University Press, 1966), pp. 370-371. Max Farrand (ed.), The Records of the Federal Convention of 1787, 3 vols.; (New Haven: Yale University Press, 1911), II, pp. 119-120. A complete list of the various means of election may be found in F.A.P. Barnard, "How Shall the President Be Elected," North American Review, CXL (Jan., 1885), 104.

[3]Madison, Notes, pp. 306-307.

proposal for popular election of the President, with only Pennsylvania voting in the affirmative.[4]

More appealing to the delegates was the proposal calling for election by the national legislature, and this method was originally adopted by a unanimous vote.[5] But as the Convention progressed, some members began to attack this procedure. Elbridge Gerry, James Madison, and Gouverneur Morris argued that election by the national legislature would destroy the system of checks and balances and open the door to intrigue, bribery, and fraud; it would make the executive a "mere creature of the Legislature," and would be "more immediately and certainly dangerous to public liberty." Morris went on to compare this process to the election of a pope by a conclave of cardinals--a strong statement in revolutionary America.[6]

The concept of election by electors was first introduced to the convention by James Wilson of Pennsylvania. Though his original proposal was defeated, the idea continued to draw support and kept reappearing. Wilson's proposal was not new to America. The Maryland Constitution of 1776 provided that electors, chosen by county delegates, elect the state senators. The Constitution of 1780 for Massachusetts provided for a canvass of the votes of the electors and a final declaration of the result.[7]

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[4]Ibid., pp. 303-307.

[5]Ibid.

[6]Madison, Notes, pp. 50-51, 306, 326-327. Farrand (ed.), Records, I, pp. 80-81.

[7]David A. McKnight, The Electoral System of the United States (Philadelphia: J.B. Lippincott, 1878), pp. 213-214, 221-222.

When it became evident that election by the national legislature had lost the support of a significant number of delegates, the formulation of a procedure for electing a president was referred to a committee chaired by David Brearley of New Jersey. The Brearley committee recommended that each state appoint electors "in such manner as its Legislature may dirrect . . . ." The electors were to vote in their respective states for two persons and then forward the votes to the President of the Senate. "The President of the Senate" the report continued, "shall in that House open all the certificates, and the votes shall be then and there counted."[8] The report of the committee was accepted with only one major amendment, which stated that the House of Representatives, as well as the Senate, shall be present for the opening and counting of the votes.[9]

The system of election, as designed by the Constitutional Convention, left open the possibility that no one candidate would obtain a majority of the electoral votes. The delegates provided for such a contingency by including a clause in the Constitution authorizing the House of Representatives, voting by states, to make the choice. There was no question in most minds that George Washington would be the first President; but many believed that after his term of office there would be a large number of candidates, none of which would be able to procure the

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[8]Madison, Notes, p. 574. Farrand (ed.), Records, II, pp. 493-494, 497-498. The Committee was composed of Rufus King (Mass.), Roger Sherman (Conn.), David Brearley (N.J.), Gouverneur Morris (Pa.), John Dickinson (Del.), Charles Carroll (Md.), James Madison (Va.), Hugh Williamson (N.C.), Pierce Butler (S.C.), Abraham Baldwin (Ga.), and Nicholas Gilamn (N.H.).

[9]Ibid., pp. 590-591. Farrand (ed.), Records, II, pp. 526-527, 597-598.

needed majority. There is evidence that the fathers of the Constitution preferred that the House of Representatives decide most elections.[10]

Election by electors, many believed, would keep the presidency free from "mischief" and prevent the office from falling to a man who was not, as Alexander Hamilton said, "in an eminent degree endowed with the requisite qualifications." Hamilton went on to state that " the mode of appointment of the chief magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure....I venture somewhat further and hesitate not to affirm that if the manner of it be not perfect, it is at least excellent. It united in an eminent degree all the advantages the union of which was to be wished for."[11] Yet some delegates, among them Gouverneur Morris, believed that the compromise invited trouble. He feared that when an election was tossed into the House there would be bargaining, and that "a predominance of faction" might choose the poorer man. His only hope was that such an occurrence would serve as a lesson for the future.[12]

As originally established the electors, or the Electoral College, as the group was called, were to be unpledged and free to vote for the most able and

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[10]Joseph Story, Commentaries on the Constitution of the United States (4th ed.; Boston: Little, Brown and Company, 1873), pp. 299-300. Refer also to Herbert W. Horwill, The Usages of the American Constitution (Oxford: Oxford University Press, 1925), pp. 28-30.

[11]Federalist, No. 68 (Modern Library edition), pp 441-442, 444.

[12]Farrand (ed.), Records, III, pp. 394-395.

distinguished citizen of the nation. This procedure not only eliminated the danger of foreign intrigue and corrupt influences of party politics, but permitted some degree of public sentiment to be heard.[13]

In Article II, section one, the requirements for the electors are set forth. Each state has as many electors as it has senators and representatives, and the electors are appointed "in such manner as the Legislature may direct." The only restriction written into the Constitution is that no senator or represenative, or "person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." It should be made perfectly clear that the selection of electors is controlled by the states. Although the federal circuit courts have jurisdiction over suits to recover offices, the electors of the President and Vice-President are excepted. This exception is all that is needed to show complete state control.[14]

To implement the provisions of Article II section one of the Constitution, Congress has passed a series of laws, the most important being the election law of 1792. Under this the electors were to be appointed before the first Wednesday of December succeeding the last election. The electors were to cast their votes on the first Wednesday in December and complete three certificates of their voting. One certificate was to be mailed to the President of the Senate, another delivered

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[13]E. W. Gilliam, "Presidential Elections Historically Considered," Magazine of American History, XIV (Aug. 1885), 181.

[14]U.S., Statutes at Large, XVI, 146. McPherson v. Blacker, 146 U.S. 1, 2-5, 27 (1892). U.S., Congress, Senate, The Constitution of the United States of America, Document No. 232, 74th Cong., 2nd Sess., 1936, p. 378. /Hereafter referred to as Senate, Doc. No. 232./.

to him personally, and the third was to be filed with the judge of the district in which the election took place. In addition the "executive of the State" was to prepare three lists of the names of the electors which were to accompany the votes. On the second Wednesday in February Congress was to convene to receive, open and count the votes. The dates of appointment and of voting has been changed from time to time, as in 1845, but the procedure has remained basically the same.[15]

When the Congress of the Confederation sent the new Constitution to the states for ratification, it also sent several resolutions passed by the Constitutional Convention on September 17, 1787, which stated the procedure to be followed should the Constitution be ratified by nine states. One resolution stated that the electors were to send their votes to the Secreatry of the United States in Congress, a new name for the Clerk of the Confederation. The Senate would appoint a President of the Senate, for the sole purpose of receiving, opening, and counting the votes for President.[16] John Langdon, who was elected President of the Senate, opened and counted the votes, and declared the result to the two Houses. George Washington was elected unanimously and without debate.[17] From all this it seems safe to conclude that Congress, some members of which were delegates to the

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[15] U.S., Congress, House of Representatives, Select Committee on Counting Electoral Votes, Counting Electoral Votes: Proceedings and Debates of Congress Relating to Counting the Electoral Votes..., Misc. Doc. No. 13, 44th Cong., 2nd Sess., 1876-1877, p. 9. /Hereafter referred to as House, Misc. Doc. No. 13/. Refer also to Senate, Doc. No. 232, pp. 379-380, and Statutes at Large, XXIV, 373.

[16] House, Misc. Doc. No. 13, p. 78.

[17] Ibid.

Constitutional Convention of 1787, agreed that the President of the Senate should open and count the vote of the electors, and declare the result. It must be stated however, that since a new government was being established, it is at least questionable that this procedure can be interpreted as solid precedent for later elections.[18]

The first serious attempt by Congree to gain control over the electoral count came in February, 1800, when Senator James Ross of Pennsylvania introduced what has been called the "Grand Committee Bill." Ross's proposal called for a committee of six representatives and six senators to unite with the Chief Justice of the Supreme Court to form a "grand committee" to "examine, and finally decide, all disputes relating to the election of President and Vice-President of the United States."[19] This committee was to have the power to examine all of the documents pertinent to the election, to view the constitutional qualifications of the candidates and the electors, and every means that may have been used to corrupt the independence of the electors. However, the sweeping provision stopped short of allowing the committee even to question the "number of votes given for an elector, or the fact whether an elector was chosen by a majority of the votes in his State or district."[20]

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[18] J. Hampten Dougherty, The Electoral System of the United States (New York: G.P. Putnam's Sons, 1906), p. 29, maintains that it is a solid precedent. John Bigelow (ed.), The Writings and Speeches of Samuel J. Tilden (New York: Harper and Brothers, 1885), II, pp. 389-390, holds the opposite opinion.

[19] For some reason the bill does not appear in the Annals of Congress but may be found in the Philadelphia Aurora, Feb. 19, 1800 or in House, Misc. Doc. No. 13, pp. 16-19.

[20] House, Misc. Doc. No. 13, pp. 16-19. Refer also to Edward Stanwood, A. History of Presidential Elections (Rev. Ed.; Boston: Houghton Mifflin Co., 1892), I, p. 65. U.S., Congress, Annals of Congress, 6th Cong., 1800, p. 129. /Hereafter referred to as Annals./

Charles C. Pinckney, then the presidential candidate of the Federalist Party, delivered the most damaging blow to the "grand committee" scheme with his speech of March 28, 1800. As a former member of the Constitutional Convention, Pinckney was able to exert a tremendous influence upon his congressional colleagues. "It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention, the right to object to any vote, or even to question whether they were constitutionally or properly given the right of determining the manner in which the Electors shall vote; the inquiry into qualifications, and the guards necessary to prevent disqualified or improper men voting, and to insure the votes being legally given, rests, and is exclusively vested in the State Legislatures...."[21] Despite the speech by Pinckney the Senate passed the measure by a vote of 16 to 12.[22] Pinckney's influence, however, did manage to help the opponents of the measure in the House. The House favored a concurrent vote of both branches of Congress for "admitting" a vote that had been challenged, while the Senate preferred a concurrent vote to reject a specified vote. One other point of difference was whether to choose the members of the committee by ballot or lot. Because of these disagreements between the Senate and House the bill was lost.[23]

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[21] Annals, X, p. 130. See pp. 126-146 for the entire speech. Portions of this important speech are to be found in House, Misc. Doc. No. 13, pp. 19-21.

[22] Annals, X, p. 146.

[23] Annals, X, pp. 692, 694, 713. Stanwood, Presidential Elections, I, p. 67.

Nevertheless, the measure formed an important precedent for the future, for it became the basis for the twenty-second joint rule of 1865 and the Electoral Commission of 1877.[24]

The Jefferson-Burr contest of 1800 produced not only the "grand committee" scheme but also the first amendment to the Constitution which affected election procedure in a presidential contest. Amendment XII was adopted on September 25, 1804 and stated that the electors must "name in their ballots the person voted for as President." This was to avoid a repetition of the difficulties encountered in the Jefferson-Burr election in which each received the same number of electoral votes even though Aaron Burr was the Vice-Presidential nominee. With respect to counting electoral votes the amendment reiterated the Constitution: "The President of the Senate shall in the presence of the Senate and House of Representatives, open all the certificates and votes shall then be counted." In the debate over the "grand committee" bill the question as to who should count the votes seems to have created no fuss, and the XII th Amendment contains the same wording that appears in the original constitution.

The XIIth Amendment, of course, was no cure-all. In actuality it dealt with the kind of problem that had arisen in 1800. The electoral system remained

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[24]For some interesting and challenging comments on the electoral system see Charles C. Tansill, "Congressional Control of the Electoral System," Yale Law Journal, XXXIV (March, 1925), 511-525.

untouched and the danger of a third party throwing the election into the House of Representatives was not eliminated; indeed, it is still with us.[25]

Elections proceeded normally from 1800 to 1817, but in the latter year a member of Congress objected to receiving the electoral votes of Indiana. The basis for this objection was that Indiana had elected the electors before achieving statehood in the Union.[26] Congress found itself in a quandary, took no action on the matter, and the votes of Indiana were counted. But the precedent of a congressman objecting to a vote had been established, and it bore first fruit only four years later.

In 1820 the state of Missouri was in the process of being admitted to the Union and had duly submitted her state constitution to the Congress. One provision in that constitution required the state legislature to pass laws prohibiting free negroes and mulatoes from coming to and remaining in Missouri. Controversy over this provision delayed the admission of Missouri and led to the agreement known to history as the Missouri Compromise.

An important aspect of the compromise was Congressional recognition of the need to review the Missouri question and decide whether or not to count the three electoral votes. Actually, those votes could play no role in determining the outcome

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[25] The only other amendment to affect the Electoral system is the twentieth. This changes the date for the beginning of a Presidential term from March 4th to January 20th. The amendment ended what was called the "lame duck" session of Congress, December 1 to March 3rd. The change was procedural rather than definitive with regard to the electors.

[26] John Bigelow, et al, The Presidential Counts (New York: D. Appleton and Company, 1877), pp. 29-34.

of the election, a fact that was of central importance in shaping the settlement.

As a part of the Compromise of 1820 Henry Clay proposed that Missouri be admitted to the Union after promising not to pass any laws which would prohibit the citizens of the several states from settling in Missouri.[27] Congress considered Clay's proposal as a joint resolution which stated that as soon as Missouri conformed to the resolution and had informed the President of that fact, the President was to proclaim Missouri a state.[28] The proclamation was so issued on August 10, 1821.

Once the issue of admission had been settled there remained the question of the count. Clay again came to the rescue, proposing an alternative count. The alternative count plan meant that one could either count the votes of Missouri or exclude them. In either event James Monroe was the President. Thus Monroe's electoral count reads either 231 or 228.[29]

Both Clay and Senator James Barbour delcared that a casus omissus existed in the Constitution with regard to counting the electoral vote, and for the next forty years Congress adhered to this principle.[30] Until 1821 the power of the

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[27] Annals, 16th Cong., 2nd Sess., 1820-21, XXXVII, pp. 1078-1080.

[28] Ibid., pp. 1784-1786.

[29] Ibid., pp. 1147-1148. The arguments over this motion are to be found on pp. 1147-1164. See also pp. 341-342 for the Senate debate. House, Misc. Doc No. 13, p. 50.

[30] Ibid., pp. 341-342, 1152.

President of the Senate to count the electoral votes had not been challenged. Now a new doctrine would be accepted in theory until the period of Reconstruction.[31]

The election of James Monroe under Clay's plan established two precedents. As already noted, one was the acceptance of the argument of a casus omissus in the Constitution. The second was the concept of the alternative count. Since there was no question over Monroe's election, the plan worked perfectly. But Congress, realizing the plan would fail in a close election, considered passing corrective legislation. Yet, when the heat of the day cooled, so did the good intentions of Congress, and nothing was done.[32]

Although a number of critics contend that in 1824 John Quincy Adams and Andrew Jackson were involved in a contested election, such was not the case. Neither Adams nor Jackson received a majority of the electoral votes and the election went to the House of Representatives. The House elected Adams and the entire procedure compiled with the provisions of the Constitution.

The next controversy arose in 1837 when the electoral returns from Michigan were challenged on the grounds that Michigan was not a state in the Union. A select committee of both Houses, led by Felix Grundy and Henry Clay, voted unanimously to recommend the alternative count method. Grundy said that the

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[31] The Democrats in 1876-1877 would not accept this theory. John Bigelow, in Presidential Counts, argues that from 1793 to 1865 there was no substantive change in the counting procedure. Under the light of more recent scholarship it now seems that it would be most difficult to hold such a theory. Refer to Dougherty, The Electoral System, p. 218; Tansil, Yale Law Journal, XXXIV, p. 521; also House, Misc Doc No 13, p. 49.

[32] Annals, XXXVII, pp. 346, 341-342, 1078-1080.

question of the electoral votes was "the very place where the rock lies which may destroy this government...." Rather than wreck the ship of state on the rock a detour was taken.[33]

The count in the alternative was quickly adopted in the Senate by a 34 to 9 vote. The House followed without division.[34] By counting the vote of Michigan, Martin Van Buren had 170 votes, by not counting, 167 votes. In either case Van Buren was elected President. The lack of an electoral majority forced the race for Vice-President into the Senate where, with each senator having one vote, Richard M. Johnson was elected.[35]

Another important aspect of the 1837 election was a statement regarding federal office holders being electors. There was a question in this election as to whether as many as six electors had been or were federal office holders at the time they voted. The committee, though rejecting the opinion that one illegal vote would vitiate the entire Electoral College, stated that an individual vote could be challenged. It recommended the enforcement of the second section of the second article of the Constitution.[36]

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[33]U.S., Congress, Congressional Globe, 24th Cong., 2nd Sess., 1837, IV, pp. 154-155, 166-167.

[34]Ibid., pp. 154-155, 163-164.

[35]Ibid., pp. 170-172.

[36]House, Misc. Doc. No. 13, p. 71.

The question here is that the report of the committee did not specify whether they meant that persons could not be federal office holders at the time of their appointment or at the time of their voting. In other words, could a federal office holder be appointed an elector and then resign his position of "trust or profit" and cast a legal vote, or must the person resign his position prior to appointment? These questions were to cause elaborate discussion in later elections.

In the 1856 election a snow storm prevented the electors in Wisconsin from voting on the required day, December 3, but they dutifully cast their votes for John C. Fremont on December 4th. When this fact was called to the attention of the combined Houses an objection was raised to the Wisconsin vote. James R. Mason, President pro tempore of the Senate, quickly disavowed any unilateral action and maintained that the "duty of counting the votes had devolved on the tellers under the concurrent order of the two Houses...."[37] This precipitated a new development.

The President pro tempore stated that he did not declare whether the votes of Wisconsin should be counted, but it was his duty to declare the "whole vote as given." Mason disclaimed any right or authority to count and would only announce what "votes had been received by the tellers, without question of their legality, and to declare the result to the two Houses."[38] Mason's denial meant the beginning of Congressional supremacy.

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[37] Cong. Globe, 34th Cong., 3rd Sess., 1856-1857, XXV, pt. 1, p. 652. The tellers, two from the House and one from the Senate, were to make a list of votes and return the list to the President of the Senate. Their original function was merely one of computation.

[38] Ibid., pp. 652-653, 645. Dougherty, The Electoral System, p. 53.

In actuality the question of whether to count the Wisconsin vote was never resolved. The President pro tempore noted that Wisconsin's vote would not change the fact that James Buchanan had been elected and the Senate dropped the matter. Benjamin F. Butler of Massachusetts raised a series of objections in the House, but soon he, too, tired of the matter and let it fall.[39]

Among the many results of the American Civil War was its enhancement of the powers of Congress over elections at the expense of the states. It is normally thought that the XIVth Amendment was the first attempt at disfranchisement,[40] but Congress had assumed that power a full year before the Amendment was even proposed. Congress, by a joint resolution, excluded the votes of the eleven seceded states from the Presidential count of 1865 because those states were in armed rebellion.[41]

President Abraham Lincoln, who favored the electoral system because of the compromise between the large and small states,[42] conceded to Congress complete control over counting the electoral votes. The President disclaimed "all right of the Executive to interfere in any way in the manner of counting electoral votes...."[43]

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[39] Ibid., p. 674.

[40] William A. Russ, "Congressional Disfranchisement, 1866-1898," (Unpublished Ph.D. Thesis, University of Chicago, 1933), states this premise.

[41] Cong. Globe, 38th Cong., 2nd Sess., 1864-1865, XXXV, pt. 1, pp. 505, 595, 711.

[42] Roy P. Basler (ed.), The Collected Works of Abraham Lincoln (New Brunswick, N.J.: Rutgers University Press, 1953), I, pp. 450-451.

[43] Ibid., VIII, p. 270. Cong. Globe, XXXV, pt. 1, pp. 595, 711.

Congress was not to be restrained by merely excluding the votes of the seceded states. A joint committee for counting the electoral votes adopted the usual procedure and also recommended that if an objection arose the two Houses should immediately separate and decide on the objection, "...and no question shall be decided affirmatively and no vote objected to shall be counted, except by the concurring vote of the two Houses...."[44] This rule, as adopted, meant that either House had the power to reject the vote of a given state by refusing to override the objection. The passage of this rule and the resulting exclusion of the votes of Louisiana and Tennessee in February, 1865, completed Congressional control over the electoral system.

The twenty-second joint rule, as it became known, was, in actuality, a misuse of Congressional power. A joint rule is never meant to be a substitute for legislation. The rule gave the power to one branch of Congress to exclude, without the consent of the other, the legitimate vote of the states. The operations of the joint rule were negative and certainly not the design of constructive legislation.

Fortunately any joint rule lasts only from Congress to Congress. The twenty-second joint rule was an expedient measure and would be dropped when no longer of use. In December, 1875, the Republicans realized that the fat years had ended; thereupon the Senate voted 50 to 4 to suspend the rule.[45] John Bigelow

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[44] Cong. Globe, XXXV, pt. 1, p. 608.

[45] Cong. Record, 44th Cong., 2nd Sess., 1876, IV, pt. 1, pp. 97-109.

challenged the action of the Senate, saying that a concurrent vote was required to drop a joint rule. His partisan motives seem to have clouded his better judgment, for the right of one House to discard a joint rule is irrefutable.[46]

The Reconstruction period saw Congressional control over the Presidential elections take shape and become solidified. In 1869 Georgia had not fulfilled the qualifications for readmission to the Union, so Senator George F. Edmunds proposed counting in the alternative. This method was adopted once again by a joint resolution, but during the count the two Houses came into conflict. Benjamin F. Butler objected to counting the vote of Georgia and going behind the concurrent resolution of February 8, 1869, to count in the alternative, noted that the electors had not voted on the day required by law. Thus, Butler not only claimed that Georgia was not in the Union, but that her electoral votes had not been cast on the first Wednesday in December.[48] The House decided not to count the votes of Georgia despite the concurrent resolution, while the Senate ruled that Butler's objection was not in order. Under the provisions of the twenty-second joint rule the vote of Georgia should have been excluded. Despite great confusion the presiding officer proceeded to declare Grant the President and to

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[46]Bigelow, (ed.), Writings and Speeches, II, p. 66. Compare the argument of Bigelow with the arguments of Democratic Senators Thomas F. Bayard and Allen G. Thurman, Cong. Record, IV, pt. 1, pp. 97-109. The importance of the twenty-second joint rule to the election of 1876 will be discussed in a later chapter.

[47]Cong. Globe, 40th Cong., 3rd Sess., 1896, XL, pt 2, p. 1058.

[48]Ibid., pp. 1050, 1058.

count Georgia in the alternative. Butler argued against this decision but it was to no avail.[49] Disregarding the twenty-second joint rule, the Republicans decided to ignore Butler and proceed along their own path, their own rule notwithstanding.

The votes of Louisiana for the seond consecutive time were objected to on the grounds that "no valid election of electors..." had taken place within the state. Both Houses approved the vote of Louisiana because the certificates contained no proof of the charge.[50]

Grant's second election produced the greatest number of Congressional objections to that date. Objections to Mississippi and Texas were heard and quickly overruled.[51] The major battles were fought over the votes of Georgia, Louisiana, and Arkansas.

Georgia presented a novel case. Three loyal Democratic electors voted for Horace Greeley on the very day that he was buried. The House voted not to count the votes, while the Senate voted to accept them. Since the two Houses failed to concur, three votes from Georgia were not counted.[52]

The dispute over Arkansas' votes stemmed from a charge that the electors were not elected by ballot and the returns were not certified according to law.

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[49] Ibid., pp. 1054, 1059, 1063-1067.

[50] Ibid., pp. 1050, 1056-1057.

[51] Cong. Globe, 42nd Cong., 3rd Sess., 1873, XLVI, pt. 2, pp. 1288, 1299; for Texas see pp. 1291, 1301.

[52] Ibid., pp. 1287, 1297.

Again the Senate and the House failed to agree and, under the twenty-second joint rule, the state of Arkansas was disfranchised.[53]

In Louisiana two groups sought control of the state returning board. The Wharton faction led by Governor Henry Clay Warmoth attempted to stack the board with its favorites. Despite a federal court order they cast their votes for Horace Greeley. The Lynch Board voted for Grant on December 6th or 7th, two days later than required by law and were certified by one Bovee, the newly appointed Secretary of State, instead of the Governor.[54]

Early in January, 1873, Senator John Sherman introduced a motion to have the Committee of Privileges and Elections, under the chairmanship of Oliver P. Morton of Indiana, inquire into and report on the election of electors in Louisiana. The basis for this motion was that Louisiana had submitted two sets of returns to the President of the Senate, one set for Grant and the other for Greeley. This new situation put everyone in a quandary.

The Committee of Privileges and Elections, after investigation, concluded that the election was "an organized fraud." The people who controlled the polls, counted the votes, and dominated the returning board were opposed to the Republican party. The Committee went on to say that although the Greeley electors were certified, the vote of Louisiana had not been counted by the returning board under

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[53]Ibid., pp. 1292, 1304. This time the Senate would not accept the votes.

[54]Ibid., pp. 1218-1219.

Louisiana law. The Committee did admit that neither it nor the Congress possessed the power to count the vote.[55] Both Houses of Congress accepted the report and the recommendations of the Committee and refused to count the vote of Louisiana.

Senator Morton's Committee actually went behind the Governor's certificate and the returns of the state canvassing board in concluding that the official returns had never been counted by any legal authority.[56] With the election of the Grant-Wilson ticket Congressional power had again been expanded at the expense of the states. The votes of two entire states and a portion of a third had been excluded, in effect disfranchising the people of those states. A question that concerned many was whether this growth of Congressional power would continue.

Late in 1873 another discussion of the electoral system developed when Morton offered a constitutional amendment to establish a new method for electing the president. Under Morton's proposal a candidate would receive one "presidential vote" for each district he carried in a state, and two additional at-large votes if he carried a majority of state districts. In the case of a tie, the at-large votes would be split. This amendment rested on the premise that equal districts, based on population, could and would be created. The amendment gave Congress the power to hold and conduct presidential elections and to establish "tribunals

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[55] Cong. Globe, XLVI, pt. 2, pp 1218-1219, 1293, 1305.

[56] Ibid., pp. 1218, 1305-1306.

for the decision of such elections as may be contested."[57] The proposed amendment never left the halls of Congress but it represents the most ambitious attempt ever made toward congressional control over presidential elections.

At least two other proposals for refining the electoral procedure were offered about the same time. Senator George F. Edmunds resurrected the "grand committee" plan of 1800 and proposed a plan to create a tribunal to investigate contested elections. The plan was never considered by the Senate.[58] Perry Belmont, as a private citizen writing for the New York Herald, advocated some type of tribunal for contested elections.[59] Thus, the electoral system came more and more under surveillance. The contest of 1876 greatly intensified that surveillance.

A wide variety of opinion is available on the history of the electoral system. Three basic arguments were presented as to who should count the votes. Republicans sometimes argued that the President of the Senate had sole authority to count. The Democrats maintained that the two Houses should do the counting, and by 1876 this idea had been embodied into the twenty-second joint rule.[60]

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[57]Oliver P. Morton, "The American Constitution," North American Review, CXXV (July, 1877), 68-69.

[58]Cong. Record, 43rd Cong., 2nd Sess., 1875, III, pt. 1, p. 634.

[59]Perry Belmont, An American Democrat (New York: Columbia University Press, 1940), p. 186.

[60]For this interpretation refer to George Bancroft, The History of the United States (New York: D. Appleton and Co., 1892), VI, pp. 340-341, fn. 1. John Bigelow, et al, Presidential Counts, presents this thesis throughout the work.

A third group stated that the two Houses jointly held the power to count, and that a concurrent vote was needed to reject electoral votes.

The counting process was one of evolution. In the beginning the President of the Senate did count the vote. Later, Congress began to assume control by arguing there was a casus omissus. This argument was the beginning of a natural process which ended with the two Houses jointly claiming the right to count. The position of the two major parties shifted from time to time, depending on the political advantage to be gained. Thus their arguments must be considered with the idea of political advantage in mind.

The founding fathers assumed the counting process would merely be an enumeration or ministerial function. Apparently they never considered the possibility of illegal votes. The President of the Senate believed that he was the proper body to do the counting as he so certified on the document which declared who was elected President.[61] This was the case through the eighth term of office. Beginning with the first election of Andrew Jackson the tellers, appointed by each House did the counting. This was reaffirmed by the denial of James R. Mason in 1857.[62] By the time of Lincoln's second election there was no question that the power of counting and canvassing resided in the two Houses.

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[61] House, Misc. Doc. No. 13, pp. 11, 15, 31, 41, 43, 45.

[62] Ibid., pp. 67, 69,74, 77, 80, 83, 85, 89.

Over the years Congress failed to approve legislation clarifying the election procedure. Each and every law passed was designed to meet a given situation and may therefore be classified as expedient. Congress legislated on a crisis-to-crisis basis, refusing to consider the electoral procedure as capable of producing a grave constitutional crisis. Indeed, there is no evidence of a phili - sophical approach toward the Electoral College, despite the fact that the concept of the elector was not consistent with our institutions or with the principles of democratic government. The danger in relying on expedient measures became evident in 1876, when the Hayes-Tilden disputed election found Congress momentarily bankrupt as to solving a crisis that threatened civil upheaval.

CHAPTER II

CRISIS AND COMPROMISE

The debate over the electoral system continued after the election of 1872 with speaker after speaker predicting disaster. In a speech at Chillicothe, Ohio, on July 4, 1873, Senator Allen G. Thurman said: "There is urgent need for an amendment.../relating/ to the mode of verifying and declaring the electors.... I do not exaggerate the dangers when I say that unless a better mode of verifying the election of President shall be provided than now exists, the country may some day--and no one can tell how soon--be plunged into civil war over this election."[1] Thurman argued that the Supreme Court had no jurisdiction and by March, 1876, he saw no way out of the electoral dilemma.[2]

As late as 1875 George F. Edmunds, a Republican Senator from Vermont, suggested a return to the "Grand Committee" plan with a tribunal composed of four representatives and four senators. If any controversy developed, this

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[1]Allen G. Thurman, Oration by Hon. Allen G. Thurman at Chillicothe, Ohio, July 4, 1873. A phamphlet in the Allen G. Thurman Papers, Ohio Historical Society, Columbus, Ohio. /Hereafter referred to as the Thurman Papers./.

[2]Cong. Rec., 44th Cong., 1st Sess., 1876, IV, pt. 2, p. 1670.

tribunal could decide who was elected. A concurrent rejection by both Houses would be needed to prevent the votes of any state from being counted or to override the decision of the tribunal. The Edmunds plan died in the Senate without debate.[3]

The question arose again in late 1875 when Oliver P. Morton, realizing that the repeal of the twenty-second joint rule[4] left Congress without a counting procedure, introduced a new bill. The Morton bill asserted the right of the two Houses, acting concurrently, to count the vote. It denied the power of the President of the Senate "arbitrarily" to count the electoral votes.[5] In the case of a double return the two Houses would concurrently decide which was the true and valid return of the state in question.[6] Thus, if the Houses did not agree, the vote of the state was lost.

The problem of dual returns monopolized debate over Senator Morton's proposal. Under the bill a state could be disfranchised by either House. Thomas F. Bayard, a leading Democrat from Maryland, argued that the bill was a mere return

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[3]Ibid., 43rd Cong., 2nd Sess., 1875, III, pt. 3, p. 1776. House, Misc. Doc. No. 13, pp. 498-499.

[4]Refer to Chapter I, pp. 17-18.

[5]Cong. Rec., 44th Cong., 1st Sess., 1876, IV, pt. 2, p. 1666.

[6]Ibid., pp. 1662-1663.

to the twenty-second joint rule.[7] Senator Thurman proposed an amendment giving the President of the Senate the power to decide cases on which the two Houses disagreed. Although Thurman praised the useful features of the bill, he realized that it could and would be used for partisan advantage.[8]

The Senate discussed and passed Morton's bill by a bipartisan vote, but reconsidered it a little later and decided to lay it aside informally. The bill was never again brought to the floor.[9] It is of more than passing interest to note that had Morton's bill passed, Hayes would have lost the 1876 election. Had Thurman's amendment been accepted Tilden would have been defeated by the vote of the President of the Senate.

The centennial year of 1876 brought high hopes to Democrats that the Republicans could be removed from both state and national offices. This hope was the greatest in the South.[10] Democrats, thirsting for victory, realized that the election presented their best chance of winning since the Civil War. Senator Bayard called for the Senate and House Committees on Rules to examine a means

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[7]Ibid., p. 1666.

[8]Ibid., p. 1667. The Nation, XXIII (March 30, 1876), 201.

[9]Ibid., pp. 1945, 5193-5194.

[10]William Watson Davis, The Civil War and Reconstruction in Florida (New York: Columbia University Press, 1913), p. 688. /Hereafter referred to as W.W. Davis, Reconstruction in Florida./.

of counting the electoral votes.[11] His proposal died without debate. The period of 1875-1876 shows the vital concern of both parties over the electoral system

The prospects of a Republican victory were not very encouraging. The scandals of the Grant Administration, a general business depression which began in 1873, and the desire for reform all pointed toward the Democrats gaining the presidency. James A. Garfield expected "the closest Presidential election I have ever seen."[12]

Electoral reform was an issue for the Prohibitionist and American National parties, but not for the two major parties.[13] The Prohibitionists nominated Guene Clay Smith while the American National party went with James B. Walker. Neither party played a determining role in the election.

The Democratic convention met in St. Louis. A near majority of the delegates came to the convention committed to Samuel J. Tilden, who won the nomination over Thomas Hendricks of Indiana on the second ballot. The convention then nominated Hendricks as Tilden's Vice Presidential candidate.[14]

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[11] Cong. Rec., 44th Cong., 1st Sess., 1876, I, p. 971.

[12] Diary of James A. Garfield, Nov. 3 and 5, 1876, Library of Congress, Washington, D.C. /Hereafter referred to as Garfield Diary./.

[13] Alexander K. McClure, Our Presidents and How We Make Them (New York: Harper and Brothers, 1902), pp. 258-260. /Hereafter referred to as Our Presidents./.

[14] Stanwood, A History of Presidential Elections, I, p. 379. McClure, Our Presidents, pp. 252-253. The Democratic candidates were entirely different with regard to the economic issues. Tilden was a "hard money" advocate while Hendricks wanted "soft money."

The Democratic nominee erroneously based his national campaign on Southern support. Reform was the center of the Democratic platform.[15]

Republicans gathered at Cincinnati in June, 1876, and nominated Rutherford B. Hayes, a darkhorse, over James G. Blaine, Benjamin H. Bristow, and Oliver P. Morton. William A. Wheeler gained the Vice-Presidential nomination to balance the sectional elements within the party.[16] The party platform called for the vigorous use of the thirteenth, fourteenth, and fifteenth Amendments. In addition, the party raised the "bloody shirt" calling the Democrats sympathetic to treason.[17] Robert Ingersoll typified Republican sentiments when he reminded the people of Boston that: "Every man that endeavored to tear the old flag from the heaven it enriches was a Democrat.... Every man that shot down Union soldiers was a Democrat.... Soldiers, every scar you have on your heroic bodies was given you by a Democrat. Every scar, every arm that is missing, every limb that is gone, is the souvenir of a Democrat."[18]

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[15]Henry Watterson, "The Hayes-Tilden Contest for the Presidency," Century Magazine, LXXXVI (May, 1913), 8. For the party's platform refer to Kirk H. Porter and Donald B. Johnson (eds.), National Party Platforms, 1840-1960 (Urbana: University of Illinois Press, 1961), pp. 49-51.

[16]For a day by day report of the convention see the New York Times, June 12-18, 1876. Stanwood, A History of Presidential Elections, I, p. 373.

[17]Porter and Johnson, National Party Platforms, pp. 53-55.

[18]Robert G. Ingersoll, The Works of Robert G. Ingersoll (12 vols.; New York: The Dresden Publishing Co., 1901), IX, pp. 157-158. /Hereafter referred to as Ingersoll, Works./. See also the James M. Comly Papers, Ohio Historical Society, Columbus, Ohio, for official approval of this type of campaining. /Hereafter referred to as Comly Papers./.

In addition to the "bloody shirt" the Republicans charged Tilden with misrepresenting his income and endangering public credit.[19]

The parties, not the candidates, conducted the campaign of 1876. Except for two brief trips to the Centennial Exposition in Philadelphia in the capacity of governor, Hayes remained in Columbus. He was not the type of man to arouse personal enthusiasm.[20] His only real commitment was to a liberal policy for the South, where he hoped to restore peace and prosperity as a major first step towards his primary goal, national unity.[21]

Tilden's campaign ran along the same lines. Democratic managers under the leadership of Abram S. Hewitt conferred with Tilden in Albany. The candidate himself was not the type of person to draw strong personal support, and was quite satisfied to abide by the wishes of his party.[22]

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[19] The Nation, XXIII (Nov. 9, 1876), 277.

[20] Charles R. Williams, The Life of Rutherford Birchard Hayes: Nineteenth President of the United States (2 vols.; Boston: Houghton Mifflin Co., 1914), I, p. 470. /Hereafter referred to as C.R. Williams, Life of Hayes./. James G. Blaine, Twenty Years of Congress: From Lincoln to Garfield (2 vols.; Norwich, Conn.: Henry Bell Publishing Co., 1886), II, p. 579.

[21] New York Times, July 10, 1876. For a more complete statement on Hayes' Southern policy refer to Frank K. Krebs, "Hayes and the South," (unpublished Ph.D. dissertation, Ohio State University, 1950). See R.B. Hayes to John Sherman, Dec. 16, 17, 1876; to William Henry Smith, Dec. 16, 1876. Hayes Papers, Hayes Memorial Library, Fremont, Ohio. /Hereafter referred to as the Hayes Papers./. The standard work is by Vincent P. DeSantis, Republicans Face the Southern Question: The New Departure Years, 1877-1879 (Baltimore: John Hopkins Press, 1959).

[22] Stanwood, A History of Presidential Elections, I, pp. 379-380.

More than one thoughtful observer believed that the election would be very close. Republican hopes depended upon preventing a "Solid South," while the Democrats counted on Northern gains for victory. In his diary Hayes mentioned the possibility of a contested election, and lamented the fact that the nation lacked adequate legal machinery for settling one. "If a contest comes now," he wrote, "it may lead to a conflict of arms. I can only try to do my duty to my countrymen in that case.... Bloodshed and civil war must be averted if possible."[23]

The election took place without incident on November 7th. By presidential order federal troops had been stationed in South Carolina, Louisiana, and Florida.[24] Democrats later charged that the troops influenced the election in favor of the Republicans. Nonetheless, the quiet, orderly election did not betray the passions of the campaign nor the desire for victory that would soon become evident.[25]

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[23]Charles R. Williams (ed.), Diary and Letters of Rutherford Birchard Hayes: Nineteenth President of the United States (5 vols.; Columbus, Ohio: The Ohio State Archaeological and Historical Society, 1924), III, p. 370. /Hereafter referred to as Hayes, Diary and Letters./. T. Harry Williams (ed.), Hayes: The Diary of a President, 1875-1881 (New York: David McKay Co., 1964), pp. 45-46. /Hereafter referred to as T. H. Williams (ed.), Diary./.

[24]James D. Richardson (ed.), A Compilation of the Messages and Papers of the Presidents, 1789-1897 (12 vols.; Washington: Bureau of National Literature and Art, 1900), VII, pp. 413-414. /Hereafter referred to as J.D. Richardson (ed.), Messages and Papers./.

[25]The Nation, XXIII (Nov. 9, 1876), 277.

On the day after the election a Democratic victory appeared evident. The avidly Republican Chicago Tribune read: "Lost. The Country Given over To Greed and Plunder." On the following day, however, the Tribune saw reason for optimism, noted that the outcome would be "Nip and Tuck," and advised that Republicans "Never Give up the Ship."[26]

The people gave Samuel J. Tilden a popular majority of some 250,000 votes, but the important electoral vote was still undecided.[27] Tilden claimed 203 electoral votes, well over the 185 required. Hayes had 165 undisputed votes. But the votes of Florida, Louisiana, and South Carolina were in doubt, and the Democrats were challenging one vote from Oregon. In all a total of twenty electoral votes was disputed. If Hayes could win all twenty he could win the election, 185 to 184. At this point begins the fight for victory in the historic disputed election of 1876. William E. Chandler, a leading Republican from New Hampshire, arrived in New York late on election day. Republican headquarters was deserted. Even Zachariah Chandler, Republican National Chairman, had retired believing that Hayes had lost. John C. Reid, a managing editor of the New York Times, met Chandler and told him that the election was in doubt.

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[26]Chicago Tribune, Nov. 8 and 9, 1876.

[27]Stanwood, A History of Presidential Elections, I, p. 383. New York Times, Nov. 8, 1876. New York Democrats questioned the Times for their opinion as to the outcome. This started a procedure that Bigelow called a conspiracy to steal the election from Tilden. John Bigelow, The Life of Samuel J. Tilden (2 vols.; New York: Harper and Brothers, 1895), II, pp. 8-17. /Hereafter referred to as Bigelow, Life of Tilden./. See also the Louisville Courier-Journal, Jan. 8, 1877.

The two men sent telegrams to leading Republicans in South Carolina, Florida, Louisiana, and Oregon, telling them to hold their respective states "at all costs."[28] The following day, November 9th, Zachariah Chandler said: "Hayes has 185 votes and is elected."[29] The telegrams undoubtedly saved the election for Hayes and helped produce the most controversial presidential election in American history.[30]

With each side claiming victory, the dispute became increasingly bitter. Democrats proclaimed at length about their popular victory, to which the Republicans replied that the popular vote had no more to do with the election of a President than "with the succession of the Emperor of China."[31] Republican propaganda went so far as to accuse the Democrats of being the instrument of a Papal plot to subvert democratic institutions.[32] Meanwhile, the uncertainty of the outcome prostrated business and commerce, and gave rise to fears of civil strife.

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[28]Reid's account of this bazaar episode may be found in the New York Times, June 15, 1887, 4-5. Reid credits himself with saving the Republican victory. For Chandler's side see an undated mss. in the William E. Chandler Papers, vol. 43, Nos. 8683-8686, Library of Congress, Washington, D.C. /Hereafter referred to as the Wm. E. Chandler Papers./

[29]Ibid. See also the Hayes Papers, Telegram dated Nov. 9, 1876.

[30]The role of William E. Chandler is best explained in Leon Burr Richardson's, William E. Chandler: Republican (New York: Dodd, Mead and Company, 1940), pp. 198-202.

[31]Harper's Weekly, XX (Dec. 9, 1876), 987.

[32]Eugene Lawrence, "The Papcy and the Election," Harper's Weekly, XX (Dec. 9, 1876), 995.

Back in Ohio Rutherford B. Hayes wanted it understood that he would insist on Republican honesty. "There must be nothing crooked on our part," he wrote to John Sherman. "Let Mr. Tilden have the place by violence, intimidation and fraud, rather than undertake to prevent it by means that will not bear the severest scrutiny."[33] With Hayes's blessing the Republicans sent "visiting statesmen" to Florida, South Carolina, and Louisiana to watch and work for a fair count of the popular votes.[34] Hayes very much wanted the presidency and thought that he had honestly been elected. His wish for office and his honest desire to improve relations between Negroes and Southern whites gave rise to a "Southern policy" which would eventually secure his victory.[35]

The Democrats, of course, believed that they had won. Victory seemed to be within their grasp for the first time in twenty years, and they were willing to fight. They too sent "visiting statesmen" into the South to make sure that foul-play did not rob them of their honest rewards. People offered Tilden their personal services, some were prepared to recruit men to fight for an honest and just cause.[36]

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[33]Rutherford B. Hayes to John Sherman, Nov. 27, 1876, Hayes Papers.

[34]The problem of the "visiting statesmen" will be discussed in later chapters.

[35]Rutherford B. Hayes's statement dictated to Webb C. Hayes sometime in Dec., 1876, Hayes Papers. It is also contained in Hayes, Diary and Letters, III PP. 379-382. T.H. Williams (ed.), Diary, pp. 51-52.

[36]J.H. Prior to Tilden, Dec. 2, 1876; Philip J. Sinkins to Tilden, Dec. 3, 1876 and Louis Depaoli to Tilden, Dec. 7, 1876. Tilden Papers, Box 13, New York Public Library, New York City. Letters representing almost every state in the Union may be found. This is not meant to imply that all Democrats were ready to fight, but it does show that a sizable faction was radical enough to think in terms of war. /Hereafter referred to as the Tilden Papers./.

The Tilden strategy, however, was merely to wait, to do nothing other than hope to be peacefully inaugurated. It was, at best, a strategy of standing firm without compromising; at worst, it was a policy of doing nothing to counteract the activities of the determined Republicans. The inherent fault of this policy was that it left the Republicans entirely free to undermine Tilden's support in the South, where he was extremely vulnerable.[37]

While the Democratic candidate watched and waited, he busied himself with a scholarly endeavor into the history of the electoral system. He personally directed the research and writing of a volume entitled Presidential Counts, in which he planned to prove that the House of Representatives had the right to reject electoral votes. Tilden clung to the position that Congress, not the President of the Senate, had authority to count the votes, and that either House could throw out the votes of any State. This was a reversion to the Republican position of the twenty-second joint, a strict adherence to which would obviate any chance of his defeat.[38] Tilden's month-long study proved nothing conclusive, but it did

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[37]That Tilden had enemies in the South and that his support was not as strong as the Democrats thought can be seen in the correspondence of Robert Toombs. See Ulrich B. Phillips (ed.), Correspondence of Robert Toombs, Alexander H. Stephens and Howell Cobb in the Annual Report of the American Historical Association, 1911 (2 vols.; Washington, D.C.: American Historical Association, 1913). In particular see Toombs to Stephens, Oct. 30, 1876, II, pp. 722-723. /Hereafter referred to as Phillips (ed.), Correspondence of Toombs, Stephens, and Cobb./.

[38]Bigelow, et. al, Presidential Counts, pp. xli-xlii. Bigelow, Life of Tilden, IIp. 60, n. 2. Bigelow (ed.), Writing and Speeches, II, p. 385.

bring him into conflict with three leading Democrats, Bayard, Thurman, and Abram S. Hewitt.[39]

While Tilden studied history Congress went into action. Both the Senate and the House began their own investigations of the disputed states, with Republicans and Democrats of both branches seeking evidence of wrong-doing by the other party. The Republican controlled Senate investigated the eligibility of electors and intimidation in the South, while the Democratic House sought control of Republican telegrams from Western Union.[40]

Amidst party bickering there hung the threat of civil war. Prominent politicians on both sides foresaw that danger. William E. Chandler believed that the Democrats were preparing for war and advised the North not to be caught as they had been in 1860.[41] John Bigelow felt that war was the natural consequence of the election,[42] while George F. Hoar believed that if war developed it would

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[39]Charles C. Tansill, The Congressional Career of Thomas Francis Bayard, 1868-1885 (Washington, D.C.: Georgetown University Press, 1946), pp. 151-153, 157-158.

[40]These topics will be treated briefly later. The question of the telegrams is a problem by itself. See William Orton, President of Western Union, to Samuel J. Randall, Jan. 2, 1877. Samuel J. Randall Papers, Box 29, University of Pennsylvania Library, Philadelphia, Pa. /Hereafter referred to as the Randall Papers./. The Nation, XXIII (Dec. 7, 1876), 333. Congressional investigations were much broader than indicated here.

[41]Zachariah Chandler Papers, Vol. VII, newspaper clipping, n.d., No. 1422, of a letter by William E. Chandler, Library of Congree, Washington, D.C. /Hereafter referred to as the Z. Chandler Papers./

[42]Diary of John Bigelow, Nov. 11, 1876. Bigelow Papers, New York Public Library, New York City. /Hereafter referred to as Bigelow, Diary./.

be party against party, not section against section.[43] Considering the general unrest caused by the economic depression that began in 1873, the bitterness generated by the disputed election created an explosive situation. But a sobering influence was the fact that the nation was still nursing its wounds from the Civil War, and this helped most of all to cool the people.[44]

The Republicans were determined to save the country from ruin and possible death at the hands of the treasonous Democrats. The Democrats, on the other hand, viewed the election as "the rising Sun of liberty" and saw Republican actions as efforts to "set the hand of time backward four years more."[45] The result would be either war or compromise.

The feeling that a compromise was feasible began to fill the air in early December. In the Senate George F. Edmunds reintroduced a constitutional amendment providing for the Supreme Court to count the electoral vote.[46] In the debate

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[43]George F. Hoar, Autobiography of Seventy Years (2 vols.; New York: Charles Scribner's Sons, 1903), I, pp. 369-370. Garfield Diary, Jan. 1, 1877.

[44]Paul Leland Haworth, The Hayes-Tilden Disputed Presidential Election of 1876 (New York: Russell and Russell, 1966, 1st. ed., 1906), 1. 189. /Hereafter referred to as Haworth, The Disputed Election/. For the more recent view on the possibility of war see Alexander C. Flick, Samuel J. Tilden: A study in Political Sagacity (New York: Dodd, Mead and Co., 1939), p. 361. Allan Nevins, Abram S. Hewitt, with some Account of Peter Cooper (New York: Harper, 1935), pp. 336, 380. /Hereafter referred to as Nevins, Hewitt./

[45]Ethan A. Allen to Thomas F. Bayard, Nov. 20, 1876. Thomas F. Bayard Papers, Box 180, Library of Congress. /Hereafter referred to as Bayard Papers./

[46]Cong. Rec., 44th Cong., 2nd. Sess., 1876, V. pt. 1, pp. 111-118, 223. The proposed amendment was originally introduced in March, 1876.

on the proposal Morton of Indiana and other Republicans objected to giving the Supreme Court political power. Ultimately the motion was defeated, 14 to 31.[47] Others proposed similar plans which would rely, in one way or another, on the Supreme Court.[48] But Congress refused to consider such proposals, indicating that a compromise would have to follow different lines.

Both political parties realized that if victory was to be theirs, party discipline would have to be strictly enforced. The Nation provided the first test for the Republican party when it asked a Republican elector to change his vote and throw the election into the House of Representatives.[49] This would automatically provide a peaceful and constitutional settlement to the crisis. Rumors quickly developed that James Russell Lowell, one of the Massachusetts electors, would follow the advice of The Nation.[50] Pressure was immediately brought to bear. Actually Lowell had no intention of changing his vote because he thought that he was bound in conscience to vote "as the people who chose me expected me to do."[51]

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[47] Ibid., p. 162. Refer also to the New York Times, Dec. 12, 1876 and New York Tribune, Dec. 14, 1876 for lack of Democratic support.

[48] Ibid., pp. 479, 592-593, 766. New York Times, Jan. 5, 7, and 8, 1877. John Sherman to Rutherford B. Hayes, Jan. 18, 1877, Hayes Papers.

[49] The Nation, XXIII (Nov. 30, 1876), 323.

[50] William Henry Smith to William Dean Howells, Dec. 4, 1876. William Henry Smith Papers, Ohio Historical Society, Columbus, Ohio. /Hereafter referred to as Wm. H. Smith Papers./.

[51] James Russell Lowell to Leslie Stephens, Dec. 4, 1876 in Charles Eliot Norton (ed.), Letters of James Russell Lowell (2 vols.; New York: Harper and Brother, 1894), II, p. 185.

Party discipline for the Republicans demanded strict adherence to the argument that the Constitution designated the President of the Senate to count the votes. The moderate wing of the party conceded the right of the two Houses to count but maintained that a definite procedure was required. Since such a procedure was lacking, the President of the Senate must, of necessity, count the votes.[52] In the Radical camp, Robert Ingersoll haughtily remarked that "if the Vice-President would count the vote right, he .../has/ the right to count it."[53] Hayes accepted his party's position that the action of the President of the Senate should be final. There must be no surrender from that principle, he said.[54]

Despite all efforts at party discipline there was dissension within the ranks. Liberal Republicans were unwilling to permit the President of the Senate to do the counting. Carl Schurz, who preferred to have the Supreme Court decide contested votes, argued that there was no tradition by which the President of the Senate could assume that function.[55] Pressure from Schurz and other Republicans forced Hayes to modify his views and adopt a position that would make possible a compromise solution.[56]

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[52]The Nation, XL (Feb. 19, 1885), 152.

[53]Ingersoll, Works, IX, p. 231. Refer also to Cong. Rec., 44th Cong., 1st Sess., 1876, IV, pt. 2, pp. 1670-1671.

[54]Rutherford B. Hayes to Samuel Shellabarger, Dec. 29, 1876 and Hayes to John Sherman, Jan. 5, 1877, Hayes Papers.

[55]Carl Schurz to Hayes, Jan. 12, 1877, Hayes Papers.

[56]Rutherford B. Hayes to Carl Schurz, Jan. 17, 1877, Hayes Papers.

Historians Paul J. Haworth and Allan Nevins have assumed that the President pro tem of the Senate, Thomas W. Ferry of Michigan,would automatically do his party's bidding. This assumption is not completely justified A number of Republicans worried a good deal about what Ferry, who evidently refused to commit himself, might do. Jacob Dolson Cox thought that he lacked the courage to count the votes and would either refuse to do so or resign.[57] The Chicago Tribune was likewise convinced that Ferry would not consent to count.[58] Some Republican leaders were disturbed by Ferry's acceptance of duplicate certificates of election from Florida, Louisiana, South Carolina, and Oregon. William Henry Smith thought that the entire controversy would have died if Ferry had merely asserted his constitutional right and refused to accept the certificates from the Democratic electors of those states.[59]

Like the Republicans,the Democrats had to cope with inner party squabbles. Tilden's position had not found favor with Congressional leaders or Southern representatives.[60]Southern conservatives were becoming very upset, if not angry,

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[57]Jacob Dolson Cox to Hayes, Jan. 31, 1877, Hayes Papers.

[58]Chicago Tribune, Jan. 3, 1877.

[59]William Henry Smith to Hayes, Jan. 23, 1877, Smith Papers, Fremont, Ohio. Ferry's acceptance of all the certificates purporting to be the votes for President greatly hurt the Republican argument.

[60]New York Times, Dec. 12, 1876. Henry Watterson, "Looking Backward: Men, Women and Events During Eight Decades of American History," Saturday Evening Post, CXCI (May 3, 1919), 61.

over Northern Democrats who were crying for war. Representative Benjamin H. Hill of Georgia reminded Fernando Wood of the "conservative influence of a fifteen-inch shell."[61]

Southern Democrats and a handful of their Northern counterparts were beginning to look for a peaceful solution. It was not a question of deserting Tilden, Hill said, but a search for a fair and honest count. "The political situation," he said, "was never so critical as now. None but cool men and patriots who love country more than office can avert the most horrible civil war that ever disgraced and destroyed liberty and humanity.... I am laboring to secure /a fair and honest/ count and when secured, I shall abide its results and so will every other man North and South who is not willing to destroy his country."[62]

Tilden was well aware of the growing dissatisfaction among the Southern wing of the party,[63] and so were the Republicans. In a letter to Hayes, Garfield noted that certain Southern Democrats were disgusted with "Tilden and his more violent followers."[64] Henry V. Boynton, an agent for William Henry Smith, wrote that there were a goodly number of Southern Democrats who would say "no" to any "revolutionary resolution" in the House.[65] As the specter of civil war caused party discipline to break down, the prospects for compromise improved.

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[61]Chicago Tribune, Dec. 14, 1876.

[62]The Atlanta Daily Constitution, Dec. 24, 1876.

[63]A.M. Gibson to Tilden, Dec. 13, 1876, Tilden Papers, Box 13.

[64]James A. Garfield to Hayes, Dec. 13, 1876, Hayes Papers.

[65]Boynton to James M. Comly, Jan. 25, 1877, Comly Papers, Fremont, Ohio.

A major obstacle in the path of compromise was the argument between the two branches of Congress. If the House accepted the authority of the President of the Senate, Hayes would be elected. Yet, if the Senate accepted the House position that either branch of Congress could reject electoral votes, Tilden would be the next President. An obvious compromise was to "reject" a vote by concurrent action, but this would not solve the problem of duplicate returns. If a compromise could not be reached there was the danger, repeatedly asserted on the floor of the House,[66] of a dual presidency, a divided people, and civil war. It should be noted, however, that Republican control of the army and, more importantly, Grant's presence in the White House tended to sober Democrats who considered war as a possible solution.[67]

The House of Representatives was much more vocal than the Senate because precedent rested on the side of the Republicans. The House Committee on

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[66]James Monroe, "The Hayes-Tilden Electoral Commission," The Atlantic Monthly, LXXII (Oct., 1893), 523. /Hereafter referred to as Monroe, Atlantic Monthly, LXXII/. Refer to Monroe's speech in the House, Jan. 25, 1877, Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 2, p. 948. Refer also to numerous resolutions in the Tilden Papers, Box 22.

[67]The fact that Grant was President posed some other problems which will be mentioned later. For the Democratic fear of Grant see Edward Spencer, An Outline of the Public Life and Services of Thomas F. Bayard... (New York: D. Appleton and Co., 1880), p. 255 /Hereafter referred to as Spencer, Life of Bayard./.

Privileges and Elections reported that no vote could be "counted against the judgment of the House."[68] This was merely reasserting the twenty-second joint rule. The radicals within the Democratic party were determined that the rule as stated by the House Committee on Privileges and Elections would be "made requisite for everything."[69]

Although each party may have been willing initially to let the other move first, most of the people, especially businessmen, demanded a quick and peaceful settlement. From all parts of the country individuals, organizations, and groups of businessmen sent petitions "demanding a compromise." The chief cry of almost all of the petitions was to put aside petty political differences and arrive at a peaceful solution.[70]

Perhaps it was a sign of the desire for compromise that President Grant was among the first to call for a peaceful solution in his eighth annual message on

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[68]U.S., Congress, House, Committee of Privileges and Elections of the House of Representatives, The Privileges, Powers, and Duties of the House in Counting the Electoral Votes, Report No. 100, 44th Cong., 2nd Sess., 1876-1877, p. 1. /Hereafter referred to as House, Report No. 100./. For the minority report see House, Report No. 100, pt. 2, pp. 11-12. Samuel J. Randall, Speaker of the House, was the leader for a return to the 22nd joint rule, New York Times, Dec. 4, 1876.

[69]Manton Marble to Samuel J. Randall, Jan. 13, 1877, Randall Papers, Box. 29.

[70]New York Times, Dec. 22, 1876. Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pts. I-II, pp. 794, 818, 930, 1051-1052, 1122, 1508, and other pages. Frederick Trevor Hill, in "Decisive Battles of the Law: The Hayes-Tilden Contest--A Political Arbitration," Harper's Monthly Magazine, CXIV (March, 1907), 558, contends that the popular pressure was so great that Congress had to bend to the public will. This is a very important factor but certainly not the sole cause for compromise.

December 5, 1876. Although the message contained no practical suggestions, the President stressed the necessity of "throwing some greater safeguard over the method of choosing and declaring the election of a President."[71]

A major move toward compromise began in the House on December 7th with a resolution from George W. McCrary, a Republican from Iowa. He proposed that a special five-man committee, appointed by the Speaker, and a similar Senate committee prepare either a "legislative or constitutional measure" placing the election in the hands of a tribunal "whose authority none can question and whose decision all will accept as final."[72] The House Judiciary Committee reported McCrary's resolution back with minor changes. The committees were to have seven rather than five members, and, as a concession to radical Democrats, the Committee on Privileges and Elections was to report on the powers and duties of the House in regard to the counting of the votes. By a bi-partisan vote the House passed the motion immediately.[73]

When the Senate was informed of the passage of the McCrary bill, Senator Edmunds promptly introduced a like resolution. Due to what the New York Times

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[71]Richardson (ed.), Messages and Papers, VII, p. 411.

[72]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 1, pp. 91-92.

[73]Ibid., pp. 197-198. The action of the House Committee of Privileges and Elections was previously discussed. Republicans backed the measure despite some misgivings by party leaders. See John Sherman to Hayes, Dec. 8, 1876. Hayes Papers, photostatic copy. Sherman felt it unwise to make any concession when the Constitution was so plain. Southerners especially favored the bill, see Atlanta Daily Constitution, Dec. 19, 1876.

called the "universal desire" to reach a definite understanding on the election question, the Senate passed the bill on December 18th.[74] President pro tem Ferry appointed Edmunds, Morton, Roscoe Conkling, Frederick T. Frelinghuysen, Allen G Thurman, Thomas F Bayard, and Matt W. Ransom, to the Senate Committee.[75] Senator Edmunds and Frelinghuysen represented the moderate wing of the Republican party while Morton constantly maintained the traditional Republican doctrine. Democratic Senators Bayard and Thurman were well-known advocates of compromise.[76]

Once the Senate had acted, Speaker Randall appointed the House Committee. It consisted of four Democrats; Henry B. Payne, Eppa Hunton, Abram S Hewitt, and William M. Springer, and three Republicans--McCrary, George F Hoar, and George Willard.[77] As a whole the House Committee was thought to be extremely strong. Nonetheless, some Republicans worried over Willard's party loyality and were uneasy over the appointment of the Democratic National Chairman, Hewitt.[78]

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[74]New York Times, Dec. 18, 1876. Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V. pt. 1, pp. 221, 258.

[75]Ibid., pp. 343, 388. John A. Logan (R-Ill.) was originally appointed but asked to be excused to attend to his reelection. The senators were from Conn., Ind., N.Y., N.J., Ohio, Del., and N.C. respectively.

[76]New York World, Dec. 22, 1876, Chicago Tribune, Dec. 22, 1876.

[77]Cong. Rec., 44th Cong., 2nd Sess., 1876, V. pt. 1, p. 373. Sometimes referred to as a joint committee, the two committees maintained their own independence and met merely to exchange ideas, not as a joint committee. The House members represented Ohio, Va., N.Y., Ill., Iowa, Mass., and Mich.

[78]New York World, Dec. 23, 1876.

The public, both political parties, and the candidates were well aware of Congressional activities toward compromise. A feeling of optimism began to dispel anxieties about war. A concerned but somewhat relieved nation waited hopefully while the two committees worked to devise a compromise.

The House committee was the first to produce a plan. George W. McCrary proposed a tribunal of Supreme Court Judges whose decision would be final unless overridden by both Houses. McCrary's proposal became "the germ of the Electoral Commission."[79]

While the House committee was working on a five-man tribunal from the Supreme Court, the Senate committee envisioned a more complex system.[80] The Senate committee quickly agreed that the President of the Senate did not possess absolute power to count, and that a concurrent vote was needed to reject votes. The unsolved question was how to handle duplicate returns.[81] At this point, on January 12, the two committees met jointly and agreed to recommend an outside tribunal to consider disputed votes. The Senate desired a thirteen-man tribunal, with five from each House and four associate justices. One of the fourteen was

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[79]Milton H. Northrup, "A grave Crisis in American History," Century Magazine, LXII (Ct. 1901), 925. /Hereafter referred to as Northrup, Century Magazine./ Northrup was Secretary to the special House Committee and left the best record of the work of the two committees.

[80]The McCrary bill called for five justices, two from each party and an independent, namely, Judge David Davis of Illinois. Samuel S. Cox, Three Decades of Federal Legislation (Providence, R.I.: J.A. and R.A. Reid, 1885) p. 638. /Hereafter referred to as S.S. Cox, Three Decades./.

[81]Northrup, Century Magazine, 924-925. Chicago Tribune, Jan. 13, 1877.

to be withdrawn by lot. The House committee preferred its own proposal but the Senate plan was adopted when the House version lost by a tie vote.[82]

The special committees recessed for the weekend after agreeing to secrecy. Somehow the plan appeared in the newspapers on January 14th.[83] Although the Tribune gave two versions, one plan with four justices and the other with six, opposition to the "lot system" to decide on the odd man was loud and clear. Tilden objected strongly to the idea of "lots."[84] In a meeting held in New York on January 14th, Tilden led Hewitt to believe that if a compromise could be arranged without drawing straws, he would not veto it.[85] At a Democratic caucus held sometime around January 14th, House leaders, including Randall, Henry Watterson, and William Springer, gave war speeches. The more moderate voices of Bayard, Thurman, and Eppa Hunton advised deliberations. Actually Northern Democrats were voicing their anger over leakage of the compromise plan.[86]

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[82]Eppa Hunton, Autobiography of Eppa Hunton (Richmond, Va.: William Byrd Press, 1933), pp. 164-165. Northrup, Century Magazine, pp. 924-926. Cox, Three Decades, p. 638.

[83]Chicago Tribune, January 14 and 16, 1877.

[84]Allan Nevins (ed.), Selected Writing of Abram S. Hewitt (New York: Columbia University Press, 1937), 11. 167-169. /Hereafter referred to as Nevins (ed.), Writings of Hewitt./.

[85]Ibid.

[86]Hunton, Autobiography, pp. 167-169.

Republicans were likewise upset. Jay Gould wrote to Zachariah Chandler that "reaching a result by the dice box" was ridiculous.[87] Hayes was convinced that the people would never approve such a scheme.[88] The Nation also objected to drawing lots, and disapproved of any tribunal that included a large number of Supreme Court members.[89]

The Committees reassembled on January 16th with a new sense of duty. House members agreed to a modified version of the Senate plan. They proposed increasing the Commission to fifteen and applying the lot system only to members from the Supreme Court. They also agreed upon a concurrent vote to overrule the tribunal.[90] An important question was how to choose members of the tribunal. After the clamor over selecting a member by lot, it was decided to find another method.

Abram S. Hewitt suggested that the two senior justices of the Supreme Court each select another justice and the four select a fifth. Edmunds thought that such a plan was "built on the cob-house principle."[91] With the support of

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[87]Gould to Chandler, Jan. 17, 1877, Z. Chandler Papers, VII, 1457.

[88]Hayes to John Sherman, Jan. 16, 1877, Hayes Papers.

[89]The Nation, XXIV (Jan. 18, 1877), 33.

[90]Northrup, Century Magazine, 926-927, 929.

[91]Ibid., 931.

his Senate committee he then submitted a counter-proposal to take the associate justices from the first, third, eighth, and ninth circuits and have the four select a fifth justice. Henry B. Payne accepted this plan even though he desired a more general procedure.[92] All but one agreed to the plan because it gave the appearance of selecting the justices on a geographical basis rather than position of party. Edmunds' plan called for Nathan Clifford to represent New England, William Strong the Middle States, Samuel F. Miller the Northwest, and Stephen J. Field the Pacific slope.[93] The Senate version left the fifteenth position open pending the decision of the four justices indirectly named on a geographical basis. The compromise satisfied everyone, especially Senator Edmunds who did not want Justice David Davis on the Commission. At least the plan did not specify Davis, and there was a possibility that he might not be chosen.[94]

The Democrats asked for a recess on January 18th to inform Tilden of the compromise. All of the Democrats signed the committee report except Eppa Hunton, who wanted Tilden's formal approval before recommending it to Congress. William Pelton, Tilden's nephew, carried the report to New York and returned saying that it was a "vast improvement." But he did not say that

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[92]Ibid., 927, 931.

[93]Ibid., 931. Abram S. Hewitt took credit for this compromise and all through his life he felt it was one of his greatest contributions to his country. Nevins (ed.), Writings of Hewitt, pp. 169-170. Nevins, Hewitt, p. 389. Hewitt viewed Edmunds's proposal as a less embarrassing version of his own plan.

[94]Northrup, Century Magazine, 927.

Tilden had given his formal approval. Since this was all the information Pelton had, Hunton signed the Committee report.[95] The two committees reported to their respective Houses. The report was signed by all except Oliver P Morton, who felt the whole thing was unconstitutional.[96]

The report of the special committees justified the constitutionality of the measure under the "necessary and proper " clause of the Constitution; therefore, the committees refused to discuss any further the constitutional question.[97] As far as the committees could see their bill was "absolutely fair" to both parties. It was of greater importance, said the report, to have a lawful count than partisan advantage.[98] The inclusion of the judiciary was necessary to secure an uneven number and to obtain men quite removed from the political passions of the day. Thus, the inclusion of five justices was also "absolutely fair."[99]

It was essential that the bill pass quickly. The committees took a sharp interest in the weakening of public credit and the paralized business community. The entire controversy, said the report, "tends to bring republican institutions

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[95]Hunton, Autobiography, p. 169.

[96]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 1, pp. 713-714.

[97]Ibid., p. 714. U.S., Congress, House, Select Committee on Electoral Votes, Counting the Electoral Vote, Report No 108, 44th Cong., 2nd Sess., 1876-1877, p. 2. /Hereafter referred to as House, Report No. 108./.

[98]Ibid., p. 3.

[99]Ibid.

into discredit, and to create doubts of the success of our form of Government and of the perpetuity of the Republic. All considerations of interest, of patriotism, and of justice unite in demanding of the law-making power a measure that will bring peace and prosperity to the country, and show that our republican institutions are equal to any emergency."[100] The essential factor was time. If the tribunal plan was to succeed, Congress could not delay passage.

The Commission bill as reported by the committees was an extremely detailed measure which foresaw, it was thought, every possibility. The two Houses would meet on the first Tuesday in February in the House chamber and the count would begin with the President of the Senate presiding. The Tellers would read the return from each state and the Presiding Officer would announce the result. Objections to any vote were to be in writing and signed by one Senator and one Representative. In the case of a single return the Senate would withdraw to its own chamber and debate the objection. The House would do the same. No vote could be rejected except by the concurrent vote of both Houses.[101]

The most important part of the compromise dealt with dual returns. Each House was to select viva voce five members to join with the five justices as specified in the bill to form a tribunal. The President of the Senate would open

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[100] Ibid., pp. 3-4.

[101] Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 1, pp. 713, 766.

all the certificates purporting to contain the electoral votes of a state, and if objections were raised the certificates and all accompanying papers were to be referred to the Commission. The bill specified that the tribunal could not be dissolved by either House, nor could either House withdraw its members. The Commission was to render under oath a true judgment as to the legal vote of the state in question. A concurrent vote of both Houses would be necessary to overrule their decision.[102]

The compromise measure devised an independent body to decide what were the "true" returns from four states, namely, Florida, Louisiana, South Carolina, and Oregon. It was common knowledge that dual or triplicate returns were submitted for these states. Both parties were vitally interested in the outcome. If the plan was acceptable to both parties, and that was a major question, then a President could be chosen without bloodshed and in a legal manner. In addition, there was a question whether each House could overcome its pride and accept an independent body to do the work that members regarded as their sole prerogative. These questions remained unanswered when the bill was reported to Congress.

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[102] Ibid., pp. 713-714, 766.

CHAPTER III

COMPROMISE AND FORMATION

The Congress of the United States prides itself on its past history and once tradition becomes established the chance of change grows more difficult with the passing years. The Forty-fourth Congress debated the advantages and disadvantages of the electoral system for over a year. But when the crisis came in 1876-1877 Congress found itself divided both along party and intra-party lines.

In the Republican camp, moderates and a few prominent leaders abandoned the position their party had long defended--that the President of the Senate should count the votes. Senators Conkling, Edmunds, and Frelinghuysen simply disavowed the right.[1] President Grant, who had the "greatest anxiety for a peaceful solution of the question," supported the moderates.[2] Even he subordinated party loyalty to the national interest. Of course, Grant favored Hayes (at the personal level, relations between them were cool) but he privately told friends that he preferred a Democratic administration to a Republican one stigmatized by fraud.[3]

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[1]The Diary of Hamilton Fish, vol. 7, Jan. 17, 1877, p. 21. Hamilton Fish Papers, Library of Congress. /Hereafter referred to as Fish Diary./.

[2]Ibid., p. 22.

[3]George W. Childs, Recollections (Philadelphia: J.B. Lippincott, 1890), pp. 77-78. /Hereafter referred to as Childs, Recollections./.

Since Oliver P. Morton, the Republican Senate leader, opposed any compromise, Grant could not ask him to guide the Commission bill through the Senate; so the President turned to Roscoe Conkling.[4] Influential Republicans were not pleased with the choice of the Senator from New York. He had not only declared openly that the President of the Senate had no right to count, but appeared ready to bolt the party and carry a number of "carpetbag" senators with him. Such a move would cost Hayes the presidency.[6]

James A. Garfield, who opposed the Commission bill, was more optimistic than some of his colleagues. He thought the loss of Conkling would be disastrous, but did not believe it would happen. The situation, said Garfield, was not "so gloomy as it appears on the surface."[7]

John Sherman voiced Republican sentiments when he said that the Commission bill was a "clumsily constructed machine to allow timid or treacherous men to defeat Hayes." The bill was a complete surrender of party advantage.[8] Hard

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[4]Ibid., pp. 79-80.

[5]John Sherman to Hayes, Jan. 3, 1877, Sherman Papers, Fremont, Ohio.

[6]Ibid., Jan. 8, 1877. Garfield Diary, Jan. 4, 1877.

[7]Garfield Diary, Jan. 4 and 15, 1877.

[8]C. A. Boynton to William Henry Smith, Jan. 22, 1877, William Henry Smith Papers, Indianapolis, Ind. Edward F. Noyes to William E. Chandler, Jan. 22, 1877, William E. Chandler Papers, vol. 43, 8750-8752. Garfield Diary, Jan. 5, 1877.

core Republicans condemned using the Supreme Court as an "umpire," for they believed that the Court was in fact influenced by partisanship. The Dred Scott Case had convinced Republicans that current opinions could easily influence the Court.[9]

Hayes denounced the Commission plan. He thought that the bill usurped the constitutional prerogative of the President to appoint members to a commission established for such a purpose. Furthermore, he saw no way to force the Commission to act if it refused to do so. This could lead to a far worse crisis than if matters were left alone.[10] The correct method, he said, would be quo warranto proceedings in the federal court system.[11]

Although Hayes privately opposed the Commission plan, his position, by and large, was sufficiently flexible to strengthen the hand of party moderates. Carl Schurz urged Hayes to avoid even a suggestion of hostility to the settlement. Schurz argued that the proposal at least appeared to be free from partisan strife and would bestow a legitimate title upon the winner.[12] Schurz and others

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[9]John Sherman to Hayes, Jan. 18, 1877, Sherman Papers, Fremont, Ohio. W.H. West to William Henry Smith, Jan. 19, 1877, William Henry Smith Papers, Indianapolis. New York Times, Jan. 19, 1877.

[10]T.H. Williams (ed.), Diary, pp. 69-70. Hayes to Carl Schurz, Jan. 23, 1877, Hayes Papers.

[11]Hayes to John Sherman, Jan. 21, 1877, Hayes Papers.

[12]Carl Schurz to Hayes, Jan. 23, 1877. Copy in the Hayes Papers.

apparently induced Hayes to modify his opinion, for he decided not to oppose the measure publicly. He ultimately submitted his case to the will of Congress.[13]

At first Republicans were reluctant to support any compromise. The disputed votes from the South, bearing the signature and seal of the proper state authorities, constituted prima facie evidence that Hayes had been elected. Thus they preferred to stand firm. But a division in the ranks appeared as soon as the House and Senate committees reported a bill. This schism made defeating the measure difficult. It also embarrassed the Republicans, for the bill had popular support. In actuality the mere act of agreeing to the two committees meant that the party would accept a compromise. Now they would have to live with it.[14]

Radical Democrats thought that too much had been sacrificed. Manton Marble argued that the moderates had surrendered the entire election by trying to use the Democratic minority in the Senate rather than the majority in the House as the center of the contest.[15] The compromise, he said, gave the illusion that the only alternative was arbitrament. In addition, he asked what was the guarantee that a semi-independent tribunal could find the truth?[16] The bill amounted "to the surrender of a sure thing."

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[13]Ibid. T.H. Williams, (ed.), Diary, p. 70.

[14]Henry V. Boynton to James M. Comly, Jan. 25, 1877, Comly Papers Fremont, Ohio.

[15]Manton Marble, A Secret Chapter of Political History: The Electoral Commission... (New York: n.p., 1878), p. 17.

[16]Ibid., pp. 14-15. See also, Eugene Beebe to Samuel J. Randall, Jan. 25, 1877, Randall Papers.

Moderate Democrats were much more vocal than their Republican counterparts. Senator Thurman praised the accomplishments of the two committees, pointing out that their hard work and patriotism had given birth to a peaceful solution which should satisfy all concerned.[17] Bayard, with less concern for tact, threatened to "wash his hands of the whole affair" if the Democratic Administrative Committee failed to approve the Commission bill.[18] The odds, moderates believed, were in fact on their side. To obtain victory they had only to win one out of twenty disputed votes. Surely, they reasoned, no fairminded tribunal would favor Hayes in every case. If an independent man like Judge Davis could be placed on the Commission, victory was assured.

Unfortunately for the Democrats, the vacillation and indecision of Samuel J. Tilden created all kinds of problems. At first he believed that a settlement should be reached by invoking the twenty-second joint rule. Then he became irresolute and turned to his advisors and friends for a decision.[19] Abram S. Hewitt pointed out that Tilden did not want war, and that the only alternatives were to capitulate or arbitrate.[20] John Bigelow's assertion that Tilden did not learn of the plan until too late appears ridiculous,[21] for the major newspapers covered the

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[17] Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V. It 2, pp. 889, 892

[18] Watterson, Century Magazine (May, 1913), 18.

[19] McClure, Our Presidents, p. 263.

[20] Nevins (ed.), Writings of Hewitt, p. 164

[21] Bigelow, Life of Tilden, II, pp. 74-77.

subject on their front pages Surely Tilden was reading at least one newspaper during the crisis.

There is little doubt that Tilden disliked the Commission scheme and that he disagreed with party leaders over its adoption.[22] At best, he said, the plan was a "doubtful agency" conceived in haste. Yet he decided to cooperate if Democratic leaders were willing to accept the plan. For him cooperation seemed to mean non-involvement in the proceedings.

Tilden never clarified his position to congressional leaders. No one was sure who was to speak for the candidate. David Dudley Field accepted a seat in the House to protect Tilden's legal interest Yet Field, Hewitt, and Randall, the Speaker of the House, received confusing statements as to Tilden's wishes. In fact, Tilden trusted no one and had apparently "dwarfed into utter helplessness."[23] He simply could not make a positive decision about the Commission, so he stayed out of the struggle. Later, after a decision had been reached, he disavowed any and all responsibility for establishing the Electoral Commission.

The Senate opened debate on the Commission bill on January 18th, when George F. Edmunds introduced it as a measure "of justice in aid of constitutional

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[22] Rufus Home, "How Tilden Lost the Presidency," Harper's Weekly, LII (March 28, 1908), 7. Flick, Tilden, pp. 370-371.

[23] McClure. Our Presidents, p. 263. Refer also to Flick, Tilden, pp. 370-372. Simon Sterene, one of Tilden's advisors, relates that Tilden was in favor of the plan because he "loathed war." This can hardly be considered a positive endorsement. New York Times, Aug. 9, 1886, p. 3.

government."[24] The bill, said Edmunds, was not a compromise in any sense but rather a measure of "constitutional justice for the preservation in peace and order of the Government." In a seconding speech Conkling said that the measure sought only to establish the truth and thus "did not involve a compromise of truth or principle."[25]

In defending the constitutionality of the Commission bill, defenders noted the "grand committee" bill of 1800. If the scheme of 1800 was constitutional, then a plan which permitted an appeal to the courts was also constitutional.[26] Since the Constitution failed to say who should count the electoral votes, Congress, under the "necessary and proper clause," could create a tribunal to settle the question.[27]

The bill gave the Commission the same powers that Congress had as of the first Wednesday in December, 1876. The tribunal was first to decide what the powers of Congress were, and then act accordingly. Explicit authority to go behind the state returns was purposely denied because of the irreconcilable differences between the two Houses.[28] It would be the duty of the Commission to decide

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[24]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 1, p. 713.

[25]Ibid., V, pt. 2, p. 875.

[26]Ibid., V, pt. 1, p. 806.

[27]George F. Edmunds, "Another View of the Hayes-Tilden Contest," Century Magazine, LXXXVI (June, 1913), 197. /Hereafter referred to as Edmunds, Century./.

[28]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, p. 877

whether the law permitted them to go behind the returns. Although Edmunds denied the right of Congress to go behind the returns, he would abide by the decision.[29] The bill, said Edmunds, was the best practical solution for the problem.[30]

Even moderate Republicans were against going behind the state returns. The returns of the states, they held, were conclusive and must be accepted, for the danger of errors would be augmented a thousandfold by going behind the returns.[31] This was the main complaint against the bill, and no one was better equipped to exploit it than Oliver P. Morton.

The question of going behind the returns, said Morton, was both unconstitutional and impractical. The Constitution specified the date for opening and counting the votes, and there was no time to "try any issue of fact then and there." In the absence of legislation the President of the Senate must, ex necessitate rei, count the votes.[32] Morton also attacked the bill as a "harmless little sham" because the Justices were selected under the guise of geographical distribution. In truth political loyality was the sole basis of selection. When it was pointed out that he was being inconsistent with his earlier proposals, Morton replied, taking a swipe at the doctrine of papal infallibilty, that there were "no popes" in the Senate.[33]

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[29] Ibid., V, pt. 1, p. 768, pt. 2, p. 911.

[30] George F. Edmunds, "Presidential Elections," American Law Review, XII (Oct., 1877), 6. /Hereafter referred to as Edmunds, American Law Review./.

[31] Cong. Rec., 44th Cong., 2nd. Sess., 1876-1877, V, pt. 1, pp. 803-804.

[32] Ibid., pp. 799-801.

[33] Ibid., p. 801, pt. 2, p. 895.

The Compromises of 1820 and 1850, Morton continued, caused a civil war and the compromise creating an unconstitutional tribunal to rob Rutherford B. Hayes of his legal and rightful title would possibly lead to the same result. "The President of the Senate," said Morton, "has his duty, and that is to open the certificates that come from the electors of the States. He is not bound to open certificates from pretended authority, from outsiders, from persons unknown officially." The President of the Senate has performed his constitutional duty for eighty-four years. To do otherwise was an usurpation of his power.[34]

Senators Simon Cameron of Pennsylvania and Aaron Sargent of California disapproved of Supreme Court Justices on the Commission. No longer, they said, could the court keep its position above the "muddy pool of politics." The bill required the Justices to wade through the mud. It would completely degrade the ermine.[35]

The position of John Sherman gained importance because he was perhaps Hayes's closest advisor. Sherman argued that the bill was unconstitutional for a number of reasons. The bill usurped the President's power of appointment and, more importantly, it undertook to delegate the powers of Congress. One of the most settled axioms of law, said Sherman, was that the legislative power could not be delegated. Along the same lines, the appointment of congressmen to this

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[34] Ibid., V, pt. 2, p. 897. For Morton's earlier statement on not being able to refer the votes to any outside tribunal, see the Cong. Rec., 44th Cong., 1st. Sess., 1876-1877, IV, pt. 2, 1667

[35] Ibid., V, pt. 1, p. 808, pt. 2, pp. 867-868.

Commission would give them another civil office which was forbidden by the Constitution.[36] Finally, the bill created a "college of cardinals" to select a president in a secret conclave. The entire procedure, concluded Sherman, would only create excessive excitement. Counting the votes should be done in the open as it had on twenty-two previous occasions.[37]

Opposition sentiment dwelt on the centralization of powers in Congress. Republicans such as Aaron Sargent argued that the founding fathers intended the election of a president to be entirely free from legislative control. If the trend continued, Congress would become a despotic body.[38]

The leading proponents of the bill were Democrats. Senator Bayard presented a strong argument against one House having the right to reject votes. Then, moving to a higher plane, he said that his oath meant support of the Consitution, not an individual party. The bill permitted the Commission to determine what person, if any, received a majority of the electoral vote. This was not election by Congress. Thus, Bayard concluded that the bill was consistent with the Constitution.[39]

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[36]U.S., Constitution, art. I, sec. 6, cl. 2, Cong., Rec., 44th Cong., 2nd Sess., 1876-1877, V. pt. I, pp, 821-822.

[37]Ibid., p. 824.

[38]Ibid., V, pt. 2, pp. 862-863. Sargent also noted that the fourteen men were picked on the basis of party allegiance and thus the total weight of the decision rested with one man, the fifteenth man on the Commission. p. 868.

[39]Ibid., pp. 885-886.

Senator Thurman was much more pragmatic. The establishment of the Commission, he said, would end the dispute between the two Houses. It would be possible, therefore, to secure a decision on the basis of law and without conflict. At the same time the bill left the circumstances of the election process open to future and legitimate criticism. The entire procedure was constitutional and acceptable to both parties as represented in the special committees. It was the only foreseeable way out of the dilemma.[40]

Proponents of the bill defeated all attempts to change it. When Morton tried to amend the bill to prevent the Commission from going behind the returns, Edmunds amended Morton's proposal to give the Commission explicit power to go behind the returns. Both amendments lost by large majorities.[41]

The Senate passed the Electoral Commission bill on January 24th, 47 to 17. The majority consisted of twenty-six Democrats and twenty-one Republicans while sixteen Republicans and one Democrat opposed the measure. The Republican minority contained seven carpetbag senators.[42]

George W. McCrary opened the House debate with an appeal to patriotism, followed by an analysis of the bill's most significant provisions. The time had come, he said, to put aside party differences and consider the welfare of the

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[40] Ibid., pp. 890-891.

[41] The Morton amendment lost 18 to 47 while Edmunds's proposal was defeated 1 to 61. Ibid., pp. 911-912.

[42] Ibid., p. 913. The Nation, XXIV (Feb. 1, 1877), 45.

country. Pointing out that the bill empowered the Commission to decide which votes to count, he went on to argue that since the Commission could not go behind the returns, the bill did not delegate quasi-judicial power.[43] No longer was it a question of who should count but rather what votes should be counted.

Eppa Hunton spoke of the ability of the justices to rise above party bias and render a fair verdict. The bill's sole purpose, said Hunton, was to give the nation a just and legal decision. A settlement could be found by using a "temporary measure," and then Congress could revamp the entire electoral system if it so desired.[44]

Abram S. Hewitt viewed the bill as the only means to upset the Republican conspiracy to install Hayes. It was, said Hewitt, a "plan of settlement," not a compromise, whereby "conservative and patriotic men" from both parties agreed to a constitutional method of deciding who was president rather than resorting to civil war. Under the proposal the interests of all were protected in absolute fairness.[45]

Republican opposition divided into two factions. One group was steadfast in its loyality to the party doctrine while the second objected to the bill out of fear that it might give the Commission power to go behind the returns. The second faction was the more vocal.

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[43] Ibid., p. 935.

[44] Ibid., pp. 937-939. Refer also to pp. 942 and 952 for similar views.

[45] Ibid., pp. 946, 947 and pp. 952, 955, and 961.

Eugene Hale, a Republican from Maine, adopted the Senate argument that the bill in no way limited the powers of the tribunal. He maintained that the Commission could not determine whom the states elected without violating the Constitution. The entire question, he said, was "fraught with the gravest dangers."[46]

In the House James A. Garfield was the Republican floor leader and naturally the party's chief speaker. "I spent most of the day," wrote Garifeld, "in a careful consideration of the principles or rather want of Constitutional principle in the Compromise bill. The more I read it, the more thoroughly I am disgusted with it and I have made up my mind to resist it to the extent of my ability."[47] At a dinner of leading Republicans, Garfield found that his misgivings were shared by William MaxwellEvarts, who impressed him with an argument that the President of the Senate count the votes.[48]

In the House, January 25, Garfield began a blistering attack on the compromise. First he said, nothing should be done under the threat of war. More importantly the bill possessed greater evils than benefits. The greatest danger was to future elections, for the bill would destroy forever the constitutional plan of election. "Pass this bill," said Garfield, "and the old constitutional safeguards are gone. Congress becomes a grand returning board from this day

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[46]Ibid., pp. 945-946.

[47]Garfield Diary, Jan. 21, 1877.

[48]Ibid., Jan. 22, 1877.

forward; and we shall see no more Presidents elected by the States until the people rebuke the apostasy and rebuild their old temple "[49] Despite his own belief, Garfield was sufficiently realistic to know that the bill would pass.[50]

Like the Republicans, the Democrats lacked unity. A small segment of Southern Democrats, feeling that the bill surrendered too much, favored reliance on the twenty-second joint rule.[51] Another segment, mainly from the North, desired positive assurances that the Commission would accept the testimony gathered by the various House committees. They desired to amend the bill to make acceptance of the testimony mandatory.[52]

Passage of the compromise became evident when a large majority of Southern Democrats gathered behind the bill. L.Q.C. Lamar of Mississippi summarized Southern support in noting that the measure showed a declaration against the use of force. Later, Lamar told his constituents that he never would have consented to the use of arms at any time.[53]

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[49]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, pp, 968, 970.

[50]Garfield Diary, Jan. 19, 1877.

[51]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, p. 980.

[52]Atlanta Daily Constitution, Jan. 23, 1877. This faction was led by House Speaker Randall.

[53]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, pp. 1008-1009. For similar Southern sentiment refer to pp. 997-999, 1007-1009, 1018, 1038-1039. Edward Mayes. Lucius Q.C. Lamar: His Life, Times and Speeches (Nashville, Tenn.: Methodist Publishing House, 1896), p. 298. /Hereafter referred to as Mayes, Lucius Q.C. Lamar./.

Although the wish for peace ranked first in Southern minds, the desire for local rule came close behind. Benjamin H. Hill became almost indifferent to the outcome "so long as the Southern States secure good local government."[54] Hill's nationalistic speech on the floor of the House "kindled a lambent flame charged with electric force."[55] The Southern Democrats acted as a restraining force to the more violent members of the party in all debates of the disputed election. Their influence facilitated compromise and helped to pass the Commission bill.[56]

The Electoral Commission bill passed the House on January 26th, 191 to 86, with 158 Democrats and 33 Republicans in support.[57] Sixty-eight Republicans and eighteen Democrats formed the opposition.[58] Basically the passage of the bill was made possible by Southern Democrats who "compelled a change of front within the Democratic party.[59] The change influenced moderate Republicans

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[54]Quoted in the Savannah (Ga.) Morning News, Dec. 18, 1876.

[55]Cox, Three Decades, p. 69. Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, pp. 1008-1009. For earlier Southern speeches in the same vein see V, pt. 1, pp. 262-264.

[56]The Nation, XXIV (Feb. 22, 1877), 110.

[57]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, p. 1050.

[58]Figures varied.. Refer to The Nation, XXIV (Feb. 1, 1877), 45, and Blaine, Twenty Years, II, p. 588, Garfield Diary, Jan. 26, 1877.

[59]Andrew J. Kellar to William Henry Smith, Feb. 2, 1877, Wm. Henry Smith Papers, Indianapolis. Most of the Democrats were convinced that the "umpire" would be a fair-minded man and thus supported the bill. Jeremiah S. Black, Essays and Speeches of Jeremiah S. Black, ed. by Chauncey F. Black (New York: D. Appleton and Co., 1885), p. 330. Refer also to Blaine, Twenty Years, II, p. 587. Democrats felt that Justice David Davis would be the best "umpire." Forty-six Southern Democrats supported the bill.

to support the proposal, and the result was a combination sufficiently strong to assure passage.

A major factor in the passage of the Commission bill was the almost universal feeling among Democrats that Justice David Davis would be the fifteenth member. An informal agreement between party leaders had eliminated the justices from Ohio and New York, leaving the choice of either Davis or Joseph P. Bradley.[60] Simon Sterne said that Tilden would never have consented to the commission scheme had he not felt sure that Judge Davis was going to be the fifth judge.[61] Democrats thought that Justice Davis was the only independent on the bench. Although a Republican until the end of the Civil War, Davis opposed Reconstruction and the Grant Administration, and allied himself with the Liberal Republican movement of 1872. A few people even thought that Davis would accept the Democratic nomination for President in 1876.[62]

While debate continued in the House, a young reporter named E.P. Mitchell asked Benjamin F. Butler if the bill would pass. Butler told Mitchell that the

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[60]Chicago Tribune, Jan. 18, 1877. Nevins (ed.), Writings of Hewitt, p. 171. Ingersoll, Works, IX, pp. 232-233.

[61]New York Times, Aug. 9, 1886. Andrew J. Kellar to William Henry Smith, Feb. 9, 1877, Wm. Henry Smith Papers, Indianapolis. Richard C. McCormick to Hayes, Jan. 19, 1877, Hayes Papers.

[62]Harry Edward Pratt, "David Davis, 1815-1886" (unpublished Ph.D. dissertation, University of Illinois, 1930), pp. 141-142.

place to watch was Springfield, Illinois, not Washington.[63] The combined Houses of the Illinois legislature were about to choose a United States Senator.

Neither Republicans nor Democrats had a majority in the Illinois legislature. The balance of power rested with five Independents.[64] The Nation reported as early as December 28, 1876, that Republican Senator John Logan's seat was in grave danger.[65] His opponent was Democrat John M. Palmer.

Balloting began on January 17th with General Logan only six votes short of the 103 required on the first ballot. Former-Governor Palmer withdrew on the twenty-first ballot and William B. Anderson entered the race. The Republicans failed to unite behind Logan and he withdrew on the thirty-fourth ballot. By January 25th the Times reported that Republicans almost conceded the election to David Davis, a justice on the Supreme Court of the United States.[66] The votes of the five Independents gave Davis the victory on the 40th ballot.[67] Justice Davis insisted that he had not sought the Senate seat and that his election came as a complete surprise.[68]

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[63]E.P. Mitchell, Memoirs of an Editor (New York: Charles Scribner's Sons, 1924), 11. 302-303.

[64]New York Times, Jan. 2, 1877.

[65]The Nation, XXIII (Dec. 28, 1876), 376.

[66]New York Times, Jan. 25, 1877, see also, Jan. 17, 1877.

[67]Chicago Tribune, Jan. 26, 1877, For a more detailed account of the election refer to Willard L. King, Lincoln's Manager David Davis (Cambridge, Mass.: Harvard University Press, 1960).

[68]David Davis to W.H. Hidell, April (?), 1884. David Davis Papers, Illinois State Historical Library, Springfield, Ill. /Hereafter referred to as Davis Papers./. James E. Harvey to Mrs. David (Adeline) Davis, March 17, 1887, Davis Papers.

Milton Northrup relates that Hewitt's countenance dropped when informed that Judge Davis was transferring from the Supreme Court to the Senate.[69] Immediately both parties charged each other with Davis's election in order to keep him off the Commission.[70] In actuality Democratic votes plus five Independent votes gave Davis the election. The election shows, if anything, a breakdown of communication between the national Democratic organization and the state party. Abram S. Hewitt, the party chairman, must accept most of the blame. Newspapers carried reports of the senate race and evidently the national and state parties failed to realize that they were working against each other.

The election of David Davis gave rise to speculation as to whether or not he could serve on the Commission. Republicans simply said "no." Perhaps Laurin D. Woodworth, a representative from Ohio, summed up party sentiment best when he said that the Democrats were "caught up by the Act of God, who disposes of all human events, and by the act of the Illinois legislature, which disposed of Judge Davis."[71]

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[69]Northrup, Century Magazine, 933.

[70]R.B. Brown, "How Tilden Lost the Presidency: Personal Recollections of the Defeat of Tilden and the Election of Hayes in 1876," Harper's Weekly, XLVIII (July 30, 1904), 1171. William Henry Smith to John Sherman, Jan. 24, 1877, Smith Letterbook, Wm. Henry Smith Papers, Box 21, vol. 22, Columbus. William Henry Smith to Hayes, Jan. 24, 1877, Hayes Papers.

[71]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, p. 1911. John Sherman to Hayes, Jan. 26, 1877, Hayes Papers.

Davis settled the Commission question by refusing to serve.[72] Years later, when trying to clear his name for a possible Republican presidential nomination, he went to great lengths to explain his action. He regarded the Commission as a dangerous experiment and precedent for the future. Secondly, he was "unwilling to accept a responsibility, which however honestly it might be exercised, would subject him to misrepresentation in history, by the defeated party."[73] Davis was anxious to leave the high bench "on account of the enforced sedentary life" and the senatorship presented an opportunity. In Davis' defense it must be said that the Democrats had assumed that he would serve without discussing the matter with him.[74] Yet the fact remains that Davis worried about his historical image and sought a way out from an unpleasant task. The heroes of history are made of sterner material.

President Grant signed the Electoral Commission bill on January 29th and sent a special message of congratulation to Congress. Perhaps the measure was not perfect, said the President, "but it is calculated to meet the present condition

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[72]New York World, Jan. 30, 1877.

[73]David Davis to W.H. Hidell, April (?), 1884. James E. Harvey to Mrs. David (Adeline) Davis, March 17, 1887. Davis Papers.

[74]Davis to Hidell, April (?), 1884, Davis Papers. Davis's biographer states that Davis thought the correct procedure would be through quo warranto proceedings, therefore he refused to serve. King, Lincoln's Manager David Davis, p. 290. Davis's reasoning was more complex than this and King is being gracious to his subject.

of the question and the country." The designed procedure affords "a wise and constitutional means of escape" for which the republic is extremely grateful.[75]

Journalistic support of the compromise was widespread. The Nation thought that nothing since the foundation of the government showed so much "political wisdom" as the Commission act.[76] Harper's Weekly said the measure showed that the democratic process could resolve its difficulties without resorting to arms.[77] Both the Atlanta Daily Constitution and the Chicago Tribune approved wholeheartedly adding that the people favored the plan.[78] The correspondence of various public figures shows a similar endorsement.[79]

Partisanship replaced patriotism after Congress approved the compromise. Republican William Henry Smith wanted loyal party members like Sherman and Garfield on the Commission. Placing Edmunds and Conkling on the tribunal, said Smith, would "decide the case at once in favor of Tilden."[80] A committee

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[75]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V. pt. 2, p. 1081.

[76]The Nation, XXIV (Feb. 1, 1877), 68.

[77]Harper's Weekley, XXI (Feb. 10, 1877), 102.

[78]Atlanta Daily Constitution, Jan. 23, 1877. Chicago Tribune, Jan. 21, 24 and 25, 1877.

[79]For example, refer to the Bayard Papers, Box 180, and the James M. Comly Papers.

[80]William Henry Smith to Henry B. Boynton, Jan. 24, 1877. Smith Letter-book, Wm. Henry Smith Papers, Box 21, vol. 22, Columbus.

of five leading Senate Republicans nominated three men for the Commission. Their selection shows a balance between the moderates and loyalists. George F. Edmunds, Oliver P. Morton, and Frederick T. Frelinghuysen were ultimately given seats on the Commission by the party caucus.[81] Edmunds was "safe," said Sherman, because no man was more desirous than he of Hayes's election. If Hayes lost on account of his "contrivance," Edmunds would be "in a bad fix."[82] Loyalists did gain a victory by excluding Conkling, who had apparently voiced the opinion that Louisiana rightfully belonged to Tilden. The Conkling faction put up a strong fight but was unable to seat their leader, whose chances were in no way helped by Grant's support.[83]

The Democrats filled their two senate positions with Allen G. Thurman and Thomas F. Bayard, who were chosen unanimously and without debate.[84] The three Republicans and two Democrats were unanimously elected viva voce by the Senate on January 30th.[85]

House Republicans held a caucus on January 27th and after some debate selected James A. Garfield and George F. Hoar. Garfield won on the first

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[81]William E. Chandler to Hayes, Jan. 29, 1877, Hayes Papers.

[82]John Sherman to Hayes, Jan. 29 (?), 1877, Hayes Papers. Evidently the question mark was Frelinghuysen because William Dennison doubted his courage for the task, Dennison to Hayes, Jan. 30, 1877, Hayes Papers.

[83]Henry V. Boynton to William Henry Smith, Jan. 30(?), 1877, Wm. Henry Smith Papers, Indianapolis.

[84]New York World, Jan. 30, 1877.

[85]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, pp. 1108-1109.

ballot while it took five ballots to arrive at the selection of Hoar.[86] Jerimiah S. Black asked Garfield to avoid a collision with the Democratic party by refusing the seat. Viewing the position as a compliment and the command of his party, Garfield rejected Black's request.[87]

The Democrats were not bothered by party squabbles but by an abundance of candidates. Henry B. Payne of Ohio was selected on the first ballot. The V irginia delegation was promised a seat if they could decide on a candidate. The choice was between John Randolph Tucker and Eppa Hunton. Since the delegation was evenly divided straws were drawn and Hunton won.[88] The third position was given to Josiah Abbott of Massachusetts. L.Q.C. Lamar nominated the three Democrats and two Republicans and the House voted approval. The only trace of dissent was that Garfield polled fourteen votes less than the others.[89]

The court of Chief Justice Morrison Remick Waite was entirely free from Congressional assult. One scholar has termed the Waite court as "probably the

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[86]Garfield Diary, Jan. 27, 1877. The New York Times reported only three ballots, Jan. 28, 1877. The choice was between Hoar and Eugene Hale of Maine. New York World, Jan. 28, 1877 also lists only three ballots.

[87]Garfield Diary, Jan. 27 and 29, 1877.

[88]Hunton, Autobiography, p. 170.

[89]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, pp.1113-1114. Garfield Diary, Jan. 30, 1877.

ablest group of jurists ever to sit on the bench at the same time."[90] From this court Nathan Clifford and Stephen J. Field, Democrats, and William Strong and Samuel F. Miller, Republicans, were to choose a fifth justice to complete the Commission. Justice Davis was their first choice but he refused.[91] The four then chose Justice Joseph P. Bradley of New Jersey, who at first refused but finally accepted the position with some reluctance.[92] Garfield suspected that the choice was made by lot but there is no evidence to support his suspicion. He did note that "all of the Judges, save one, were very sorry to be called to the Commission."[93]

The selection of Justice Bradley was generally well-received. In his early career he had been criticized for his role in a transfer of a transcontinental railroad. Also his appointment to the Supreme Court was regarded as an attempt to reverse the decisions in the Legal-Tender Cases. Bradley's service on the high bench, however, brought him the respect of his colleagues and the public.[94]

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[90]Charles Warren, The Supreme Court in United States History (3 vols.; Boston: Little, Brown and Co., 1923), II, p. 285.

[91]New York World, Feb. 1, 1877. The Democrats eliminated Chief Justice Waite because of his alledged dislike of Tilden.

[92]R.B. Brown, Harper's Weekly, 1171-1172. Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 2, pp. 1122, 1138.

[93]Garfield Diary, Jan. 31, 1877.

[94]The New York World brought up the old changes once again when Bradley's appointment was announced, Feb. 1, 1877.

Because of his attitude toward the Negro, his performance as a circuit judge and his opinion that the Enforcement Act of 1871 was unconstitutional, the South regarded him as a conservative.[95] Abram S. Hewitt thought that he would be fair, above prejudice and party feeling.[96]

The Republicans were likewise satisfied with Bradley. William E. Chandler believed that he would side with Republicans if the law permitted.[97] The son of Rutherford B. Hayes, Webb, showed his youthful exuberance in wiring his father, "The Judge, it is Bradley. In Washington the bets are 5 to 1 that the next President will be Hayes."[98] Republicans clearly preferred Bradley to Davis, while the Democrats, whose first choice was Davis, found Bradley an acceptable alternative.

Considered as a whole the Commission was extremely impressive. Twelve men possessed college or legal degrees. From the Senate Thurman and Edmunds were well known as the foremost constitutional lawyers of their day. Morton brought his reputation as the greatest of the Civil War governors, and Bayard was just beginning his rise which would lead to the office of Secretary of State. The House offered Garfield, who would soon be President, and other men of talent and integrity.

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[95] Atlanta Daily Constitution, Feb. 1, 1877.

[96] Nevins (ed.), Writings of Hewitt, pp. 171-172.

[97] William E. Chandler to Hayes, Feb. 4, 1877, Hayes Papers.

[98] Webb C. Hayes to his father, Telegram, January 30, 1877. Hayes Papers.

The Commission first met on January 31st in the Supreme Court Chamber. Justice Nathan Clifford was the President due to his senority on the bench. The members took the oath to "impartially examine and consider" all questions submitted to the Commission and to render a true judgment.[99] Judge Clifford sat in the center with the Republicans on his left and the Democrats on his right.

A committee, composed of Justices Miller and Field, Senators Edmunds and Bayard, and Representatives Payne and Hoar, drew up procedural rules. The rules permitted each side to be represented by counsel, who were allowed a total of four hours to present their arguments. An additional fifteen minutes were set aside for interlocutory questions. Congressment would be the objectors and would be the first to deliver the arguments.[100] Finally, the Commission decided that the private consultations and deliberations of the tribunal would not be reported in the Congressional Record.

While the Commission was organizing, the parties were trying to attract the best possible legal talent. The Republicans sent out requests for funds to help pay the expense of their lawyers.[101] Counsel for Hayes consisted of William Maxwell Evarts, perhaps the foremost lawyer in the United States, Edwin W.

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[99] U.S., Statutes at Large, XIX, 228.

[100] Cong. Rec., 44th Cong., 2nd Sess., V, pt. 4, "Proceedings of the Electoral Commission and the two Houses of Congress in Joint Meeting relative to the Count of Elector Votes Cast December 6, 1876 for the Presidential Term Commencing March 4, 1877," pp. 1-2. /Hereafter referred to as Proceedings./ There was no limitation on the number of counsel, but there could only be 2 objectors for each side.

[101] Zachariah Chandler Papers, VII, 1466-147/.

Stoughton of New York, Stanley Matthews of Ohio, and Samuel Shellabarger, Hayes' personal representative. Evarts was widely known for his defense of Andrew Johnson and his work on the Alabama Claims. Matthews later entered the Senate and sat on the Supreme Court, while Edwin Stoughton became Minister to Russia In the interest of developing consistent and convincing arguments, the Republican cause was argued throughout by these same four men.

The Democrats were also ably represented. Charles O'Conor was perhaps the best known, having appeared in the most famous cases of his day. Jeremiah S. Black, Buchanan's Attorney General, was widely regarded as the champion of unpopular causes. John A. Campbell was a former Associate Justice of the Supreme Court. Former Senator Lyman Trumbull of Illinois and William C. Whitney, a close friend of Tilden, completed the ranks of counsel.

The counting of the electoral votes began in the House chamber on February 1, 1877. In each case the President of the Senate opened the state certificate and handed it to the tellers along with the duplicate. After reading the certificate, the President of the Senate asked for objections and on hearing none, the votes were then counted. Proceeding in alphabetical order the States of Alabama, Arkansas, California, Colorado, Connecticut, and Deleware passed without difficulty.[102] The first case to be argued before the Commission was that of Florida.

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[102] Cong. Rec., 44th Cong., 2nd Sess., 1877, V. pt. 2, p. 1195.

CHAPTER IV

FLORIDA

Florida was a vital state to both Republicans and Democrats. If the Republicans were to win the presidency they had to keep the state from joining the "solid South." The Republicans had controlled Florida since 1865 and the Democrats desired to "redeem" the state. The election of 1876 provided the Democrats with the best opportunity of regaining local self-government.

In November, 1876, Marcellus L. Stearns, a Republican, ran for reelection as governor against Democrat George B. Drew. A power struggle within the Republican party minimized the chances for victory. Nonetheless, both parties used every possible means to win. For instance, Democrats suppressed the Negro vote by intimidation and violence, while Republicans controlled election returns through the county and state canvassing boards.[1]

Anticipating difficulties, both parties asked that federal troops be present in Florida for the election. The request was granted; and when the results of the

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[1]The best account of the election is to be found in W.W. Davis, Reconstruction in Florida, cf. pp. 694-200. Refer also to John Walker, Carpet-Bag Rule in Florida: The Inside Workings of the Reconstruction of Civil Government in Florida. . . (Jacksonville, Fla.: DaCosta, 1888), chp. XIX, pp. 325-346. Florida's election officials were appointed by the Governor giving the Republicans a tremendous advantage.

election were in doubt, Governor Stearns sought additional troops.[2] The returns from five different counties were contested, either in whole or in part. Archer precinct No. 2, in Alachua county, was the center of the greatest controversy. The poll showed that 537 ballots were cast, with 399 going for the Hayes electors and 136 for the Tilden electors. Democrats charged that only 316 people actually voted and that the ballot box had been stuffed by the Republicans. The forces of Governor Stearns claimed that intimidation had increased the Democratic total by over a hundred votes.[3] The final outcome of all the disputed precincts rested with the State Canvassing Board.

Republicans sent "visiting statesmen" to Florida, Louisiana, and South Carolina, to insure a "fair and honest count." William E. Chandler, Stanley Matthews, ex-Governor Edward F. Noyes of Ohio, Generals Lew Wallace and Francis Barlow, and John A. Kasson of Iowa, decended on Florida to help insure

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[2]U.S., Congress, House, Select Committee on the Presidential Election, ("The Potter Committee"), Presidential Election Investigation, 45th Cong., 3rd Sess., 1878, Misc. Doc. No. 31, 5 vols, IV, p 343. /Hereafter referred to as House, Misc. Doc. No. 31, 45th Cong./. U.S., Congress, House, Select Committee on the Privileges, Powers, and Duties of the House of Representatives, Testimony before the Select Committee on the Privileges, Powers, and Duties of the House of Representatives in Counting the Vote for President and Vice-President of the United States, 44th Cong., 2nd Sess., 1876-1877, Misc. Doc. No. 42, pp. 435-436. /Hereafter referred to as House, Misc Doc. No 42./.

[3]U.S., Congress, Senate, Committee on Privileges and Elections, Florida Elections, 1876: Report of the Senate Committee on Privileges and Elections, 44th Cong., 2nd Sess., 1876-1877, Report No. 611, pp. 15-16. /Hereafter referred to as Senate, Report No. 611./. Refer to pt. 2, pp. 136, 138, 180, 207, 228-229, 233, 241, and other pages for evidence of intimidation of Negroes.

a Republican victory.[4] Bribery and violence were everywhere. Lew Wallace found the situation so confusing that he did not know whom to believe. "Money and intimidation," he wrote, "can obtain the oath of a white man as well as black to any required statement. A ton of affidavits could be carted into the state-house tomorrow, and not a word of truth in them, except the names of the parties swearing, and their ages and places of residence."[5] The "visiting statesmen" would help argue the Republican case before the Returning Board.

The Florida legislature had created a state Canvassing or Returning Board in 1872. The Board was composed of the Secretary of State, the Attorney-General, and the Comptroller of Public Accounts. Their task was to canvass the county returns and formally announce the results,[6] and they had the power to throw out any returns they regarded as irregular.[7]

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[4]House, Misc. Doc. No. 31, 45th Cong., I, pp. 1361, 1398. Other solid Republicans were also sent to Florida from time to time by the National Committee headed by Zach Chandler.

[5]Lewis Wallace, Autobiography of Lew Wallace (2 vols.; New York: Harper and Brothers, 1906), II, pp. 901-902. /Hereafter referred to as Wallace, Autobiography./.

[6]In 1876 the Canvassing Board consisted of two Republicans, Samuel B. McLin, Secretary of State, and Clayton A. Cowgill, Comptroller, and one Democrat, Attorney-General William A. Cocke.

[7]Senate, Report No. 611, p. 2.

The Canvassing Board initially gave the Hayes electors a forty-five vote majority upon the face of the returns.[8] This preliminary determination was subject to a final review by the Board. Republicans and Democrats argued over the judicial power of the Canvassing Board to go behind the county returns. Precedent was found for both sides. In 1874 Attorney-General William A. Cocke, a Democrat, ruled that the Board might legally go behind the county returns. The Board chose to use discretionary rather than ministerial powers.[9] The election of 1876 found the Democrats advocating ministerial powers while the Republicans demanded discretionary powers.

Public hearings were held by the Canvassing Board in late November to determine the outcome of the election. Contestants were permitted to object to and submit evidence against the county returns. "Visiting statesmen" appeared for both sides to act as counsel. Party positions were clearly defined even though oral argument was prohibited.[10] The Canvassing Board purged the disputed returns to give the Republicans a majority. Precincts were rejected either in total

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[8]Ibid., p. 3. Even this return was disputed. W.W. Davis, Reconstruction in Florida, does not accept it and states that the Tilden electors had a 91 vote majority if the fradulent returns from Archer Precinct No. 2 are counted, p. 715.

[9]Senate, Report No. 611, pp. 4-5. W.W. Davis, Reconstruction in Florida, p. 726.

[10]Senate, Report No. 611, p. 3.

of in part. W.W. Davis suggests that the proceedings were run on the principle of "tails I win, and heads you lose."[11]

The Board certified the Hayes electors on December 6th, by a two to one vote.[12] This was the day required by law for the electors to vote for President. Attorney-General Cocke immediately denounced the Board's action as a "criminal and base fabrication of the returns." He then issued certificates of election to the Tilden electors.[14]

The decision of the Canvassing Board was influenced by the Republican "visiting statesmen." William E. Chandler had persuaded the Board to investigate every contested county rather than a few sample ones. Chandler later wrote Hayes that the decision of the Board must either be accepted upon its face by the Electoral Commission or the Commission would have to go to the bottom of the poll. "The latter," said Chandler, "is impossible."[15] At the same time John A. Kasson

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[11]W.W. Davis, Reconstruction in Florida, p. 727. Refer also to Wallace, Autobiography, II, pp. 904-906.

[12]Manton Marble wired Tilden that the Republicans had manufactured a majority of 925 with a complete disregard for fact. Marble to William Pelton, Telegram, Dec. 7, 1876, Tilden Papers, Box 13.

[13]Senate, Report No. 611, p. 29.

[14]Atlanta Daily Constitution, Dec. 8, 1876. For a Democratic narrative refer to E.W.R. Ewing, History and Law of the Hayes-Tilden Contest Before the Electoral Commission: The Florida Case, 1876-1877 (Washington, D.C.: Cobden Publishing Co., 1910), pp. 106-107. /Hereafter referred to as Ewing, The Florida Case./.

[15]Undated typed mss., William E. Chandler Papers, vol. 43, Nos. 8685-8686. Chandler to Hayes, Jan. 24, 1877, Hayes Papers.

reported that the primary concern in Florida was for local control rather than the election of Tilden. There would be little violence over the defeat of the Democratic candidate.[16]

In an attempt to reverse the decision of the Canvassing Board the Democrats went into court. On December 6th they began Quo Warranto proceedings in the second judicial circuit court of Florida. Republicans were charged with having usurped the offices of electors and of unlawfully exercising the duties of electors. A decision was rendered in favor of the Democrats in late December.[17] Simultaneously a suit was brought before the Florida Supreme Court over the contest for governor. In Florida Ex Rel. George F. Drew the Court declared that the Canvassing Board did not possess strict judicial powers. The Court stipulated that the Board could not reject part of a precinct. It must accept or reject the returns in toto. The Court then ordered a recanvass of the vote for governor, saying nothing about the vote for electors. The decision called for a recount by December 27th.[18]

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[16]From a letter quoted in Edward Younger's John A. Kasson: Politics and Diplomacy from Lincoln to McKinley (Iowa City, Iowa: State Historical Society of Iowa, 1955), p. 272.

[17]U.S., Congress, House, Committee on the Florida Elections, Recent Elections in the State of Florida, 44th Cong., 2nd Sess., 1876-1877, Report No. 143, pt. 1 p. 8. /Hereafter referred to as House, Report No. 143, pt. 1./. The complete proceedings may be found in the Edward L. Parris Papers, Hayes Memorial Library, Fremont, Ohio. Parris was the chief Democratic lawyer in Florida. /Hereafter referred to as Parris Papers./.

[18]Parris Papers, printed decision, Box 3. New York Times, Dec 24, 1876. The decision was rendered on Dec. 23, 1876. Parris Papers, Box 1.

Under the order of the State Supreme Court the Board of Canvassers recounted the vote for Governor and returned George F. Drew. But the Board went beyond the Court order and recanvassed the vote for the electors, returning the Hayes electors once again.[19] The Democratic legislature retaliated by passing a law requiring a new canvass of the entire vote. Three Democrats were appointed to the Canvassing Board by Governor Drew, and they gave the Tilden electors a majority of ninety-eight. Drew then issued a second certificate of election to the Tilden electors dated January 26, 1877.[20]

Congress decided to investigate each of the disputed States and a House committee under the chairmanship of Democrat William R. Morrison of Illinois went to Florida. The majority found that the original Canvassing Board acted without lawful authority and that the certification of the Hayes electors was a "bald usurpation" of authority. Therefore the committee recommended that the votes of the Tilden electors were the legal votes and "must be counted as such."[21] A Republican minority reported that they had been refused an opportunity to view the evidence used by the Canvassing Board. The entire investigation, they charged, had viewed only half of the contested precincts, and no attempt had been made to investigate Democratic intimidation. They therefore recommended the Hayes electors as the lawful votes of Florida.[22]

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[19] Proceedings, p. 195.

[20] Ibid., pp. 289-290. House, Report No. 143, pt. 1, p. 10.

[21] Ibid., pp. 1-3, 30-31.

[22] Ibid., pt. 2, pp. 1-35.

The Republican controlled Senate also sent an investigating committee to Florida. The majority report contended that the Canvassing Board did possess "quasi judicial powers." Republican electors were legally returned by a majority ranging from forty-seven to 211. The Senate committee left open the right of Congress to go behind the "ministerial certificate" of the governor. But the committee denied the right of Congress to go behind the declaration of the authorized canvassing board.[23] This would become the chief argument of Republicans before the Electoral Commission.

When the electoral count reached Florida three certificates of election were presented. Certificate No. 1 was signed by Governor Marcellus Stearns and fulfilled every legal requirement. It gave Florida's four electoral votes to Rutherford B. Hayes. Democrats objected to it on the following grounds: The Tilden electors had been duly elected and appointed; the circuit court of Florida for the second judicial district had found in quo warranto in favor of the Tilden electors; and the Hayes electors were not appointed by the state in the manner prescribed by the legislature. A separate objection was made to the vote of Frederick C. Humphries on the grounds that he held an office of "trust and profit" under the United States and was therefore constitutionally ineligible.[24]

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[23] Senate, Report No. 611, pp. 12, 28-30. A minority report filed by the Democrats may be found in Senate, Report No. 611, pt. 4, cf. pp. 6-15.

[24] Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V. pt. 2, pp. 1195-1196. Proceedings, p. 8.

Certificate No. II was irregular in that it lacked the signature of the Governor and was signed by Attorney General Cocke. This certificate contained the votes of the Democratic electors for Samuel J. Tilden. Republicans charged that the certificate was not authorized or authenticated according to the requirements of the Constitution and that it lacked the signature of the executive authority of the state of Florida.[25] Certificate No. III was the same as No. II but it was certified by Governor Drew and dated January 26, 1877. Republicans argued that the certificate was ex post facto, thus completely null and void.[26] The President of the Senate sent all of the certificates and corresponding papers to the Electoral Commission.[27]

On the eve of the first meeting of the Commission, Democrats had high hopes. If they could present testimony before the Commission to show that Frederick C. Humphries was a federal office-holder, they would have an "opening wedge" to examine the entire question of certification. In addition there was every indication that the tribunal would use its judicial power to reach a fair verdict.[28]

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[25]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, pp. 1196-1197.

[26]Ibid., p. 1197. Proceedings, pp. 11, 13.

[27]The Electoral Commission law permitted each House to carry out daily business while a case was being argued. Controversy later arose as to whether the House of Representatives could go about its daily routine when the Commission had rendered its decision.

[28]New York World, Feb. 1, 1877.

The Florida case presented two main questions. First, could and would the Electoral Commission decide that it was competent to go behind the certificate of the State Canvassing Board? Secondly, of what importance was the Constitutional restriction prohibiting federal officeholders from being appointed electors? The decision of each of these questions was vital to both sides because it would be a precedent for the remaining cases.

President Clifford ruled that since there were three certificates and three objections, the objectors to Certificate No. I would open the argument. Counsel in favor of Certificate No. I would reply and then the argument would be closed by counsel opposed to the certificate. Thus it fell to David Dudley Field to open the case for the Democrats.[29]

David Dudley Field and John Randolph Tucker presented a case built on the misuse of power by the Florida Canvassing Board. Field argued that the Republican controlled Board had fraudulently certified the election in favor of the Hayes electors. The action of the Board was ultra vires because it had assumed an elective power by transfering votes from Tilden to Hayes. Florida had spoken against Certificate No. I with a new certificate signed by Drew, with quo warranto proceedings, and the decision in Florida Ex Rel. Drew. Field closed his argument with an emotional flurry. "Hold it /the Hayes certificate/ up to the light. It is black with crime. Pass it around; let every eye see it; and then tell me

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[29]Proceedings, p. 4. Certificate No. I was the vote of the Hayes electors. The title was given because it was the first one read by the President of the Senate. Democratic objections were read again, p. 8.

whether it is fit to bestow power and create dignity against the will of the people....If it /fraud/ succeeds now, let us hang our heads for shame; let us take down the Dome of this Capitol the statute of which every morning faces the coming light; let us clothe ourselves with sackcloth and sit in the ashes forever."[30]

Republican George W. McCrary responded with a vigorous argument in favor of the authority of the Canvassing Board. The State erects authorities or boards to obtain the true and legal result of any election. When an election has been certified by the proper state authorities that was the voice of the state. Absolutely no inquiry could be made upon the voice of the state. McCrary attacked the quo warranto decision on the grounds that it was rendered after December 6, 1876. The law required the electors to vote on December 6th and having preformed their duty they became functus officio. Thus the electors were immune from any action taken after December 6th.[31] The Republicans concluded by noting that Humphries had resigned his office prior to his election; therefore, the Democratic objection was without foundation.[32]

John A. Kasson attacked Certificate No. II for its irregularities and dismissed the signature of the Attorney-General as an office unknown to federal law. Kasson then began what amounted to a lecture on the powers of the Commission. Under

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[30]Ibid., pp. 4-8. Garfield felt the Field's argument was "Sophmoric." Diary, Feb. 2, 1877. Tucker dwelt on the ineligibility of Humphries, Proceedings, pp. 8-10.

[31]Ibid., pp. 14-16.

[32]Ibid., p. 16.

no circumstances, said Kasson, could the Commission count the votes which elected the electors. The sole function of the Commission was to perform a ministerial act in the stead of the President of the Senate. The Commission can only decide which of the three certificates is the most regular on its face. Trespassing further would amount to amending the Constitution and making Congress supreme.[33]

Democratic counsel Charles O'Conor offered a series of propositions which he said the Democrats could prove if the Commission would accept evidence. O'Conor offered as evidence the quo warranto proceedings, the case of Florida Ex Rel. Drew, and the results of the second canvass of the Florida returns.[34] After a brief initial debate Justice Miller suggested an extension of time in order to permit a full argument on the question of accepting evidence. The Commission granted three hours to each side for counsel to argue both the question and the powers of the Commission under the act of Congress which created it.[35] Each side made a prodigious effort to present every argument that would strengthen its case.

Jeremiah Black opened for the Democrats claiming that all of the evidence necessary was contained in the records of Congress. The former Attorney General

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[33] Ibid., pp. 10-13.

[34] Ibid., p. 18. For Democrats the "second canvass" was in reality the the third canvass because they naturally regarded the second canvass by the Republican board as null and void.

[35] Ibid., pp. 20-22. Justice Clifford had originally ruled the question of evidence to be an interlocutory question, thus precipating Justice Miller's motion, p. 19.

maintained that the Commission was a court of equity and had to receive evidence. And as a court of equity, he said, the tribunal must receive all evidence presented until the objecting party can show cause for rejection.[36] Richard L. Merrick continued the Democratic argument by citing precedent for going behind the returns. A Senate Committee had gone behind the Louisiana returns in 1873. The state of Florida had already performed that task for the Commission. The legislative, executive, and judicial branches of the state government had supplied the evidence that Certificate No. I was fradulent. If that evidence could not be presented then the governor's certificate was conclusive.[37] The Commission must view the true facts in order to arrive at a correct verdict.

Stanley Matthews and Edwin Stoughton each took their turns in presenting the Republican argument. Matthews presented the pragmatic argument of time. The time required to go to the bottom of the poll would take months, certainly well beyond March 4th, the date of the inauguration. There could be no half way position. To go behind the state returns would open the Commission to a multitude of questions such as the legal registration, use of intimidation, and the need to research every vote cast. Such a task was impossible. More importantly, Congress did not possess the power to go behind the returns and could not delegate a

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[36] Ibid., pp. 19-20.

[37] Ibid., pp. 22-24.

non-existent power to the tribunal The sole task of the Commission was to determine the de facto electors. Even if the electors were fraudulently certified, their acts were legal.[38]

Stoughton argued that the Governor's certificate was not conclusive. The Commission could lawfully go behind such a certificate in order to answer questions of forgery or mistake. However, the Commission could not go behind the decision of the Canvassing Board. Mistakes and error had to be corrected by the state prior to December 6, 1876. Evidence of fraud or error after that date was irrelevent and could not be accepted.[39]

Republican counsel had only touched upon the real issues leaving the main argument for William Maxwell Evarts. In a terse and brilliant statement Evarts put the final touches to an argument that was obviously well planned. Evarts succinctly divided the main question into three major parts. What evidence beyond the certificates opened by the President of the Senate can be received? If evidence other than the opened certificate can be received, what kind of evidence is to be admitted? What evidence other than the certificates, if any, was pending before the Commission?[40] Slowly Evarts worked his way through each question. The Commission could not possess judicial power because Congress can give that power only to the courts and the President appoints the judges with

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[38]Ibid., pp. 26-28.

[39]Ibid., pp. 28-29.

[40]Ibid., p. 30.

the advice and consent of the Senate. If the proceedings were in the nature of a quo warranto, where was the jury? Continuing, Evarts argued that once an elector voted, the vote was untouchable by the state, because the act of voting was a federal task. The federal government could not interfere with the appointment of electors because that was within the realm of state power

Evarts then moved to counteract the rulings of the Florida courts. The Constitution established the date of March 4th as the day for the president's inauguration. Any interference by the Courts would prohibit the orderly transfer of government and is unconstitutional

In the final analysis, said Evarts, the question of what is evidence becomes relevant. The objections filed by the House and Senate could not be considered as evidence. Likewise, the testimony and documents collected by Congress were neither competent nor legally correct. The state of Florida conferred "either honestly or dishonestly, purely or fraudulently" all that the law requires. The Hayes certificate must be accepted on its face because the state has spoken. Congress and therefore the Commission was utterly powerless to change anything.[41]

The Republicans very neatly divided the election of a President into two parts. A state enjoyed sovereignty over the appointment of the electors, but once the electors were certified, sovereignty passed to Congress. Neither the States nor Congress could interfere with or even examine the process of the other. Each was supreme unto itself. It would be the task of the Democrats to show that the Republican argument was not sound constitutuional law.

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[41] Ibid., pp. 29-33.

Democratic counsel began a two-pronged attack by arguing that Congress had the power to ascertain the correct vote and that fraud vitiated everything. First, argued Charles O'Conor, Congress does possess the power to conduct investigations. The argument against this is that of ab inconvenienti The Commission had merely to determine how far the investigation was to go and the matter was settled. In actuality it was only necessary to correct the "unlawful extrajudicial acts of the canvassing board." Secondly, states rights could not be used as a shelter for fraud. If the acts of the Canvassing Board were fraudulent, then the entire certificate was a fraud. Thus, the Commission must decide in favor of the Tilden electors or reject all of the certificates completely.[42]

Concluding arguments were finished on February 5th and the Commission went into closed session to deliberate the question of evidence. Three main questions were involved. Could the Commission go behind the Governor's certificate? Could it go behind the certification of the Board of Canvassers? Could it go behind the county returns and examine the actual vote cast?[43] Justice Miller moved the following order on February 7th: "Ordered, that no evidence will be received or considered by the Commission which was not submitted to the joint convention of the two Houses by the President of the Senate with the different

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[42]Ibid., pp. 34-36.

[43]Notes of Justice Bradley, marked "consultation, Feb. 6, 1877," in the Joseph P Bradley Papers, New Jersey Historical Society, Newark, N.J. /Hereafter referred to as the Bradley Papers./.

certificates, except such as relates to the eligibility of F C Humphreys, one of the electors."[44] Justice Bradley joined with the seven Republicans to pass the motion by an eight to seven vote.[45]

James A Garfield wrote in his diary that the Commission had decided on February 1st not to accept affidavits and similar documents sent along as part of of the objections.[46] This was an informal decision pertaining to the evidence submitted by Congress and cannot be viewed as deciding the issue of accepting evidence. Evidently the Commission had merely anticipated the question and decided to reject outside evidence until full arguments could be heard. In the final analysis this was the only fair way to handle the situation. It would be difficult indeed to reject evidence already seen by the entire Commission.

The next question concerned the eligibility of Frederick C. Humphreys, one of the Republican electors. The Democrats were granted three hours to present a full argument. The main point of contention was whether Humphreys had actually resigned In testimony before the Commission on February 8th, Humphreys said that he had sent his resignation to the judge of the circuit court for Northern

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[44]Proceedings, p. 37. Two different spellings were used for the name of Humphreys (Humphries) throughout the Florida case. Justice Bradley joined with the seven Democrats to admit evidence with regard to Humphreys. Miller's motion gave the appearance of de facto recognition of the Hayes electors. The Democrats objected to the wording, p. 38.

[45]Ibid., pp. 37-38. The individual opinions of the Commission will be discussed later in this chapter.

[46]Garfield Diary, Feb., 1, 1877. Garfield said that the private diliberations were severe intellectual work. The decision on the question of evidence was a "strictly partisan division." Diary, Feb. 6 and 7, 1877.

Florida on October 5, 1876. At that time court was not in session and the judge was visiting in Ohio. The judge while in Ohio accepted Humphreys' resignation and appointed the Collector of Customs to assume the duties of Shipping Commissioner.[47]

George Hoadly, arguing for the Democrats, maintained that since the circuit judge was not in his court, the resignation was not acceptable. Humphreys was therefore a federal officeholder on November 7th and December 6th. No election had taken place because Humphreys was ineligible and Florida should lose one vote rather than have the next highest candidate gain the office.[48]

Democrats continued to argue that Humphreys had never technically resigned. Intermittently they would revert back to the validity of Certificate No. II. Both Ashbel Green and Richard L. Merrick emphasized that the Governor's certificate was not essential. In fact, said counsel, Certificates Nos. II and III support one another and show that the State of Florida took every possible action to correct fraud.[49]

Republicans reverted to their standard argument that there could be no question concerning Humphreys' resignation. It had been accepted and a successor appointed. Beyond that, moreover, the state and Congress were powerless to change Humphreys' vote. Once the vote was cast, jurisdiction passed to

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[47] Proceedings, p. 39.

[48] Ibid., pp. 40-43. Hoadley's position would haunt him in the Oregon case.

[49] Ibid., pp. 45-46, 52-55.

the national government and a state had no authority to change that vote A state may challenge the title to office, but it must arrive at a decision prior to the final act of voting.[50]

The clause of the Constitution prohibiting federal officeholders from serving as electors, said Evarts, was not self-executing. And since neither the federal nor state governments had legislation with which to execute that clause, the votes of a state must be accepted as sent forward and certified by the Governor.[51] Evarts had earlier given a capsule summary of the Republican position when he said "If a disqualified elector has passed the observation of the voters in the State, passed the observation of State law, that when these are all overpassed and the vote stands on the presentation and authentication of the Constitution--that is upon the certificate of the electors themselves and of the governor--it must stand unchallengeable and unimpeachable in the count."[52]

Final arguments were concluded on February 8th and the Republican members of the Commission desired to deliberate immediately. Justice Bradley, however, joined with the Democrats to gain an adjournment to the following day.[53] The closed deliberations of the Commission covered the entire question of Florida.

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[50] Ibid., pp. 47-48. Argument of Edwin Shallabarger.

[51] Ibid., pp. 50-51.

[52] Ibid., p. 31.

[53] Ibid., p. 56.

Justice Bradley evidently came out quite strongly for accepting the resignation of Humphreys. Henry B Payne appealed to the Justice to change his opinion, pointing out to him that he was the "umpire of the nation."[54] Senator Thurman offered a motion that Humphreys was not a Shipping Commissioner on November 7th. Edmunds offered a substitute covering the entire Florida case. A second substitute in favor of the Tilden electors was defeated. Edmunds withdrew his motion in favor of one by Garfield to accept the Hayes electors. Garfield's motion drew the support of Justice Bradley and passed, eight to seven. Justices Bradley and Miller, and Senator Edmunds were appointed to draft a report for final action.[55]

The Commission ruled that it was not competent to go into "evidence aliunde the papers opened by the President of the Senate...." This was a reaffirmation of the February 7th decision. The appointment of electors was strictly within the realm of the state and once the State Canvassing Board had certified an elector according to law the title was unimpeachable. The state's only recourse was to act and decide the case prior to the casting of the votes. When the vote was cast and transmitted to the President of the Senate the electors had completed their function forever and were immune from any further action. The Commission would not consider the effect of a vote cast by an ineligible elector

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[54]Garfield Diary, Feb. 9, 1877.

[55]Ibid. Proceedings, pp. 56, 275-276.

No evidence had been presented to show that Humphreys was a federal office-holder on the day he was appointed.[56] The Commission concluded that the votes for Hayes in Certificate No. I were the true and legal votes of Florida.

Separate opinions were later filed explaining the votes and decisions of the members of the Commission. Throughout the course of the proceedings Henry B. Payne and George F. Edmunds never filed a written opinion. Edmunds had made himself perfectly understood during the congressional debate over the Commission bill. The question of eligibility was to be settled by the individual states or by the electors themselves. Congress had to accept the authorized voice of the state as conclusive.[57] Representative Payne took the opposite position, maintaining that Congress had the right and duty to investigate the actual votes cast. This, said Payne, was the "pivotal act." In the case at hand Payne argued that Florida had spoken through its Supreme Court against the Stearns government. The Court clearly impeached the certificates of the Hayes electors. The Commission must accept this action as final.[58]

Senator Oliver P. Morton delivered a strictly Republican opinion. Congress could investigate forgery but not the requisite qualifications of the electors. If the state chose to disregard the constitutional safeguards nothing else could be done. The Constitution was designed to prevent congressional supremacy over the

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[56] Ibid.

[57] Notes of Justice Bradley, dated Feb. 6, 1877, Bradley Papers.

[58] Notes of Thomas F. Bayard, dated Feb. 6-7, 1877, Bayard Papers, Box 180.

election of a president. The electors were state officials, said Morton, until they voted; then they became federal officials. Their sole task was to vote and once that was accomplished the electors were functus officio. The Republican argument was correct, Morton insisted. To do otherwise would lead to the ruin of our democratic government.[59]

Democratic Senators Bayard and Thurman decried the decision not to view the evidence of the case. Bayard pointed out that as a member of the Senate he was well aware of the facts in Florida. He could not be blind to such information. Justice could not be achieved by placing a blindfold over the judges. Florida had spoken in the State Ex Rel. Drew and in quo warranto, and yet the Commission refused to listen.[60] Thurman attacked the concept of justice of the majority when he said: "It is not sound logic to say, that because we cannot investigate everything we shall investigate nothing, that because we cannot correct all errors and frauds we shall correct none." Justice required time and the argument that there was no time could not be permitted to bar the search for truth. The state has used every legal means to correct errors and the Commission has refused to listen.[61]

The remaining congressional members of the Commission filed opinions that greatly reflected the arguments of their respective parties. Republicans adhered to

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[59]Proceedings, pp. 196-197. For an expanded version of Morton's views refer to his article, "The American Constitution," North American Review, CXXIV (May, 1877), 341-346.

[60]Proceedings, pp. 212-214.

[61]Ibid., pp. 200-201. Due to illness Senator Thurman did not submit any written opinions. The Proceedings contain only a synopsis of his remarks.

the doctrine of non-interference, while Democrats held to an expansive view of the powers of Congress. Legal precedents saturated all of the opinions, the most important of which were those of the Supreme Court Justices.[62]

Democratic Justices Clifford and Field represented loyally their party's contention that Congress had broad investigatory powers in the matter of presidential elections. They emphasized the importance of examining the county returns. It was unnecessary to go further, they said, because voter qualifications were never challanged. Both argued that fraud vitiates everything and must be investigated. Such an investigation may be carried out at any time because the search for truth can never be limited. Again they reiterated the fact that the state had spoken through the executive, legislative, and judicial branches of government. The only honest alternative was to heed the action of the state.[63]

Justices Strong and Miller used similar arguments to reach their verdict. Justice Strong advocated state supremacy as the only method of purifying a state election. Florida law specified that the final canvass was to be made by the returning board. The Governor's certificate was merely a recognition of the final canvass and prima facie evidence of election. Because the state failed to reverse its own decision before December 6th, the original certificate was final.[64]

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[62]The opinions of the Congressional members may be found in the Proceedings as follows: Frelinghuysen, pp. 203-206; Hunton, pp 222-225; Abbott, pp 231-234; Hoar, pp. 239-240; Garfield, pp. 240-242.

[63]Ibid., Field, pp. 245-249; Clifford, pp. 267-272. Justice Clifford was so upset by the Florida decision that he refused to participate in any further discussion, p. 272.

[64]Ibid., pp. 251-254. Notes of Thomas F. Bayard, Feb. 7, 1877, Bayard Papers, Box 180.

Justice Miller followed suit by arguing for the validity of the state certificate. Congress cannot and need not look any further than the certification demanded by state statute. If a certificate fulfills the law the proper electors have been found. The fathers of the Constitution had designed the election process to be free from legislative control.[65]

The most important opinion was that of Justice Bradley. He denied the right to investigate the election of electors. The most that Congress could do was to ascertain whether the state had performed its task according to its own laws. If that had been accomplished then the certificate of election became "prima facie evidence of a very high character." This was the true and proper design of the Constitution.[66] In referring to the authority of the Board of Canvassers the Justice said: "It seems to me that the two Houses of Congress, in proceeding with the count, are bound to recognize the determination of the State board of canvassers as the act of the State, and as the most authentic evidence of the appointment made by the State; and while they may go behind the governor's certificate, if necessary, they can only do so for the purpose of ascertaining whether he has truly certified the results to which the board arrived. They cannot sit as a court of appeals on the action of that board."[67] At worst, he continued,

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[65]Proceedings, pp. 255-258. Notes of Thomas F. Bayard, Feb. 7, 1877, Bayard Papers, Box. 180.

[66]Memorandum on Florida by Joseph P. Bradley, Bradley Papers. Proceedings, p. 260. Much has been said about how the Justice arrived at his decision. This will be discussed in the final chapter.

[67]Proceedings, p. 261.

the Hayes electors are officials de facto and until removed by some judicial process their acts are binding. The Board of Canvassers rightly possesses judicial power. At worst the Board is guilty of human error. The decision of the State Supreme Court is wrong. The Constitution includes a restriction against federal officeholders for the benefit of the states. If the state chooses to ignore the directive, "who else has a right to say anything against it."[68]

On February 10th the Electoral Commission presented its decision to Congress, which could either overrule or approve the verdict. House Democrats delayed the joint session of Congress in order to gather their forces.[69] As soon as the outcome was announced objections were lodged against the Florida decision.

The main Democratic objection was that the Commission failed to receive and view evidence "tending to prove that the Hayes electors were not the lawful electors of Florida...." To count the votes of the Hayes electors, the objectors concluded, would be a violation of the Constitution.[70] Following the presentation of the objections, the two Houses separated to begin deliberations.

Democrats in each branch sought a weekend recess. They succeeded in the House,[71] but failed in the Senate where John Sherman proposed to accept the decision of the Commission as its own, the objections notwithstanding. When a

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[68]Ibid., pp. 259-261. Florida Memorandum, Bradley Papers.

[69]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 2, p. 1478.

[70]Ibid., pp. 1473, 1481.

[71]Ibid., pp. 1481-1487.

substitute motion in favor of the Tilden electors was defeated, Sherman's motion passed after a brief discussion.[72] The Republican majority in the Senate was in no mood to accept the dilatory tactics of the Democrats.

The House again took up the question on February 12th. Debate was a mere rehashing of the arguments originally presented before the Commission. George W. McCrary and John Randolph Tucker once again assumed the leading roles. An innovation was presented by J. Proctor Knott who wished to resubmit the entire case to the Commission in order to force the tribunal to give the "true reasons" why they decided in favor of Hayes.[73] Speaker Randall killed the motion from the chair by ruling that the law did not permit the House to resubmit anything.

Democratic strength asserted itself and a motion to accept the decision was defeated. By a 168 to 103 vote the House of Representatives rejected the decision.[74] From the opening of debate both Houses of Congress divided along strict party lines. Hayes confided to his diary that the decision showed "the strength of party ties."[75] The Republicans were elated by the entire procedure. They thought that Hayes would surely be inaugurated unless the House began delaying tactics. Sherman

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[72] Ibid., pp. 1472-1477. The motion passed 44 to 24, a strictly partisan vote.

[73] Ibid., p. 1490.

[74] Ibid., p. 1502.

[75] T. H. Williams (ed.), Diary, p. 73.

was convinced that such a revolutionary act would never be used.[76] Garfield noted that there was "much anxiety" about the role the Democrats would play in the completion of the count. Rumors persisted that the opposition would resort to revolutionary resistence.[77]

The Democrats were stunned by the verdict. Charges of inconsistency, bribery, and fraud appeared almost at once. The decision not to go behind the returns in the state was ominous for the Democratic cause. Precedent now rested on the side of the Republicans.[78] Still, Democrats dared to hope, for their strongest case was yet to be presented.

On February 12th Congress reconvened in joint session to continue the count. The four votes of Florida were declared for Rutherford B. Hayes because the Houses had failed to concur in rejecting the verdict of the Commission. The count continued without interruption until the State of Louisiana was called.

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[76] John Sherman to Hayes, Feb. 10, 1877, Hayes Papers.

[77] Garfield Diary, Feb. 10 and 11, 1877.

[78] The Nation, XXIV (Feb. 15, 1877), 95.

CHAPTER V

LOUISIANA

Louisiana differed from the rest of the South during the Reconstruction period. From the end of the Civil War until 1877 Louisiana was a bloody battleground. Republicans maintained control through political trickery and federal troops. Periodically the Democrats attempted to "redeem" Louisiana but were repulsed either by the State Returning Board or federal bayonets. The election of 1874 almost succeeded in removing the Republicans from office, but William Pitt Kellogg managed to continue Republican rule through a federal court order. The election of 1876 promised to be more vigorously contested than that of 1874.

Violence was the key to victory for both Democrats and Republicans. Assassination, fraud, and intimidation were common tools of electioneering Democrats used nightriders and white men's clubs to "bulldoze" countries in their favor. Republicans were no less guilty than their opponents, only more successful. The Republicans countered intimidation by control of voter registration and the State Returning Board.

In Louisiana the paramount issue was the establishment and maintenance of local self-government. Essentially the question was between the federally-supported government of William Pitt Kellogg and the desire for local Democratic control.

The most important race was between Republican Samuel B. Packard and Democrat Francis T. Nicholls for the governorship. Neither party spared any effort to gain control of the state.[1]

An act of 1872 created the Louisiana Returning Board. The State Senate appointed the five members to unlimited terms of office. In actuality the Board was self-sustaining because it could fill any vacancy. The law required that all political parties be represented on the Board, and empowered the members to investigate any riot, tumult, acts of violence, intimidation, or corruption which in any way prevented a free election. If the Board ruled that a free election had not taken place in a given precinct, it could exclude that precinct from the final returns. Section three of the act required that hearings be open to any candidate who would be interested in the outcome.[2]

Republican domination of the Returning Board was so well known that some readily predicted the outcome of the election. Democratic majorities throughout the State would be reversed by the Returning Board, whose action would be accepted as "readily as the Romans did the consulship of Caligula's horse. . ."[3]

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[1]The best account of the election of 1876 in Louisiana is by Fanny Z. Bone, "Louisiana in the Disputed Election of 1876," Louisiana Historical Quarterly, XIV-XV (July, 1931-April, 1932) /Hereafter referred to as Bone, LHQ/. Local issues dominated New Orleans newspapers. Refer to the Louisiana Democrat, the New Orleans Daily Picayune on the eve of the election.

[2]Laws of Louisiana, 1872, sections 3 and 26. See footnote no. 14.

[3]Robert Toombs to Alexander H. Stephens, Oct. 30, 1876, in Phillips (ed.), Correspondence of Robert Toombs, p. 723. Flick, Tilden, p. 308.

Louisiana's past history showed the Returning Board to reign supreme The election of 1876 gave little promise of being different from the past

Shortly after the election "visiting statesmen" from both parties arrived in Louisiana to observe proceedings and protect their particular interests. President Grant and the National Republican Party requested prominent Republicans to go to New Orleans to insure a "proper return." The Republican delegation, led by John Sherman and James A. Garfield, totaled close to thirty men.[4] All were convinced that a "fair count of the lawful votes" would give Hayes the state.

John Sherman found an extraordinary amount of violence and intimidation in Louisiana. In two districts the ballot did not contain the names of the Hayes electors, an inequity capable of giving one or two Tilden electors a majority.[5] Nonetheless, if the Returning Board excluded certain parishes, Hayes could carry the state. Everything rested with the Returning Board. Its members were, said Sherman, "firm, judicious, and, as far as I can judge, thoroughly honest and conscientious."[6]

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[4]U.S., Congress, Senate, "Sherman Report," Executive Document No. 2, 44th Cong., 2nd Sess., 1876-1877, p. 2 /Hereafter referred to as Senate, Executive Doc. No. 2./. Some historians have included William Maxwell Evarts among the visitors. There is no evidence to indicate that Evarts went to any of the disputed states. For example, refer to Ellis P. Oherholtzer, A History of the United States Since the Civil War(5 vols.; New York: MacMillan Co., 1917-1937), III, p 283. See James M. Comley to William Henry Smith, Nov. 10, 1876, Wm. Henry Smith Papers, Box 14, Columbus.

[5]John Sherman to Hayes, Nov. 23, 1876, Hayes Papers.

[6]Ibid. Sherman thought that he was in grave danger while in Louisiana. Sherman to Cecilia (Mrs. John) Sherman, Nov 29, 1876, Hayes Papers, photostatic copy.

A delegation of over twenty Democrats went to Louisiana to protect their party's interest. Led by John M. Palmer and Lyman Trumbull of Illinois, the Democrats asked the Republicans to join with them to exert a combined influence on the Returning Board. This, they said, was the only way that fairness and impartiality could be assured.[7] The Republicans refused, reasoning that they were only observers who could not interfere with Louisiana law.[8]

The Democratic visitors signed a report denying the authority of the Returning Board to count the votes. The people of Louisiana, the report claimed, legally elected Tilden by a majority of over 8,000. Any change in the votes would be done by an unconstitutional body possessing elective powers. The entire affair, they concluded, was a mockery of justice and of democracy.[9]

Republicans contended that the Board's powers were inadequate, pointing out that it was powerless to change Tilden votes to Hayes votes where Democratic intimidation was proved. They also wanted to count in the Hayes column all votes not cast because of such intimidation. Under the law, however, the Board could reject but not change or add votes. Thus the Republicans complained that

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[8]Senate, Executive Doc. No. 2, pp. 32-33.

[9]The Nation, XXIII (Dec. 14, 1876), 347-348.

there was no way, under the law, to redress their greviences.[10] And they were perfectly satisfied that Hayes had carried the state but was deprived of a majority by Democratic intimidation.[11]

Still some Republicans, including Hayes, thought that the decision of the Returning Board would be "unfavorable." The "wrongs" were so great, wrote Hayes, that even the Board could not lawfully correct them.[12] For obdurate Republicans who believed that Louisiana rightfully belonged in the Hayes column, the question was how to place it there without permitting Congress to go behind the returns. If the Returning Board certified the Hayes electors, that decision must be made to stand.

Congressional investigations of the Returning Board in Louisiana elections had become something of a perennial affair in the 1870's. The most damaging investigation was completed by a House Committee in 1875. The Democratic majority agreed that the Board had the right to go behind the returns, but maintained that it had "defeated the will of the people."[13] But the most severe indictment of the Board's integrity was delivered by the Republican minority.

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[10]Senate, Executive Doc. No. 2, pp. 4-5.

[11]John Sherman to Hayes, Nov. 23, 1876, Hayes Papers.

[12]T. H. Williams (ed.), Diary, p. 53.

[13]U.S., Congress, House, Committee on the South, Condition of the South, Report No. 261, 43rd. Cong., 2nd Sess., 1875, pp. 1-4.

George F. Hoar, William A. Wheeler, and William P. Frye said that the Returning Board had no right to change the vote unless the provisions of the Louisiana law were explicitly followed. They did not deny the right of the Board to go behind the returns, but said that exercise of that power should be within the exact letter of the law. In 1875 they condemned the Board for acting without the required evidence.[14] The minority report of 1875 was a useful argument for the Democrats in 1876.

An investigating committee from the House of Representatives arrived in Louisiana in November, 1876. The Democratic majority concluded that the Returning Board was composed of men who lacked integrity and were nothing but criminals. The Canvassing Board, they said, acted without the authority of law and their actions should be regarded as null and void. To count the vote of the Hayes electors, said the Committee, would be to approve the illegal and fraudulent action of the Returning Board.[15]

The Republican minority reported that neither Congress nor the Committee had the right to go behind the state returns. The Constitution forbade such action

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[14]Ibid., p. 21. The law as amended in 1872 required the Commissioner of Elections in a given poll to forward duplicate copies of the returns along with the sworn statements of three reliable witnesses to the State Canvassing Board as evidence of riot, turmoil, or violence. Laws of Louisiana, 1872, no. 98, section 3 and 26. See Senate, Ex. Doc. No. 2 p. 160.

[15]U.S , Congress, House, Committee on the Louisiana Election, The Recent Election in Louisiana, Report No. 156, pt. 1, 44th Cong., 2nd Sess., 1876-1877, pp. 19-20. / Hereafter referred to as House, Report No. 156./

and the returns of the Board were prima-facie evidence of election. Republicans tried to show that the Democrats forced Negroes to leave the Republican party. There was no question, the minority said, that the Returning Board acted within the law. Consequently, they recommended the acceptance of the votes for Hayes and Wheeler.[16]

In 1876 four Republicans, J. Madison Wells, Thomas C. Anderson, L.M. Kenner, and G. Casanane composed the State Returning Board. Oscar Arroyo, a Democrat, resigned from the Board in December, 1874, and was never replaced. The Board President argued that the Democrats had forfeited their right to be represented on the Board with Arroyo's resignation.[17] The Republican-controlled Board would have the final word as to the result of the election.

Based upon the face of the returns the Tilden electors had a majority ranging from 6,300 to 8,957. The State Returning Board changed or rejected 13,217 Tilden votes and 2,412 votes for Hayes. For example, the Board rejected 1,763 votes cast for William Pitt Kellogg and 10,299 votes cast for his opponent. Kellogg who lost by 6,000 votes on the face of the returns won the election by close to 5,000 votes. The result of the election converted a Democratic

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[16]Ibid., pt. 2, p. 10.

[17]Palmer, Personal Recollections, pp. 397-398. Refer also to U S., Congress, House, Committee on the Louisiana Election, Recent Election in Louisiana: Testimony, Misc. Doc. No. 34, pt. 2, 44th Cong., 2nd Sess., 1876-1877, pp. 506-510, 590, 597-598, for an evaluation of the character of the Board by leading citizens of Louisiana. /Hereafter referred to as House, Misc. Doc. No. 34./. The Board was exactly the same as it had been in 1874.

victory into a Republican victory, with the Hayes electors attaining a majority ranging from 4,626 to 4,712.[18] The Republican electors were certified by the Board on December 6, 1876

The charge of bribery was immediately heard. The Board, said Democrats, was an unconstitutional device paid for by Republicans to keep Republicans in office. There is evidence to indicate that the Republicans offered the Board members political rewards but the Democrats were also offering rewards for services rendered. Neither party can claim purity in the election or in the proceedings of the Returning Board. In the final analysis both parties were guilty of using criminal means to achieve victory.[19]

Republican organs praised, albeit with considerable skepticism, the action of the Returning Board. The New York Times commended the Board for fearlessly preforming their duty under threats of violence.[20] Harper's Weekly questioned

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[18]The actual figures vary depending upon the source used Democrats claimed that their total was higher than shown by the Supervisors' returns. Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt 2, p. 1504. House, Report No. 156, pt. 1, p. 1. Bone, LHQ, XV, 234.

[19]Washington Union, Dec. 7, 1876, an open letter by Jeremiah S. Black. Refer to Edgar L. Gray, "The Career of William Henry Smith, Politician-Journalist" (unpublished Ph.D Dissertation, Ohio State University, 1951). William Henry Smith to Hayes, April 19, 1877, Hayes Papers. Two letters from John Sherman to D.A. Weber and James E. Anderson, Nov. 20, 1876, are most damaging to the Republican cause, photostatic copies, Hayes Papers. Democrats investigated these charges in the "Potter investigation," House, Misc. Doc. No. 31, 45th Cong., cf. I, p. 957. A list of offices given to the members of the Board and their families may be found in John Bigelow (ed), Letters and Literary Memorials of Samuel J. Tilden (2 vols.; New York: Harper and Brothers, 1908), II, pp. 565-567.

[20]New York Times, Dec. 6, 1876.

the fairness of the Board. While recognizing the lawlessness of the Democrats, Harper's could not justify the fact that "just enough votes" had been changed to insure a Hayes victory.[21] In a series of articles The Nation condemned the action of the Board completely. Edwin Godkin went so far as to suggest that Hayes reject the Louisiana vote because it was obtained through "judicial fraud and chicane."[22]

Republican politicians were also questioning the result in Louisiana. President Grant thought that Tilden carried the state on the basis of the initial returns.[23] The action of the Returning Board appeared to reaffirm the President's belief.[24] Other Republicans doubted whether it would be legally possible to award the state to Hayes. Doubt over Louisiana and Florida was in part responsible for the formulation of the Electoral Commission.

The existance of a dual government within Louisiana complicated Hayes's victory. The Returning Board certified Republicans to the governorship and legislature. The Republican legislature accepted the decision and counted in S. B. Packard for governor. Democrats adjourned, formed their own legislature, and certified the election of Francis T. Nicholls along with the rest of the

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[21] Harper's Weekly, XXI (Jan. 13, 1877), 22.

[22] The Nation, XXIII (Nov. 16, 1876), 294, (Nov. 23, 1876), 309, (Nov. 30, 1876), 319.

[23] Childs, Recollections, pp. 76-77, 81.

[24] Henry V. Boynton to James M. Comly, Jan. 25, 1877, Comly Papers.

Democratic ticket. In the end Louisiana had two governors, two legislatures, and two complete sets of state officials. The Packard government controlled only the state house and existed solely because of federal troops. Nicholls' government controlled the entire state and also the purse.[25]

President Grant formally recognized Packard's government on January 14, 1877. Republicans realized that the votes for the Hayes electors and Packard were directly related. It would be extremely difficult, they thought, to maintain the election of Republican electors and not the Packard government. If the Packard government was overthrown the authority of the Hayes electors would likewise be lost.[26] Republicans decided to keep the Packard government in power until after the inauguration.

When the electoral count reached Louisiana four certificates were presented, the first being that of the Republican electors as determined by the Returning Board. Certificate No. II was signed by John McEnery and contained eight votes for Tilden. The third certificate was a duplicate of the first Republican vote. Senator Ferry read a fourth paper purporting to be a certificate

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[25]Bone LHQ, XV, 234-235. Packard and Nicholls take office in late December, after the electors have voted.

[26]Garfield Diary, Jan. 14, 19, 20, 1877.

signed by "John Smith, bull-dozed governor of Louisiana." The latter certificate was quickly dropped by the joint session.[27]

Louisiana Republicans forwarded two different certificates to Washington to cover a mistake. Upon receiving the first certificate President pro tem Ferry informed the messenger that the return lacked the electoral certificate on the envelope. The messenger returned to New Orleans with the certificate. William Pitt Kellogg composed a second certificate but forged the names of two members of the Returning Board because they were not immediately available to sign the document. The second certificate was taken back to Washington. Thus Ferry had the original certificate by mail and a forged second return.[28] The Democrats, unaware of the incomplete or forged return, never bothered to view the certificates and were ignorant of the errors until 1878.[29]

Democrats were, however, well-aware of one Republican trick. When the Hayes electors met on December 6th, A. B. Levissee and O. H. Brewster failed to

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[27]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, pp. 1503-1504. The New York Times said that this certificate was eight votes for Peter Cooper, Feb. 13, 1877. The disappearance of the fourth certificate led to charges of Republican fraud and corruption. Democrats also said that the certificate was to cover over the second Republican certificate. There is no evidence to substantiate such charges.

[28]In Ferry's defense it must be said that he pointed out errors on other certificates regardless of party. House, Misc. Doc. No. 31, 45th Cong., p. 133. Evidently some leading Republicans knew that something was wrong with the second certificate and not to trust it. cf. p. 711. Oliver P. Morton was one of the Republicans who did not trust the second certificate. Refer to U.S., Congress, House, Report No. 140, 45th Cong., 3rd Sess., 1878-1879, pp. 50-63, 89-91.

[29]Hill, Harper's Monthly Magazine, 565.

meet with the college. At the time of their election both held federal offices which, they said, they had since resigned. To avoid joining the college as unqualified electors, they waited outside the room while the other members of the college met, declared that two vacancies existed, and appointed Levissee and Brewster to fill the vacancies. Democrats hoped that such action would be repudiated by the Commission.

Objections were filed by both political parties to the Louisiana returns. Democrats put forth arguments against the Hayes electors with three separate objections. Louisiana law, they said, specified that electors should be elected, not appointed by the Returning Board. The Board acted without jurisdiction, and fraudulently certified the Hayes electors despite the wishes of the people. In addition, the Returning Board was an unconstitutional authority composed of persons from only one party. The Democrats further charged that two of the Republican electors, Levissee and Brewster, held federal offices and were therefore ineligible. In addition, four other Hayes electors already held state offices. The Louisiana constitution prohibited the holding of more that one state office. The entire certificate was a conspiracy on the part of William Pitt Kellogg and the Returning Board to defraud the people of Louisiana.[30]

Republicans objected to the Tilden certificate on the grounds that John McEnery was never governor of Louisiana. Conclusive evidence, they said, showed that William Pitt Kellogg was the governor. Furthermore, no evidence

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[30]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 2, pp. 1504-1505.

existed to show that the Tilden electors were ever appointed in the manner prescribed by the legislature. Republicans advocated the acceptance of Certificate No. I because it contained all that the law required. It was the legitimate voice of the state and must be accepted.[31]

Once again the crucial question was the acceptance of evidence. The case for the Democrats depended upon a ruling by the Commission in favor of admitting evidence to prove fraud. If the Commission so ruled the Democrats thought that Louisiana would be their best case. Republicans were well aware that the Returning Board had acted without the required evidence. The Board also failed to fulfill the requirment that "all political parties" be represented. Nonetheless, Republican hopes were high. Louisiana presented no new problems. The Florida precedent covered every argument for Louisiana. Republican strategy would be to hold the Commission to the Florida decision.[32]

Democrats added Lyman Trumbull to their ranks of counsel, while Senator Joseph E. McDonald of Indiana and Representative George A. Jenks of Pennsylvania served as the objectors. Republicans were represented by the same four men who conducted the Florida case. The objectors were Senator Timothy O. Howe of Wisconsin and Representative Stephen A. Hurlbut of Illinois. Arguments began on February 13th.

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[31] Ibid. John McEnery was the Democratic claimant to the governorship. He had been removed from office in 1874 by Kellogg through the use of a federal court order.

[32] New York World, Jan. 29, 1877. Stanley Matthews to Hayes, Feb. 13, 1877, Hayes Papers.

Senator McDonald opened with an analysis of Louisiana law. He contended that legislation approved in 1868 authorizing the election of electors by popular vote, had been repealed by laws of 1870 and 1872.[33] Despite the lack of legal authority an election was held. The result clearly showed a Democratic majority ranging from 5,300 to 8,990. The Returning Board, acting without lawful authority or evidence, changed this majority into a Republican victory. History shows, said McDonald, that the Louisiana Returning Board has always been corrupt. Congressional committees saw fit in 1873 and 1875 either to reject the votes of Louisiana completely or severely limit the authority of the Board. The situation in 1876 was no different than before.[34]

George A. Jenks continued the argument by going behind the certificate of the Returning Board. Jenks charged that the commissioners of election illegally threw out votes before sending the precinct results to the state board. Not only did the Board act without authority but the parish returns were changed before being sent to New Orleans. If the action of the Returning Board, said Jenks, is beyond inspection, the ineligible electors are not. Levissee and Brewster held offices of profit from the federal government. In addition, four other so-called electors were in violation of the state constitution by holding

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[33]Proceedings, p. 59.

[34]Ibid., pp. 60-61.

other state offices. Finally, said Jenks, the Returning Board was bribed. Certificate No. 1 was void because of fraud, ineligibility, and bribery.[35]

Republicans justified the action of the Returning Board by arguing that Louisiana was a unique state. Murder, intimidation, and violence were proof of a continuous attempt to overthrow law and order. The Returning Board was a legitimate means of trying to correct these disorders. Although admitting the danger of such a device, Republicans argued that it was entirely necessary and legal. Even the Louisiana Supreme Court ruled in its favor. The Board was legal and its action must be accepted as final.

Neither Howe nor Hurlbut made any plea that the Hayes electors were ever elected. They based their entire argument on the supremacy of the governor's certificate. William Pitt Kellogg, they said, was the recognized governor of Louisiana. The Commission had no choice but to recognize the true executive authority of the state and not that of a would-be claimant.[36]

A compromise by the Commission gave counsel four and a half hours to argue the case. Democrats had originally asked for a total of twelve, but it was decided that nine hours would suffice. Under the rules the Democrats were the first to present their case.

Matthew H. Carpenter delivered the argument against Louisiana's election codes. Continuing along the lines of Senator McDonald, Carpenter discussed the

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[35]Ibid., pp. 61-65.

[36]Ibid., pp. 65-71. For the ruling of the Louisiana Supreme Court refer to Collins vs. Knoblock, 25 Louisiana Annual Reports, 265-268.

election laws of 1868, 1870, and 1872 in detail. The law of 1872 failed to contain a provision for filling vacancies in the electoral college. Under the existing statute, he said, vacancies had to be filled by popular election. The appointments of Brewster and Levissee were therefore void. Carpenter tried to show that the law created a dilemma. If the act of 1868 was in effect there could not legally be a final canvass of the vote by the Returning Board. On the other hand, if the act was not in force vancancies could only be filled by a popular election. In either case Certificate No. 1 was void because it violated the law. In conclusion, Carpenter noted that the Kellogg government was put into office by violence. More violence was the result. The Republican certificate should be rejected.[37]

Lyman Trumbull offered nine propositions which could be proved if the Commission received the necessary evidence. In brief the propositions centered on the Returning Board. The Board, said Trumbull, failed to observe the requirements of the law. Votes were rejected without statement of riot or violence being forwarded by the commissioners of election. Also, the Board never received any written statements from witnesses as required by section twenty-six. Trumbull then repeated the charges of ineligible electors. The entire certificate was the result of a conspiracy to certify a Republican victory.[38]

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[37] Ibid., pp. 72-80.

[38] Ibid., pp. 80-84.

Trumbull's propositions raised a question of procedure. Should additional time be given to argue the acceptance of evidence or should the case be argued in its entirety and one decision given? Edmunds suggested that a total of eight hours be given to the entire case and then the Commission would hand down one final decision. His proposal was defeated, four to eleven. Finally the Commission decided to allow each side two hours to debate the admissibility of evidence.[39]

The argument of Democratic counsel amounted to a complete restatement of their case. The only innovation was an attack on the Kellogg government. Trumbull gave a detailed history of the Kellogg-McEvery conflict of 1872-1873. The Kellogg government was a military regime, said Trumbull, kept in power only by the illegal presence of federal troops. Democrats then reminded the Commission that the certificate of Kellogg had been rejected in 1873 by a Senate committee chaired by Oliver P. Morton. Morton forced Trumbull to read the entire Senate report. The Morton report of 1873 limited Congress merely to

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[39]Ibid., p. 86. Thurman had suggested three hours for each side. Republicans thought this was too much time and defeated the motion, eight to seven. No vote was recorded on the final decision. It is safe to assume that it was accepted by a large majority since at lease eleven members voted against the Edmunds proposal. Counsel was permitted to use time from the regular two hours allotted to argument. Thus, counsel had a total of four hours if it wished to dispense with final arguments. As a rule Justice Clifford strictly enforced the time limits. Garfield thought the requests for extensions of time was evidence that the Democrats were stalling, Diary, Feb. 13, 15, 1877.

inquiring as to whether the votes had been canvassed. Morton had denied the right of Congress to go behind the returns in 1873. In attempting to argue with the former Indiana governor Trumbull greatly injured the Democratic position.[40]

Republicans Stoughton and Shellabarger dismissed the Democratic arguments as irrevelent or altogether nonexistent. There was no conflict, they said, within the Louisiana law. No act may be repealed unless expressly stated. Shellabarger effectively showed that the provision for the college to fill its own vacancies was never repealed.[41] Stoughton argued that the Kellogg government was republican in form. Since Congress accepted the representatives and senators from Louisiana no one could question the form of the government. Shellabarger answered the charge that only Republicans served on the Returning Board by informing the Commission that the law was merely directory. The essential question, said Republicans, was whether or not the Commission could go behind the certificate of the Returning Board. For them, the Florida decision answered the question completely.[42]

William Maxwell Evarts concluded the Republican case with a thorough discussion of state sovereignty and elector eligibility. The Kellogg government,

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[40]See Ibid., pp. 89-90 for the exchange between Trumbull and Morton. Exchanges such as this were common but none was more damaging to the Democratic cause. Morton caught Trumbull using a report out of context. It should be noted that Trumbull helped to write the report in 1873.

[41]Ibid., p. 98.

[42]Stoughton, Ibid., pp. 93-97; Shellabarger, pp. 97-103.

said Evarts, presented every certification required by law. Upon meeting, the electoral college found two vacancies existing and filled the vacancies with Brewster and Levissee. Democrats contended that the two men were ineligible. That they were ineligible on November 7th was not the question. Brewster and Levissee were granted seats in the college on December 6th. Their appointment was beyond question because the State is sovereign over its appointments.[43]

Anticipating the Oregon case Evarts discussed the question of ineligibility. He maintained that the office of elector was either filled or vacant. If an ineligible elector was returned by the voters and certified by the state, the office was filled. "Now," said Evarts, "we say in regard to the Federal disqualification, no proof can reach the point, none is offered that touches the point, none would be admissible if it did touch the point, because of the want of legislation . . ."[44] Congress and therefore the Commission can only accept the certification of the State.

In conclusion Evarts dismissed the contention that a state officer could not be an elector. Democrats, he said, could not decide whether an elector was a state or federal officer If an elector was a state officer, how then could Congress go behind the returns? The Louisiana constitution did not apply if an elector was a federal officer. In truth, said Evarts, the electors were merely voters, not officers. To permit congressional interference in state law would destroy the safeguards of

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[43] Ibid., p 104. Refer to p. 292 for the complete details of filling the vacancies.

[44] Ibid., p. 108.

the people. The Commission had no choice but to accept the verdict of the state.[45]

The Democrats failed to use the time for rebuttal to their advantage. Rather than come to grips with the Republican argument, John A Campbell chose to reargue the entire case. He spoke of the necessity of congressional investigation in order to protect the country from instruments such as the Returning Board. Again and again he spoke of the disfranchisement of Democrats by the Returning Board Louisiana, he concluded, was under the control of an "oligarchy of unscrupulous, dishonest, corrupt overreaching politicans and persons who employ the powers of the State for their own emolument."[46]

With the question of evidence fully argued the Commissioners went into private deliberations on February 16th. Hoar moved that the evidence offered should not be received. Abbott offered a total of five substitutes to accept certain portions of evidence, for example, to show that the Returning Board was unconstitutional. The Commission rejected Abbott's suggestions eight to seven.[47] Motions by Hunton, Bayard, Field, and Payne to accept certain Democratic objections met the same fate. Justice Bradley sided with the Republicans on every vote. Finally, by an eight to seven vote the Commission refused to accept any evidence.[48]

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[45] Ibid., pp. 109-110.

[46] Ibid., p. 116.

[47] Ibid., p. 117.

[48] Ibid., pp. 117-118.

After the decision Payne moved to allow one hour for final argument by each side. Both Evarts and Campbell said that they would rest their case. Commissioner Abbott said that he was utterly surprised that Democratic counsel would have nothing more to say.[49]

Once again in private consultation, Thurman moved to reject all of the certificates from Louisiana. Again the motion was defeated eight to seven. The Commission voted eight to seven to accept and count the votes of Certificate No. 1. Hoar, Miller, and Bradley were to prepare the final report.[50]

Seven Republicans and Justice Bradley decided that the certificate of William Pitt Kellogg was the legal and true return of Louisiana. The Commission was "not competent under the Constitution and the law as it existed at the date of the passage of /The Commission/ act to go into evidence aliunde the papers opened by the President of the Senare...." Also, the Commission was not competent to prove if any of the electors held offices of trust and profit via aliunde evidence. The majority concluded that the Returning Board was a legally constituted body.[51]

The minority dwelt upon the Returning Board in their written opinions. The Board failed to follow the regulations of section twenty-six of the law. Evidence

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[49]Ibid., p. 118.

[50]Ibid., Garfield did not want Frelinghuysen on this committee and substituted Hoar's name.

[51]Ibid., pp. 118-119.

of fraud existed, said Democrats, by the very fact that all parties were not represented on the Board.[52] All agreed that the restrictive clause of the Constitution was self-executing Therefore, they said, the votes of Brewster and Levissee should not be counted.[53] The Returning Board acted illegally and unconstitutionally Commissioners Hunton and Abbott cited the opinion of Justice Miller in Schench v. Peay as the basis for their position. In that decision Miller decided that when a board was defined at the specific number, a lesser number would not constitute a legal board.[54] Using Miller's decision as a precedent, the two Democrats decided that the Returning Board was unconstitutional.[55]

Republicans rested their opinions on the Florida decision. It was decided that the Commission could not go behind the returns in Florida; therefore, they could not do so in Louisiana. Garfield pointed to an inconsistancy in the Democratic argument In Florida the Democrats maintained that the decision of the State Supreme Court was final. But in Louisiana they never mentioned the decision of

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[52]Bayard, Ibid., p. 215.

[53]Ibid., pp. 203, 217, 225, and 234.

[54]Schench v. Peay, 1 Woolworth's Circuit Court Report, (1868), 175. Miller's opinion was considered a landmark decision in 1868. From Abbott's comments it is obvious that Miller did not consider his opinion to apply to the Louisiana Returning Board, Proceedings, p. 234.

[55]Proceedings, pp. 225-229, 234. Commissioners Payne, Clifford, and Field did not write an opinion on Louisiana.

the State Supreme Court. Garfield concluded that Louisiana had followed the mode prescribed by the legislature. Nothing more could be demanded than an adherence to the law.[56]

Justice Miller did not write an opinion. In 1888 he said that the view of state supremacy over electors saved the country from anarchy. He went on to complain about the lack of recognition for the honorable service performed by the Commission.[57]

Garfield wrote in his diary that the Republicans "had no hint of the conclusion to be reached until Bradley was twenty minutes into his speech. The suspense was painful, and the efforts of members to appear unconcerned gave strong proof of the intensity of feeling."[58] Once again Bradley was cast as the umpire. His was the deciding vote.

In an extensive opinion Bradley divided the case into three main divisions followed by a series of conclusions. He accepted the Republican argument that the act of 1872 had not repealed the presidential election law of 1868. The latter, said Bradley, was a separate law passed on October 30, 1868 and not joined to

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[56]Proceedings, Morton, pp. 197-198, Frelinghuysen, p. 206, Garfield, pp. 242-244. Garfield viewed the proceedings of February 16th as a "day of the most nervous strain and anxiety I have passed since Chickamauga." Diary, Feb. 16, 1877.

[57]Quoted in Samuel Whitaker Pennypacker, The Autobiography of a Pennsylvanian (Philadelphia: John C. Winston Co., 1918), p. 132. Republicans Hoar, Edmunds, Strong, and Miller did not write opinions on Louisiana.

[58]Garfield, Diary, Feb. 16, 1877.

the general law of October 19, 1868. Thus, the electoral college did possess the legal authority to fill vacancies within the college. Secondly, the abuse of a power does not make a law unconstitutional. The Supreme Court of Louisiana refused to go behind the returns of the Board. The State law was sustained. Finally the lack of a member cannot make a board inoperative. The Supreme Court of the United States can operate with less than nine judges. The Board was once completely filled and was therefore legally constituted.[59]

Bradley ended his opinion with a series of conclusions. Kellogg's certificate, said Bradley, must be considered prima facie evidence of election. The findings of the Returning Board, however, were not conclusive in the complete sense. Congress may investigate to see if the Board acted within the general scope of its powers. The question is not the protection of fraud but whether Congress can legitimately investigate the States. Under no circumstances can the two Houses be viewed as a court to view the legality of an election or to act as a canvassing board for the States. Congress may reject electoral votes if fraud is manifest, but, concluded Bradley, fraud was only charged in Louisiana.[60]

Justice Bradley admitted that he was not satisfied with his opinion on Florida. He was not inclined to believe that a federal officeholder could be appointed an elector but must resign before voting. There was no difference, he said, between

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[59]Proceedings, pp. 262-263.

[60]Ibid., pp. 261-264.

"the prohibition that federal officeholders shall not be electors, or shall not be appointed electors."[61] Therefore, the disqualification means nothing until the vote is cast. If an elector is inelibigle at the time of voting his vote should be rejected. Yet if the elector has resigned his federal position before voting the vote should be counted. The constitutional restriction does not apply to appointment but only to the act of voting. Bradley never clearly defined who should reject the vote of an ineligible elector. From his writing it seems that he favored state action over congressional rejection. He evidently weighed this particular question greatly but never came to a final decision.[62] Bradley reasoned that since the purpose of an elector had changed, the matter of eligibility dwindled in importance. It was for Congress to clarify the situation.[63]

The eight to seven decision in the case of Louisiana literally crushed the Democrats. The Atlanta Daily Constitution thought that Democrats would either have to accept Hayes or put Tilden in by force.[64] A slight hope did exist that moderate Republicans might bolt the party out of disgust over the decision. Realists, however, began to think that all was lost. There seemed absolutely no chance that the Senate would reject the decision of the Commission.

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[61]Memoranda on Louisiana, Bradley Papers.

[62]Ibid. The Justice wrote out in longhand the major argument to the question but never listed a decision.

[63]Proceedings, p. 264.

[64]Atlanta Daily Constitution, Feb. 17, 1877.

The Commission informed Congress of the decision on February 17th. House members immediately recessed despite the knowledge that the Senate was about to render its decision. Speaker Randall kept the Secretary of the Senate waiting at the bar for over a hour while the House discussed a recess.[65] A Democratic caucus resolved not to delay the electoral count with dilatory oposition. The resolution, however, decried the shameless violations of the law by the Commission.[66] The Democrats then seemingly reversed themselves and voted for the recess.

Democrats filed objections to the decision on the grounds that the Commission failed to accept evidence. A second objection was much more specific. There was, said the Democrats, no denial that the Tilden electors had received the highest number of votes. Likewise, it was never denied that the Returning Board was guilty of fraud. Certification of the Hayes electors was a complete violation of the spirit if not the letter of the Commission bill. The Constitution would be violated if the votes were counted.[67]

Senate Democrats again reiterated counsel's argument before the Commission. Acceptance of the Commission's decision would mean recognition of fraud.[68]

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[65]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 2, pp. 1664-1665.

[66]Atlanta Daily Constitution, Feb. 18, 1877. The Constitution thought that the caucus had completely surrendered to the Republicans.

[67]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 2, pp. 1666-1667, 1670.

[68]Ibid., pp. 1675-1677.

Bayard presented the most passionate plea, saying: "My labors and my efforts have been crowned only by failure. Deep indeed in my sorrow and poignant my disappointment. I mourn my failure for my country's sake; for it seems to me that not only does this decision...destroy and level in the dust the essential safeguards of the Constitution...but it announces to the people of this land that truth and justice, honestly and morality, are no longer the essential basis of their political power."[69]

Roscoe Conkling gave the Democrats a slight hope. L.Q.C. Lamar asked Bayard if Conkling would lead a Republican revolt in the Senate.[70] Rumors were rife that Conkling would lead a dissent against the Louisiana decision. Eppa Hunton thought it was "thoroughly understood" that Conkling would leave the Republicans.[71] When the Louisiana decision came to a vote in the Senate Conkling was not in his seat.

Conkling's disappearence was due, said Democrats, to Kate Chase Sprague. Mrs. Sprague had convinced Conkling not to appear in order to avenge her father's defeat for the presidential nomination in 1868 by Tilden.[72] If Conkling

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[69]Ibid., p. 1678.

[70]Lamar to Bayard, Feb. 19, 1877, Bayard Papers.

[71]Hunton, Autobiography, pp192-193.

[72]McClure, Our Presidents, pp. 268-269. Hunton, Autobiography, pp. 192-193. Mrs. Sprague's father was Salmon P. Chase, Chief Justice of the U.S. Supreme Court. Mrs. Sprague and Conkling were known to be romantically involved.

had revolted, Southern Republican Senators would have joined him and prevented the Republicans from accepting the Commission's decision. What discounts the entire story is the fact that Southern Republicans were in power due to carpetbag governments, most of which had already been overthrown. It is doubtful that Democrats would have returned them to power for bolting the Republican party. Undoubtedly Conkling simply lost his courage and did not go to the Senate.[73]

The Republicans struck back at the Democratic objections by waving the "bloody shirt." Aaron Sargent accused the Democrats of being responsible for Lincoln's assassination. "The robe of the Democratic party," said Sargent, "is stained all over with gore, is stained all over with the results of an unnecessary war, is stained all over by dripping assassinations from that of the best man that God ever created...Abraham Lincoln, down to the poorest Negro of Louisiana or Mississippi that in this last election has been slain because of his desire to cast his vote for the party that gave him freedom."[74]

Debate in the Senate followed party lines with a predictable result. Motions to reject the decision of the Commission were defeated. The Senate decided to

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[73]Thomas C. Donaldson, "Memoirs of Thomas C. Donaldson," unpublished typed Mss., Indiana Historical Society, Indianapolis, entry for March 10, 1877. Hereafter referred to as Donaldson, "Memoir." If the seven carpetbag Senators would have joined Conkling they could have rejected the Commission's decision, 35 to 34. Again, such a theory does not consider the effect of Republican pressure on the seven southern Republicans.

[74]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 2, p. 1680.

accept the decision, 41 to 28.[75] This, of course, meant that the votes would be counted for Hayes regardless of House action.

House Democrats divided over the proper course of action. Jeptha D. New of Indiana pleaded for "submission" to the decision without undue delay. The shame of fraud, he said, would ultimately bring victory to the party. The main Democratic contention was that the Commission recognized fraud while honest people were disfranchised without due process. S.S. Cox made jest of the aliunde decision by using the Bible. When Republicans objected, he noted that even the Bible was aliunde to the Republicans.[76]

Republicans charged the Democrats with bad faith. Democrats were the most responsible for passing the Commission bill and now cried over an adverse decision.[77] The only task of the House was to vote without delay. The House discontinued debate and voted 173 to 99 to reject the Commission's decision.[78]

Congress reassembled in joint session to continue the count. The Houses failed to concur in rejecting the verdict of the Commission; therefore, Louisiana's eight votes were counted for Hayes. The count then proceeded with several interruptions to Oregon.[79]

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[75]Ibid., p. 1683.

[76]Ibid., pp. 1690-1691. Refer also to pp. 1684-1703.

[77]Ibid., pp. 1684-1691

[78]Ibid., p. 1703.

[79]Ibid. Objections were made to several states. These will be discussed in the chapter on South Carolina.

CHAPTER VI

OREGON

Republicans and Democrats somewhat reversed their positions over Oregon. The Republicans assumed the offensive by challenging the executive authority of the state, while the Democrats found themselves advocating the supremacy of the governor's certificate. For both parties this constituted a complete reversal of their earlier positions.

The Republicans carried the state by a small majority in November. William H. Odell, J.C. Cartwright, and John W. Watts were chosen electors with majorities of over a thousand votes each. No one questioned the fairness or legality of the election. The secretary of state, as the canvassing officer, certified the results in favor of the Republicans.[1] Shortly after certification, however, Democrats questioned the eligibility of John W. Watts, one of the Republican electors.

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[1]U.S. Congress, Senate Committee on Privileges and Elections, Report on the Eligibility of Electors from the State of Oregon. Report No. 678, 44th Cong., 2nd Sess., 1876-1877, pp. 1-2. /Hereafter referred to as Senate Report No. 678./ Proceedings, p. 296. There was a question as to whether the secretary of state was the sole canvassing officer. Democrats later argued that the governor also formed part of the canvassing board.

Watts was a deputy postmaster of the fourth class at a little town called LaFayettee in Yam Hill county with a compensation of about $268 per annum.[2] Evidently few people knew of his "office of trust and profit." At any rate, it went unnoticed until after the election. Watts resigned his office on November 13th and the Postmaster General appointed a successor.[3] The Democrats, however, were not about to overlook such an issue.

Governor LaFayette Grover, a Democrat, held hearings on Watts's eligibility on December 5th. Republicans, denying the governor's authority, did not attend the hearing. Grover ruled that since the Constitution prohibited a federal office-holder from being an elector, Watts could not hold the office. The Governor then gave all three certificates of election to E.A. Cronin, the person who had received the next highest number of votes in the election.[4] When the electoral college met on December 6th Cronin refused to give certificates of election to Odell and Cartwright, who then went to another part of the room, accepted Watts's resignation and proceded to elect Watts to fill the vacancy on the board. This done, the three Republicans cast their votes for Rutherford B. Hayes.[5]

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[2]Senate, Report No. 678, p. 2.

[3]Ibid., pp. 3-5.

[4]Ibid., p. 5. Chicago Tribune, Dec 10, 1877.

[5]U.S., Congress, Senate, Committee on Privileges and Elections, Electoral Vote of Certain States, Misc. Doc. No. 44, 44th Cong. 2nd Sess., 1876-1877, pp. 59-63. /Hereafter referred to as Senate, Misc. Doc. No. 44./.

At the same time Cronin formed his own college, appointing as members J.N.T. Miller and John Parker. This group cast two votes for Hayes and one for Tilden,[6] and Cronin conveyed the results to Washington. The one vote for Tilden was all that was needed to make him the president.

Oregon thus presented two certificates of election. Cronin's certificate bore the signature of Governor Grover and the secretary of state. The Republican certificate carried the state seal and a certified abstract of the popular vote, but lacked the governor's certification, having instead the signature of the secretary of state.

Democrats argued that because Watts was ineligible he could not be elected Accordingly, since Watts was never elected he could not resign a position he never held. Abram S. Hewitt had wired Governor Grover to certify the candidate with the next highest number of votes in mid-November.[7] The certification of Cronin was a Democratic maneuver to force Republicans into a dilemma. The Democrats were well aware that the Republicans had legitimately carried the state, and they had no intention of insisting that Cronin's vote be counted.[8] Hewitt realized that the Republicans would use returning boards to gain victory in the South and then

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[6]Senate, Report No. 678, pp. 5-7.

[7]Hewitt to Grover, telegram, Nov. 15, 1877, quoted in Nevins, Hewitt, p. 327.

[8]Chicago Tribune, Dec. 18, 1876. Atlanta Daily Constitution, Dec. 7, 1876. New York Times, Dec. 9, 1876.

maintain that Congress could not go behind the governor's certificate. By having Cronin certified, Hewitt hoped to force Republicans into going behind the state returns. If they went behind the returns in Oregon, they could not refuse to do so in Florida, Louisiana, and South Carolina.[9]

Republicans wasted no time in crying "fraud." They distinguished between the governor and the canvassing board. Oregon appointed electors, said Republicans by the vote of the people, thus the governor's signature was only intended to furnish evidence of election. The important signature was that of the canvassing board, namely, the secretary of state.[10] Republicans maintained that the governor's signature was not part of the appointment. If it was, then Congress was attempting to prescribe the form and character of the appointment, a task specifically left to the state legislature. The action of the governor, they concluded, was ultra vires (beyond the power of the governor) and void.[11]

The Senate Committee of Privileges and Elections, led by Oliver P. Morton, charged that over $15,000 went to defraud the voters of Oregon. Part of the money was to pay for counsel but the vast majority was used to influence a Republican

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[9]Nevins, Hewitt, pp. 326-327. See H. J. Boughton to Tilden, Dec. 2, 1876 Tilden Papers, box 13, for the same idea.

[10]Senate, Report No. 678, p. 38. Under Oregon law the secretary of state was to give a final canvass of the votes in the presence of the governor. The law required both to sign but only the secretary of state to count. General Laws of Oregon, sec. 37, p. 547.

[11]Senate, Report No. 678, pp. 38-39. Refer also to pp. 44-61.

newspaper, the Oregonian. The certification of Cronin was a conspiracy conceived in Tilden's home by his nephew, William T. Pelton [12]

The Oregon case precipitated another public debate over whether Congress could go behind the state returns. The Nation predicted that Oregon would be used to force Congress to check state elections. Such an undertaking, said The Nation, was completely unconstitutional.[13] Harper's Weekly conceded the right to go behind the governor's certificate but said that Congress could not inquire beyond the state canvassing board.[14] The same arguments that had been heard for a century were heard again. It would take a special tribunal to settle the question

The publicity given to the Oregon case may have injured the Democrats more than it helped them. The Democrats handled Oregon in such a bungling manner as to cloud the essential issues. "Indeed," wrote Hayes, "it now looks as if it /Oregon/ would damage our adversaries in the public judgment without in any manner injuring us."[15] People easily followed the day-to-day events in the newspapers. Everything became so transparent that Republicans foresaw no

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[12] Ibid., pp. 10-18. The Potter Committee investigated these charges in 1878. The case of the "cipher telegrams" did great injury to the Democratic party. See House, Misc. Doc. No. 31, 45th Cong. (5 vols.). Tilden denied any knowledge of bribery or fraud both before the Potter Committee and later Tilden Papers, undated transcript, box 22, also draft article, box 20.

[13] The Nation, XXIII (Dec. 14, 28, 1877), 350-352, 379-380.

[14] Harper's Weekly, XX (Dec. 30, 1876), 1050.

[15] T.H. Williams (ed.), Diary, p. 57.

problem with Oregon The entire affair, wrote Garfied, "will make some impression upon the public mind in the way of showing the character of Tilden's campaign."[16]

Debate over the question of eligibility reached its highwater mark with the Oregon case. Did the constitutional provision against federal officeholders being electors make every state of the proceedings culminating in the appointment null and void? If a federal officeholder was elected, was there an election? If the appointment was void ab initio, could the properly elected electors fill the vacancy themselves? The Commission would have to decide the answers to these questions

The first Oregon certificate contained the three Republican votes for Hayes and Wheeler. Democrats filed objections to the certificate on the grounds that it lacked the governor's certification, and that John W. Watts was at the time of the election a postmaster and therefore ineligible Pointing out that Governor Grover had certified J.C Cartwright, William H. Odell, and E.A. Cronin, the Democrats held that the two Republicans had no right or authority to appoint Watts to the college. They should have acted with Cronin--that is, they should have cooperated with him in forming the college and voting for the president. Finally, Watts's appointment on December 6th was also void because he was still a postmaster. The certificate should therefore be rejected.[17]

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[16]Garfield diary, Jan 5, 1877.

[17]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 3, pp 1730-1731

Certificate No. II contained a statement by Governor Grover that Odell, Cartwright, and Cronin had the highest number of votes for "persons eligible under the Constitution of the United States." There was a statement signed by Cronin, J.N.T. Miller, and John Parker explaining their appointment and showing two votes for Hayes and one vote for Tilden. Republicans objected to the certificate, saying that Cronin, Miller, and Parker were never appointed in any legal manner; that Odell, Cartwright, and Watts were duly appointed; and, that the Cronin certificate failed to conform to the laws of both Congress and Oregon.[18] President pro tem Ferry referred the certificates and objections to the Commission.

Senator James K. Kelly from Oregon and Representative George A. Jenks served as Democratic objectors. Democratic counsel consisted of Richard T. Merrick, George Hoadly, Ashbel Green, and Alexander Porter Morse. The Republicans used Senator John H. Mitchell of Oregon and William Lawrence of Ohio as objectors but, once again, did not make any change with regard to counsel. Arguments began on February 21st.

The Democratic objectors centered their case on Watts. Senator Kelly argued that since the Constitution and revised statues specified the appointment of electors on November 7, Watts's appointment was void. Watts held a federal office on that date and was ineligible. Since it was impossible to hold a second election, the qualified person who received the highest number of votes should be elected. Oregon law required two signatures, that of the governor and the secretary of state. Watts lacked the governor's certification.[19]

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[18] Ibid.

[19] Proceedings, pp. 122-126.

George A. Jenks continued the argument by denying the right of Odell and Cartwright to fill a non-existent vacancy. The time of appointment, said Jenks, was all important. The constitutional restriction against federal office-holders being electors "is an utter denial of power for the voter to vote" for Watts. The votes cast for Watts must be regarded as illegal. Thus, concluded Jenks, it follows that the legal candidate with the highest number of votes wins. Likewise, because Watts was never an incumbent he could not resign an office he never held. Odell and Cartwright could not accept Watts's resignation. Instead they were honor-bound to unite with Cronin as certified by the governor.[20]

John H. Mitchell presented a long list of objections to the Cronin certificate. First, he said, the governor's signature is merely directory, having no part in the appointment of electors. Secondly, the governor does not possess authority in any sense to investigate the question of eligibility. Oregon law requires that the person receiving the "highest number of votes shall be declared duly elected." In failing to certify Watts, the governor was violating the state constitution. Finally, Mitchell contended that Watts was in fact an elector. No competent tribunal ever passed judgment on this case, said Mitchell, so there is no power on earth that can legally question Watts's vote.[21]

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[20] Ibid., pp. 127-129.

[21] Ibid., pp. 131-138. Mitchell hints at a Democratic conspiracy but notes that evidence aliunde is not acceptable. Ibid., p. 140.

William Lawrence proceded to list reasons why Watts's vote should be considered valid. If every reason was refused, he said, there is one that cannot be rejected: E.A. Cronin's refusal to unite with Odell and Cartwright. If Cronin was elected, his refusal to act permitted the two Republicans to fill a vacancy. Yet, in fact, Lawrence continued, Cronin was never elected or appointed in the manner prescribed by the state legislature. There was evidence to suspect that Cronin did not receive the highest number of votes. Thus, concluded Lawrence, Watts had two titles to office, one by election and one by the appointment of the electoral college. The first certificate, although lacking the governor's signature, must be accepted as the true and legal vote of Oregon.[22]

Democratic counsel offered to prove that Watts was a postmaster on November 7th and December 6th. Also, that more than 1, 100 voters of Oregon voted for Watts with full knowledge that he was a postmaster and, therefore, ineligible. George Hoadly requested additional time in order to allow a full argument. The Commission allotted a total of seven hours to debate the entire question, the admissibility of evidence and the merits of the case itself. Thurman objected to such a proposal, fearing that counsel would not know if its evidence was admissible, but was overruled.[23]

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[22]Ibid., pp. 143-149. Under Oregon law "refusal to act" created a vacancy. Lawrence's speech set the tone for the major Republican argument. Refer to Senate, Report No. 678, p. 61 for a full copy of the Oregon statute of 1865, sec. 2.

[23]Proceedings, pp. 150-151.

Hoadly argued that the Commission must remain true to the Louisiana and Florida decisions. He maintained that the Republican certificate was aliunde the Oregon constitution. Cronin was the elector de facto because he possessed certificate by the governor and secretary of state. If the Commission remains true to its previous decisions it must, said Hoadly, accept the governor's certificate as conclusive.[24] Democrats now openly accepted the Republican doctrine that neither Congress nor the Commission had the right to go behind the governor's certificate.

Stanley Matthews answered the Democrats by quoting his own speech from the Florida case. At no time, he said, did Republicans deny the right to go behind the governor's certificate. Republicans always admitted that the governor may have erred or failed to certify the proper returns. While the governor's certificate may be investigated the action of the returning board may not be questioned. In Oregon the secretary of state was the returning board and had duly certified three Republicans. The governor certified a result different from the actual canvass. Certainly, said Matthews, the Commission can investigate such a visible error.[25]

Both parties now put forth offers of evidence concerning Watts's postmastership. Democrats offered to prove that Watts never resigned. Republicans, on the other hand, offered to prove that he had resigned in early November after

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[24] Ibid., pp. 151-159.

[25] Ibid., pp. 160-165.

settling his accounts with the Post Office, and that a successor had been appointed prior to December 6th.[26]

William Maxwell Evarts began his argument by showing his consistancy through the Florida and Louisiana cases. His central thesis was that Certificate No. 1 contained enough evidence to show Watts's election. In addition, if Watts was ineligible, his appointment to the college by Odell and Cartwright remained untouchable. In the last analysis, said Evarts, the Republicans never violated the Constitution or the laws of Oregon. Certificate No 1 contained the certification of the secretary of state as required by law. Cronin had no right to create his own college. The majority of the college, said Evarts, "anchors the college to itself, and ... the minority is no college at all." Thus, the Commission can, without violating any previous decision, find in favor of the Republicans. He concluded by thanking the Democrats for accepting his argument and finally admitting that Congress could not challenge the state returns.[27]

Richard Merrick denied that he or the Democrats were ever inconsistant. He interpreted the previous decisions of the Commission to mean that Congress can inquire as far as the state seal and no farther. Governor Grover, said Merrick,

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[26] Ibid., pp. 166-168. Republicans offered certified copies of telegrams for Watts's resignation and the appointment of a successor. The Democrats did not have certified copies but Evarts conceded that evidence did not mean that the Commission would accept it or even that the evidence was admissible.

[27] Ibid., pp. 169-173.

could not have certified Watts without violating his oath of office, so he certified Cronin and attached the great seal,[28] thereby making Cronin an elector de facto. Since the Commission had already decided that it was not a judicial body, it must accept Cronin's certificate because to do otherwise would be to break with the Florida and Louisiana precedents. Merrick concluded with the warning that if justice proved unattainable in this instance, the image of the Supreme Court would forever be damaged.[29] This was, in short, an impassioned plea for Justice Bradley to break with his previous opinions.

Commissioner Thurman was unable to attend the first private session on Oregon because he was suffering from neuralgia.[30] After the Commissioners read their initial statements the final private session was held in Thurman's home. Oliver P. Morton was the only person to object to the move.[31]

Edmunds proposed that Certificate No. II did not "contain nor certify the constitutional votes" to which Oregon was entitled. The Commission unanimously adopted the resolution.[32] Democrats then moved to reject one Oregon vote on the

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[28]Ibid., p. 175. It should be noted here that the abstract of votes in Certificate No. I also contained the great seal of Oregon.

[29]Ibid., pp. 173-177.

[30]Neuralgia is an accute paroxysmal pain of the nerves. Although not accompanied by fever or other illness it is extremely painful.

[31]Proceedings, p. 178. Refer also to the Garfield diary, Feb. 23, 1877.

[32]Proceedings, p. 178.

grounds of a failure to elect or appoint, but they lost by the usual count of eight to seven. Morton moved to count the votes as contained in the first certificate, and again, by an eight to seven vote, the Commission accepted the Republican certificate.[33]

In their written opinion to Congress the majority of the Commission explained their decision. Under Oregon law the secretary of state was the sole canvassing official. By his canvass Odell, Cartwright, and Watts received "the highest number of votes for that office and by the expressed language of the /state/ statute those persons are deemed elected." The refusal of the governor, said the majority, to sign the certificate does not defeat their appointment. Secondly, although Watts was a postmaster on November 7th, he did not hold that office at the time of voting. Finally there was no question over Certificate No. II, all agreed that it was null and void.[34] The votes of Oregon should be counted for Hayes and Wheeler.

Commissioners Hoar, Morton, and Frelinghuysen agreed in their written opinions that Governor Grover exceeded his authority. Although the governor's certificate was prima facie evidence, it certainly was impeachable. Republican counsel, they said, effectively showed that Grover's certificate was in conflict

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[33] Ibid.

[34] Ibid., pp. 178-179.

with the final canvass. The governor's certificate, Hoar wrote later, was of "no more official character than a like certificate of the Governor-General of India would have been."[35]

Commissioners Bayard, Hunton, and Abbott argued that Watts's vote should not be counted. Certificate No. I did not contain the signature of the governor. In Louisiana and Florida the Commission accepted the governor's certificate as final but in Oregon the actual returns were used. Secondly, if the provisions of the Constitution were not self-executing on November 7th, how could they be self-executing on December 6th? The three Democrats concluded that only two votes from Oregon could be counted.[36]

Republican Justices Miller and Strong ruled that the secretary of state was the sole canvassing official for the state. Governor Grover, said the Justices, was to perform a ministerial act. Thus, the lack of the governor's signature did not negate Certificate No. I. Both Justices accepted the argument that the Commission could investigate what officials were to make the final returns and if the governor certified that result. In Oregon Governor Grover certified a result different from the final return. Such an error, said the Justices, need not be repeated by accepting the Cronin certificate. Watts resigned his position and a

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[35]Ibid. Morton, pp. 198-200; Frelinghuysen, p. 206. Hoar did not file an opinion on Oregon but did comment on the case later. Refer to Hoar, Autobiography, I, pp. 373-374.

[36]Proceedings, Bayard, pp. 218-220; Hunton, 230-231; Abbott, pp. 234-237.

successor named. All of the evidence opened by the President of the Senate points to Certificate No. 1 as being perfectly valid.[37]

Justice Field viewed the case of Watts as a failure to elect. Again, he expressed his belief that the constitutional provisions were self-executing. Governor Grover had the right and duty to refuse to certify Watts. Nonetheless, Cronin was never an elector because there was a failure to elect. Under such circumstances Watts's resignation was void and only two votes could be counted.[38]

Justice Bradley again had the deciding vote. He ruled that the secretary of state made a final canvass certifying Watts, Odell, and Cartwright. Having done so, the secretary could not change his result. Being the sole canvasser and having preformed his duty, the secretary of state became functus officio with regard to the election. The action of the governor, said Bradley, was clearly an usurpation of power, for his duty was to perform a simple ministerial act. Although the governor's certificate is prima facie evidence, it may easily be impeached. Bradley concluded that Watts's appointment on December 6th was valid because the failure to elect created a vacancy. The Justice conceded that Watts's election may have been void, but that question was of no importance. The December appointment was perfectly valid and, as a result, Hayes should receive three votes from Oregon.[39]

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[37] Ibid., Miller, pp. 257-259; Strong, pp. 254-255.

[38] Ibid., pp. 249-251.

[39] Ibid., pp. 264-266.

The entire case took only two days to argue and a third day to reach a decision. Congress learned of the verdict on February 23rd. More as a matter of course rather than principle, the Democrats objected to the decision, demanding that the vote of Cronin be counted for Tilden.[40]

The Democrats in the Senate repeated many of the arguments made by counsel before the Commission. In general they viewed Watts's election, appointment, and vote as completely void. Oregon was entitled to only two votes. A few Democrats, such as William Eaton from Connecticut, used the debate to justify their negative vote on the Commission bill. It was, said Eaton, a case of "I told you so."[41]

Republicans argued that no one tried to defend the procedure by which Cronin became an elector. In the main the Republicans maintained relative calm while hinting of Democratic fraud and bribery. In the final analysis, they said, the question was whether Watts's appointment was valid. Desiring haste rather than debate, the Republicans worked for a vote on the Oregon question.[42]

The Senate disposed of the Oregon case with a partisan vote. A motion to accept only two votes from Oregon went down to defeat, 24-39. Sargent moved to accept the decision of the Commission, the objections notwithstanding. The Senate accepted the decision on February 24th, 40 to 24.[43]

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[40]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 3, p. 1887.

[41]Ibid., p. 1895.

[42]Ibid., pp. 1889-1896.

[43]Ibid., pp. 1896-1897.

The House met to consider the Oregon question and surprisingly defeated a motion to recess over the weekend, 112 to 158. When a second attempt was made, Speaker Randall ruled that it was a dilatory motion. The Speaker went on to state that "when the Constitution...directs anything to be done, or when the law under the Constitution...enacted in obedience thereto directs any act by the House, it is not in order to make any motion to obstruct or impede the execution of that injunction of the Constitution and the laws."[44] Garfield viewed this action as a "saving vote," because it meant that the count could be completed.[45]

Debate in the House resulted in a plea for moderation. After a few opening remarks of a partisan nature Southern Democrats conceded Hayes's election. John Young Brown of Tennessee noted that the South was now the voice of moderation. Republicans, he said, while calling for state rights still kept the South in chains. "The manacles," said Brown, "must fall from the limbs of our sister Southern States. You must call off your dogs." Realizing that revolution would be suicidal, Brown called for party unity and moderation to solve the Southern problem.[46]

Republicans calmly replied that Oregon was entitled to three votes, and that the appointment of Watts was legal and constitutional in every respect. They

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[44]Ibid., pp. 1906-1907.

[45]Garfield diary, Feb. 24, 1877.

[46]Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 3, pp. 1909-1910. Refer also to the speech of William P. Caldwell, pp. 1910-1911

reminded the Democrats that they were responsible for creating the Commission and were obligated to abide by the decision of their own instrument.[47]

In a sign of moderation the House voted to reject the vote of Watts. The implication, said Lafayette Lane, was that two votes would be counted. As finally amended, Lane's motion passed, 152 to 106.[48]

With the Oregon question settled Republicans began to worry about a Democratic fillibuster. The date of the inauguration was close at hand and it would be a simple task for the Democrats to delay the completion of the count. Without a President on March 4th, who would rule? Garfield hoped that the Republican Senate would have enough nerve to complete the count by itself. This, he said, would prevent Democratic mischief.[49]

Congress met again in joint session to continue the count. Since the two Houses could not agree in rejecting the decision of the Commission, Oregon's three votes were placed in the Hayes column.[50] The count again proceeded with some minor interruptions until South Carolina was reached.

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[47] Ibid., pp. 1907-1915.

[48] Ibid., pp. 1907, 1916.

[49] James A. Garfield to James M. Comly, Feb. 23, 1877, Comly Papers, Box 2, Columbus.

[50] Cong. Rec., 44th Cong., 2nd Sess., 1877, V, pt. 3, p. 1916.

CHAPTER VII

SOUTH CAROLINA AND OTHER STATES

Prior to the formation of the Electoral Commission, Republicans and Democrats investigated numerous states in search of ineligible electors or evidence of intimidation. The Senate questioned the votes of South Carolina, Georgia, Alabama, Louisiana, and Mississippi while the House challenged votes in South Carolina, Florida, and Louisiana. Simultaneously local political organizations brought the results of other states into doubt.

Republicans found evidence of ineligible electors in Mississippi, Missouri, New Jersey, and Virginia.[1] Southern Republicans planned to object to the vote of Mississippi on the grounds of an illegal government placed in power by "revolutionary means." Intimidation, they said, was greater in this state than in any other state in the South. During the roll call a Democratic filabuster threatened to delay the completion of the count. Fearing that the inauguration would be delayed, Republicans permitted the Mississippi vote to go unchallenged.[2]

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[1] New York Times, Dec. 24, 1876.

[2] Ibid., Feb. 23, 1877. The Republicans also thought they had a legitimate objection to the vote of Alabama. But due to the time factor and an embarrassing lack of testimony they dropped the case, Ibid., Feb. 1, 1877.

The case of Missouri paralleled that of Oregon. Republicans challenged the appointment of Daniel M Frost as an elector because Frost, who had been an officer in the United States Army, joined the Confederacy in 1861. Under section three of the Fourteenth Amendment Frost could not be an elector. Republicans argued that due to Frost's ineligibility there was a failure to elect. With reference to Oregon, they sought to have the next highest candidate, a Republican, given the office. Frost failed to meet with the college and a Democrat was named to fill the vacancy. Again, fearing a delay in the count, the Republicans dropped their objections. Expediency proved to be the best policy.[3]

The Senate Committee on Privileges and Elections found irregularities in New Jersey and Virginia. In both cases an ineligible elector failed to meet with the Electoral College and a successor appointed. The Senate Committee dismissed the New Jersey question in favor of Virginia.[4] Although conceding the legality of the appointment of a successor, the Committee argued that the person receiving the next highest number of votes should have the title to office In the final analysis, said the Committee, the doctrine of giving office to the second

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[3]U.S., Congress, Senate, Committee on Privileges and Elections, Electoral Vote in Certain States, Report No. 627, 44th Cong., 2nd Sess., 1876-1877, pp. 3-4. /Hereafter referred to as Senate, Report No. 627./. Senate, Misc. Doc. No. 44, pp. 14-15. The Missouri case centered around whether or not Frost ever received a presidential pardon. Republicans charged that he had never gained a two-thirds vote from both Houses of Congress.

[4]Senate, Report No. 627, p. 2.

highest candidate has never been used in the United States. Thus, such a practice must be illegal in Oregon as well as in Virginia. Their sole purpose was to discredit the action of Governor Grover in Oregon.[5]

Colorado presented a case of Democratic misunderstanding and mismanagement and clearly shows the use of partisanship in the disputed election. Democrats were convinced that they would carry the state in the summer election of 1876. Prior to the election both parties agreed to allow the incoming state legislature to appoint the electors rather than bear the expense of another election.[6] Much to the surprise of the Democrats the state returned a Republican legislature. The result meant Republican electors.

Democrats challenged the results by questioning whether Colorado was a state. The Senate, quite naturally, accepted Colorado's two senators without question. The House, on the other hand, was in no rush to be so magnanimous. After a prolonged debate the House finally passed a resolution in late January accepting Colorado as a state. With the acceptance of Colorado's representative there was no question that Hayes would receive the state's three electoral votes.[7]

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[5]Ibid., pp. 5-6. The statutes in Oregon and Virginia were simular, allowing Republicans to make broad comparisons.

[6]McClure, Our Presidents, p. 261. McClure maintains that Colorado cost Tilden the presidency.

[7]New York Times, Dec. 5, 1876. Democrats held up passage of the resolution until Jan. 31, 1877. Ibid., Feb. 1, 1877.

Republicans were fearful that the Democrats would challenge at least one vote from Illinois. Abram S. Hewitt and William S. Springer were preparing to object to an elector on the ground of ineligibility. The Democratic committee in charge of objections ultimately dropped the matter, fearing injury to their argument for Oregon and Louisiana.[8] Evidently Roscoe Conkling played an influencial role in the decision. Hewitt relates that it was Conkling who presented the most damaging argument against the objection. Although no one doubted the constitutional disqualification, said Hewitt, Senator Conkling noted that such a move would "be construed into a disposition on the part of the Democrats to claim a vote which in justice they were not entitled, and this would be quoted against us when the Oregon Case should come up for decision."[9] Fearing more damage than good, the Democrats dropped the matter completely.

The Democrats did object to one vote from Michigan. One elector, said John Randolph Tucker, was a United States Commissioner and therefore ineligible. Benton Hanchett was originally elected but failed to meet with the College when his eligibility was challenged. The College appointed Daniel L. Crossman to fill the vacancy. Tucker argued that Hanchett's failure to attend did not create a vacancy because there was, in actuality, a failure to elect.[10]

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[8]Atlanta Daily Constitution, Feb. 13, 1877.

[9]Nevins (ed.), Writings of Hewitt, pp. 173-174. Refer also to the Garfield diary, Feb. 12, 1877, and the New York Times, Feb. 12, 1877.

[10]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, pp. 1704-1705. The objection took the Republicans by surprise. Garfield diary, Feb. 20, 1877.

As Michigan presented only a single certificate the matter was not referred to the Commission; instead the Houses separated to debate the matter individually. The House attempted to recess but failed when Tucker and other moderates denied any connection with the motion.[11] The Democrats then attacked the certificate on the grounds that Hanchett was never elected and, thus, could not resign. They were preparing the groundwork for the Oregon case.

Republicans, on the other hand, were aware that the law was on their side. Under Michigan law certification was prima facie evidence. This meant that Hanchett could surrender the office and have the College appoint a successor.[12] The House finally accepted all eleven votes when George A. Jenks, a Democrat, noted that Hanchett had not exercised his powers of Commissioner for over twelve years.[13] The objection to Michigan was more for the purpose of delay rather than trying to have Tilden elected.

The Michigan question produced a Democratic division in the Senate. While Bayard maintained a strong party position in demanding rejection, Francis Kernan of New York argued that Michigan should not be deprived of a vote on

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[11]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, pp. 1704-1705.

[12]The People ex rel. Emile P. Benoit vs. George Miller, 16 Michigan Reports, 56-60 (1867).

[13]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, pp. 1713-1716.

doubtful evidence.[14] The division shows that the more moderate Democrats desired a fight to the end by using every legal means to delay the count. The longer the delay the greater the anxieties of the Republicans.

Oliver P. Morton led Republicans in arguing that evidence aliunde the certificates was not acceptable, thus binding the Senate to the decision of the Electoral Commission. There was, said Morton, no alternative but to accept the decisions and abide by the results. In general the Republicans argued that the evidence presented was insufficient and that Michigan law covered the situation completely.[15] The Senate, by a vote of 40 to 19, said that the objection was without legal foundation. Later the Senate accepted the disputed vote unanimously.[16]

Michigan's eleven votes were ultimately counted for Hayes. Under the Commission act both Houses had to agree to reject the vote. The count again continued until reaching Nevada.

The Nevada case paralleled that of Michigan. Democrats maintained that an elector was a United States Commissioner and therefore ineligible. The Senate adjourned to its own chamber and accepted the vote without debate.[17] The House, after some difficulty, voted to recess.

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[14] Ibid., pp. 1692-1696.

[15] Ibid.

[16] Ibid., p. 1696.

[17] Ibid., p. 1700.

It was, indeed, a red-faced William Springer who arose to speak when the House reconvened. Springer admitted that his objections were in error. The elector, he said, was not a Commissioner, but a clerk. Thus, there was no evidence that could support the objection. The House voted to accept Nevada's vote without further delay.[18] Since the Houses agreed to dismiss the objection, Nevada's votes were counted for Hayes.[19] The count proceeded to Oregon and later to Pennsylvania.

The situation in Pennsylvania was again the same as in Michigan and Nevada. A man was certified, thought to be ineligible, and a successor appointed. Again the Democrats objected, maintaining a failure to elect.[20] Debate in the House produced a series of fire-eating speeches. Even the moderate Hewitt said that he would "in the last event resort to arms, if necessary, and follow in the crusade against injustice, oppression, and tyranny."[21] After the representatives had their fill of emotional speeches the House voted to reject one vote because the elector had not been appointed in the manner directed by the legislature.[22]

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[18] Ibid., pp. 1726-1728. For the problems over the recess, see p. 1723.

[19] Ibid., p 1728.

[20] Ibid., p. 1917.

[21] Ibid., p. 1932.

[22] Ibid., p. 1938. The vote was 135 to 119.

Republicans in the Senate argued that the elector was in power de facto, leaving no alternative but to accept the vote. Even the troublesome Conkling joined the ranks in this case. Democrats merely reargued their old, and somewhat tired, proposition that the Constitution was self-executing. The Senate accepted the vote without division.[23] The count again proceeded.

Democrats next challenged the vote of Rhode Island. The objections were somewhat novel as most Democrats agreed that Rhode Island had fulfilled the law. George H. Corliss received a plurality of votes on November 7th, but his eligibility was later questioned. The state legislature convened on December 1st and named a successor. Likewise the Electoral College named the same successor on December 6th. In the interim the state Supreme Court ruled that Corliss was ineligible and could not hold the office. One vote from Rhode Island was objected to on the grounds that the procedure used violated the Oregon decision. Democrats maintained that under the decision the appointment by the state legislature was void.[24]

The objection to Rhode Island was a symbolic gesture on the part of the Democratic party to decry the decision of the Commission in the Oregon case. There was never any intention of trying to deprive Rhode Island of a vote. Political realists knew that the Senate would never favor rejection. Both Houses accepted the vote of Rhode Island almost unanimously.[25]

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[23] Ibid., pp. 1897-1905. Twenty-nine votes were given to Hayes.

[24] Ibid., pp. 1938-1939.

[25] Ibid., pp. 1945, 1925. The Senate accepted the vote unanimously while the House did not even divide over the question.

The next major dispute arose over South Carolina. A series of riots and "massacres" in July, September, and October, 1876, prompted President Grant to place federal troops in the state [26] Democrats protested against the use of troops and openly stated that they would challenge the final result [27] By mid-November both parties laid claim to the state's seven electoral votes.

One reason for an apparent Democratic victory was a split within the local Republican organization. A quasi-reform movement, led by Governor Daniel H. Chamberlain, compromised with the "carpetbag faction" just prior to the November election. The result was a mediocre state ticket headed by Chamberlain. Local Republicans thought that control of the state returning board and influencial state offices could preserve a victory.[28] This would be the only way, they reasoned, to overcome the influence of all-white rifle clubs used to intimidate Negroes.

South Carolina, like Florida and Louisiana, had a returning board composed of six state officers and the chairman of the committee of privileges and elections of the state house. The board returned Republican electors by an average majority

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[26]U.S., Congress, House, Select Committee on South Carolina, Recent Elections in South Carolina, Report No. 175, pt. 1, 44th Cong., 2nd Sess., 1876-1877, pp. 46-53. /Hereafter referred to as House, Report No. 175, pt. 1./ The Hamburg Massacre of July 4-5, 1876, was the worst of the civil disturbances.

[27]New York Times, Oct. 24, and 27, 1876.

[28]A South Carolinian, "The Political Condition of South Carolina," The Atlantic Monthly, XXXIV (Feb., 1877), 186. /Hereafter referred to as Carolinian, Atlantic Monthly, XXXIV (Feb., 1877)/.

of 816. At the same time, however, it seemed as if Democrat Wade Hampton won the governorship.[29] The final tabulations were never clear, resulting in state-side confusion. Evidently Hampton ran ahead of the Tilden electors by some 1,500 votes. Local Democrats advised Negroes to split their vote, accepting Hampton on the one hand and the Hayes electors on the other. Although such a policy was denied, The Nation later became convinced that this was the Democratic plan.[30] In actuality Negroes were leaving the Republican party because of corruption and poor government on the state level. They had not, however, lost faith with the national party and, as a result, split their ticket.[31]

A House committee under the chairmanship of Milton Saylor of Ohio investigated the election. Their report formed the basis of the Democratic objections to the Republican certificate. The majority charged that the state legislature had failed to provide for a proper registration of voters making the election a violation of the state constitution. The committee also charged that the use of

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[29]Appleton's Annual Cyclopaedia and Register, 1876 (New York: D. Appleton and Co., 1878), p. 724.

[30]The Nation, XXIII (Nov. 23, 1876), 306. A letter to The Nation from R. Means Davis, clerk of the state Democratic central committee denied such a policy in 1893. Ibid., LVI (Feb. 23, 1893), 139-140.

[31]The election was extremely close. Hampton clearly won the race for governor. The choice of electors, although certified by the returning board for the Republicans, was uncertain. Refer to Francis Butler Simkins and Robert Hilliard Woody, South Carolina During Reconstruction (Chapel Hill: University of North Carolina Press, 1932), p. 517. Some historians maintain that the Hayes electors carried the state. Refer to Haworth, The Disputed Election, p. 148; Oberholtzer, History, III, p. 284.

federal troops within the state had influenced the election in favor of the Republicans.[32] Despite the charges the Democratic majority admitted that the returns showed a majority of 831 for the Hayes electors. Although admitting the majority, the committee would not state that the returns were completely accurate.[33] In fact Democrats went to great lengths to indicate that the returns could not be trusted.

In the minority report Republicans charged that intimidation, violence, and murder prevented Chamberlain from being reelected. The minority found that Negroes were threatened with expulsion from their tenant farms, loss of credit, and higher charges for professional services if they failed to join the Democratic party.[34] More importantly, Republicans argued that the troops could not have influenced the election. As of November 7th there were a total of 1, 526 officers and men within the state. The Army distributed the men in small squads at sixty-seven precincts. In over half of these precincts the total number of soldiers did not exceed thirteen. In actuality 424 precincts out of 491 did not contain a single soldier.[35]

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[32]House, Report No. 175, pt. 1, pp. 6-8.

[33]Ibid., pp. 3, 13, 57. The majority thought Hampton won the governorship. Refer to The Nation, XXIV (Jan. 4, 1877), 1.

[34]House, Report No. 175, pt. 2, pp. 38-46. For evidence of intimidation refer to U.S., Congress, Senate, Committee of Privileges and Elections, South Carolina in 1876: Testimony as to the Denial of the Elective Franchise..., 3 vols., Misc. Doc. No. 48, 44th Cong., 2nd Sess., 1876-1877. This contains only testimony as the committee failed to make a report before the session expired. See also, Carolinian, Atlantic Monthly, XXXIV (Feb., 1877), 177-194.

[35]House, Report No. 175, pt. 2, pp. 21-24.

The situation within the state was further complicated by the existence of dual governments. After the election the Republican state house returned Chamberlain as governor. The Democratic members formed a rump legislature and declared Wade Hampton the governor. Each government put forth its own slate of state officials and candidates for the United States Senate. Hampton then proceeded to break with the national Democratic party, claiming that the Hayes electors carried the state while he won the race for governor. The new Democratic governor went so far as to tell President Grant that his legislature would not interfere with the casting of the electoral vote.[36] The implication was, of course, a recognition of the Hayes electors.

The national Democratic party began quo warranto proceedings against the Hayes electors in the state Supreme Court. The Court dismissed the suit on a technicality, maintaining that the "proceedings were illegally presented on the part of the state instead of the United States."[37] Despite setbacks the Democrats sent their own certificate of election to Washington in favor of Tilden. Once again a state presented two certificates, both purporting to be the true and legal return. The Republican certificate bore the signature of the governor and the secretary of state. The Democratic return was not certified by anyone, but claimed that the electors had received a majority and were entitled to vote.

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[36] Ibid., pp. 65-67. New York Times, Dec. 3 and 15, 1876.

[37] Quoted in the Atlanta Daily Constitution, Jan. 27, 1877. The form of a legal document was considered to be of the utmost importance until well into the 20th century. An improper form meant automatic dismissal of the suit.

Democrats realized that their case was weak, their pretensions flimsy, and somewhat groundless. Nonetheless, national leaders thought it of tactical importance to claim the state.[38] Even a weak case must go before the Commission. The inclusion of South Carolina meant that the Democrats could claim every disputed state and, if the opportunity presented itself, could be generous and concede the state as a token gesture of conciliation in return for the presidency.

Senator Thurman resigned from the Commission just prior to the South Carolina case. Being confined to bed Thurman could not attend any future sessions and requested that his position be filled. Upon receipt of Thurman's resignation the Senate elected Francis Kernan of New York to the Commission.[39] The change in membership did not affect the political composition of the tribunal in any way. One Democrat merely replaced another.

In their objection to the Republican certificate the Democrats put forth five major charges. First, the election was illegal because the state legislature failed to provide for the registration of prospective voters. Secondly, South Carolina was without a republican form of government. The presence of federal troops, said the objectors, was illegal and prevented a free election. Finally,

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[38]Flick, Tilden, p. 336.

[39]Proceedings, pp. 179-180.

the government of South Carolina was a "pretended government set up in violation of the law and the Constitution" by federal authority and sustained by federal troops.[40] Any certificate of election must therefore be considered void.

Republicans, feeling secure in their case, presented only a few objections against the Democratic certificate. The so-called electors in the certificate were never appointed by any legal authority. Evidence of authority, said the Republicans, like the governor's signature and the state seal, were lacking. More importantly, a certificate bearing all that the law requires was before Congress. There was no question as to what certificate should be counted.[41] They desired to rush through the case as quickly as possible because there remained only six days until the scheduled inauguration.

William Lawrence and Issac P. Christiancy put forth the Republican objections to the Commission. Matthews and Shellabarger were to act as counsel if the party decided to argue the case. The Democrats also had objectors but, initially, they were not going to be represented by counsel. After some confusion they decided that Montgomery Blair and Jeremiah S. Black would argue the case.[42]

The central thesis of the Democratic objections was the lack of a republican government within the state. Being controlled by violence which necessitated

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[40] Ibid., p. 299.

[41] Ibid.

[42] Ibid., pp. 180-181, 184. Alexender G. Cochrane and Frank H. Hurd were the Democratic objectors.

the presence of federal troops was evidence enough of anarchy. Even if a republican government did exist, said Frank H. Hurd, the failure to provide for registration made the election illegal. Thus, said the objectors, the results should be rejected.[43] In a final effort the Democrats argued to have the election rejected because they realized that if the election was illegal, as they claimed, Certificate No. II could hardly be valid. Their only hope, and a dim one at that, was to try to have the South Carolina votes rejected entirely, thus throwing the election into the House of Representatives.

Republicans began a dual argument against the Democratic claims. Foremost was the desire to prove the legality for the presence of federal troops and, secondly, to show the validity of their own certificate. Denying the importance of the Democratic certificate was a fairly simple task, thus William Lawrence concentrated on the government of South Carolina. The state did have a republican government because Congress accepted South Carolina's representatives and senators. Once congressional recognition was extended, Lawrence said, the question was beyond challenge.[44] With regard to registration he dismissed the law as being merely directory. To require otherwise would conflict with the constitutional provision that electors be appointed in the manner determined by the state legislature. Finally, the laws of the nation give the President the power to place troops within a state to quell domestic violence and

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[43]Ibid., pp. 181-185.

[44]Lawrence was referring to the decision in Luther v. Borden, 7 Howard, 42.

"to keep the peace at the polls." There is no evidence, he said, that the troops did influence the election and, even if such evidence existed, it would be aliunde.[45] After the presentation by Lawrence, the Republicans rested their case, not wishing to waste time with arguments by counsel.[46]

Montgomery Blair spoke briefly on behalf of the Democrats, leaving the major argument for Jeremiah S Black. The latter, a former Attorney-General, listed the major points of the case and then opened an emotional attack against the previous decisions of the Commission. Since the formation of the Commission, said Black, "all of our notions of public right and public wrong have suffered a complete bouleversement." The procedure was a denial of law in order to protect fraud and scoundrels. "We may," continued Black, "struggle for justice; we may cry for mercy; we may go down on our knees, and beg and woo for some little recognition of our rights as American citizens; but we might as well put up our prayers to Jupiter or Mars...." Black concluded by saying that no longer were the American people the electors of their own president, for the power to elect resided in state returning boards.[47]

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[45]Proceedings, pp. 185-188.

[46]Garfield diary, Feb. 27, 1877. Jeremiah S. Black Papers, Box 79, p. 41, Library of Congress, Washington, D.C. /Hereafter referred to as Black Papers./.

[47]Proceedings, pp. 190-191. Bradley's notes on Black's speech show only one remark: "Black--Made an insolent speech." Bradley Papers.

Debate concluded on February 27th, the Commission going immediately into private deliberations. Morton offered a motion that (1) the Houses could not investigate while counting the electoral votes; (2) that South Carolina had a Republican form of government; (3) that Congress, while counting the electoral votes was not competent to investigate the actions of the President of the United States; (4) that the evidence offered could not be received; and, (5) that the objections to Certificate No. I did not contain a valid cause to reject it. By covering every possible alternative Morton hoped to relieve any sense of wrong-doing from both Grant and the Republican party as well as to present counter-arguments to the Democratic charges. After defeating a substitute motion by Justice Field, the Commission accepted the Morton proposal, eight to seven. The tribunal then rejected Certificate No. II by a unanimous vote. But when the question of accepting Certificate No. I came to a vote the Commission reverted to its usual eight to seven count.[48]

In its written report to Congress, the Commission explained the importance of proper certification. The Republican certificate contained every needed signature and fulfilled every requirement of the law. The failure to provide for registration, said the majority, "did not render nugatory all elections held under such laws...." The presence of federal troops was properly requested by state officials and was beyond the jurisdiction of the tribunal. In concluding, the majority held that neither the two Houses nor the Commission had the authority to "inquire into the circumstances under which the primary vote for electors was

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[48]Proceedings, p. 192.

given." Due to such restrictions the Commission had no choice but to accept the vote as certified by the governor and secretary of state.[49]

Commissioners Frelinghuysen and Morton agreed that South Carolina had a republican form of government. Such a question must ultimately be decided by the two Houses of Congress, not the Commission. Morton went on to argue that the Democrats were inconsistant. If the failure to pass a registration law made the election illegal, how could the government of Wade Hampton be anything but a fraud. The fact was, said Morton, that previous elections were never challenged nor even questioned. This election came under the same law, it was valid, and no one denied that the Hayes electors received a majority. That being the case, the votes must be counted for Hayes and Wheeler.[50]

Democrats Bayard, Hunton, and Abbott built their case on the illegal use of federal troops. The presence of troops, said Bayard, was to support the Republican party, help insure the reelection of the Chamberlain government, and the election of Republican electors He preferred to drop both certificates although recognizing the fact that Certificate No. II was without evidence.[51] Hunton joined in the condemnation of both certificates, saying that no one was

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[49] Ibid. It should be noted that the majority report never denied the right to go behind the governor's certificate when and if necessary.

[50] Ibid., pp. 200, 206.

[51] Ibid., pp. 220-222.

ever duly elected and no one ever cast the votes provided by the Constitution.[52] Abbott attacked Certificate No 1 on slightly different grounds. The electors did have a majority of the popular vote, he said, but they failed to vote by ballot. Likewise, the failure to pass a registration law and the presence of troops combined to make the certificate null and void. All agree that the vote of South Carolina should be rejected.[53]

Justice Bradley dismissed the Democratic objections as either frivolous or insufficient. He directed his comments toward the reckless use of the congressional power of investigation. Congressional investigations, he said, are not competent for the purpose of receiving or rejecting electoral votes without proper law. The decision to receive or reject the vote of a state "is a final decision on the right of the State in that behalf, and one of a most solemn and delicate nature, and cannot properly be based on the deposition of witnesses gathered in the drag-net of a congressional committee." As in his opinion on Louisiana, Bradley again spoke of the need for legislation to clarify the election procedure Until such legislation was procured, it was impossible for Congress to investigate the appointment of electors during the counting of the votes.[54] What he desired

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[52] Ibid., p. 231.

[53] Ibid., pp. 237-239.

[54] Ibid., pp. 266-267. Garfield, Hoar, Edmunds, Payne, Kernan, Strong Miller, Clifford, and Field did not write opinions on the case.

was legislation clarifying the appointment of electors and their proper function in the selection of the President.

As expected the Democrats objected to the decision, maintaining that the election was held under duress, and was therefore invalid.[55] The situation, however, was complicated by a Democratic filibuster which threatened to delay the inauguration scheduled for March 4th. Republicans were fearful that the Democratic House would delay the continuation of the count. Garfield noted that the House was more disorderly and violent than at any time in his fourteen years as a Congressman.[56]

Senate Democrats used the debating period to launch partisan attacks against the Commission. Some even tried to shove through a motion requiring the Commission to accept the evidence presented To this even Bayard objected.[57] Although moderate Democrats condemned the Commission's partisan decision, they made it perfectly clear that they would be true to the bill and allow the count to be completed.[58]

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[55]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, pp. 1992-1993, 2006. The objections were, of course, quite specific but amounted to a repetition of the original objections filed when the returns were first read.

[56]Garfield diary, Feb. 28 and March 1, 1877.

[57]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, pp. 1993-1995.

[58]Ibid. See in particular the speeches of Thomas C. McCreery and Joseph E. McDonald, pp. 1995-1996.

Democratic radicals now made a tactical change in their policy. No longer did they argue that the votes for Tilden should be counted, but rather the votes of South Carolina should be rejected altogether. Even the rejection of one vote would throw the election into the House of Representatives. The tactical change came too late and amounted to wasted breath.[59] The Senate, intent on the time factor, accepted the decision, 39 to 22.[60]

Although a Democratic filibuster was in progress, a noticeable change of opinion was beginning to affect the House of Representatives. Motions to recess went down to defeat by sizable majorities. At the same time Randall was upheld in his decisions against dilatory motions. The outcome became somewhat obvious when a motion to read a 1,200 page report was defeated.[61] Southern Democrats combined with a few Northern Democrats and Republicans to defeat any motion that would delay the completion of the count. Conservative and moderate Democrats permitted partisan attacks on the Commission, in fact they joined in the attacks, but they would not tolerate any excessive delay in the counting procedure. By supporting the chair against dilatory motions, moderates were able to bring the question of South Carolina to a vote after a reasonable amount of time. Again, as expected, the House rejected the Commission's decision.[62]

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[59] Ibid., p. 2000.

[60] Ibid., p. 2002.

[61] Ibid., pp. 2006-2009.

[62] Ibid., p. 2020. For the Republican answer to the objections see pp. 2008-2019.

The joint session met on February 28th to continue the count The seven votes from South Carolina were given to Hayes because the Houses failed to agree on rejection.[63] Vermont was the next state to be challenged.

Initially no one objected to the vote from Vermont. Abram S. Hewitt finally stood up and announced that he held a package "which purports to contain electoral votes" from Vermont. President pro tem Ferry refused to accept the package, saying that the law prohibited him from accepting votes after the first Tuesday in February.[64] While attention was given to Hewitt, Senator Augustus S. Merrimon and William Springer prepared and submitted a written objection to one vote fromVermont. The charge was that one elector was a postmaster. Immediately a few radicals demanded that the "dual returns" be forwarded to the Electoral Commission.[65] The two Houses separated for debate.

Without even considering Hewitt's purported return, the Senate, after a brief discussion, accepted the vote of Vermont by a unanimous decision.[66] The major debate took place in the House of Representatives.

The House was the scene of continuous confusion that boardered on chaos. Speaker Randall could barely maintain order Democrats desired to open Hewitt's

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[63] Ibid., p. 2021.

[64] Ibid.

[65] Ibid., pp. 2022-2023.

[66] Ibid., pp. 2023-2024.

package but it could not be found. It was finally learned that the package was lost.[67] Motions to send the "dual returns" to the Commission were defeated by majorities of thirty or more.[68] Interestingly enough, the moderates would not vote to table these motions but refused to reconsider them. Radicals must have found themselves completely frustrated by the change in the temperament of the House.

The final vote in favor of rejection was not truly indicitive of House sentiment. Republicans joined with the Democrats to vote in favor of rejection in order to prevent further delays in the count. Everyone was aware of the Senate decision and realized that the action of the House was immaterial. Thus the entire Vermont vote went for Hayes.[69]

Democrats tried one final objection to the Wisconsin vote, claiming one elector held an office of trust and profit. By this time their tactics had proved useless and a complete waste of time. The Senate accepted the Wisconsin vote without debate or division.[70] The House defeated a motion for a recess and finally rejected one vote from Wisconsin.[71]

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[67] Ibid., p. 2035, see also p. 2047. The strange disappearance of the package still remains unsolved. Since no one would accept it, the package was most likely misplaced. Its disappearance was of no real importance.

[68] Ibid., pp. 2048-2049.

[69] Ibid., pp. 2052-2054. The House voted 206 to 19 in favor of rejection.

[70] Ibid., pp. 2055, 2029.

[71] Ibid., pp. 2067-2068.

After the South Carolina case the work of the Commission was completed. The tribunal met for the last time on Friday, March 2nd, to complete its tasks. Final reports were completed and submitted to Congress. Realizing that there were no more dual returns, the Commission adjourned, sino die.

The joint session reconvened at four a.m. on March 2nd to complete the count. With the counting of the vote from Wisconsin the result was obvious. President pro tem Ferry announced that Rutherford B. Hayes was the new President having 185 electoral votes to Tilden's 184.[72] The disputed election was over. A president had been elected without war and under the guise of law. People now had time to ponder the value of the Commission.

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[72] Ibid., p. 2068.

CHAPTER VIII

INTERPRETATIONS OF THE COMMISSION

In the years following the Hayes-Tilden contest historians either relegated the Electoral Commission to a place of secondary importance or ignored it altogether. The obvious question is whether such inattention to the Commission is warranted. The relationship of this experiment to the electoral system is plain enough, yet even that has been ignored. More importantly, the relationship of the Commission to the so-called end of Reconstruction in 1877 raises a series of questions, most of which have not been answered.

Since the prize in the disputed election was the Presidency itself, it is not surprising that Republicans and Democrats abandoned long-held views and positions to gain that office. Democrats, known as the defenders of state rights, found themselves advocating an increase of federal power. They had denounced the twenty-second joint rule for over a decade but when faced with the possibility of gaining the Presidency they turned to that instrument as one which might insure victory. Republicans, on the other hand, retreated from their philosophy of advocating a powerful national state and spoke of the need of state sovereignty in the area of elections. In this controversy both parties adopted expedient philosophies in their quest for control of the executive branch of the government. Once the contest was decided, the parties returned to their former positions.

Almost any discussion of the Hayes-Tilden contest eventually comes to the question of who won the election. Actually both political parties were guilty of fraud or intimidation which deprived the nation of a free election. To say that Tilden won is to ignore Democratic intimidation, while a Hayes victory must be considered in light of known frauds by southern returning boards. The final answer, if there is one, would depend on a complete voting analysis which has never been attempted. Until such a study is completed historians are faced with a moot question.[1] In the final analysis historians must come to grips with the question of economic and political power, and more importantly, physical and military power.[2]

When considered in terms of power the man who failed completely was Samuel J. Tilden. The Democratic candidate lacked the courage and stamina necessary to overcome an election crisis. Tilden developed nothing in the way of political structure or strategy to meet the situation. Nor did he delegate responsibility for protecting Democratic interests either to party or congressional leaders, and his failure to do so created uncertainty, frustration, and at times chaos. There was in Tilden an "irritating hesitancy and secretiveness inconsistent

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[1]David Dudley Field, The Vote that Made the President (New York: D. Appleton and Co., 1877), p. 11. William Dudley Foulke, Life of Oliver P. Morton (2 vols.; Indianapolis, Ind.: Bowen-Merrill Co., 1899), II, p. 477.

[2]Harry Barnard, Rutherford B. Hayes and His America (Indianapolis, Ind.: Bobbs-Merrill Co., 1954), p. 317.

with good generalship."[3] When it became necessary to choose between arbitration and war, Tilden hesitated. This indecision split his party right down the middle. In the end each faction blamed the other for defeat.[4]

A few influential Northern Democrats combined with Southerners to favor compromise over war. Democrats Thurman and Bayard realized that the Republicans would not concede the Presidency, yet might surrender the right of the President of Senate to count the votes if an effective compromise could be arranged. Any such plan must appear to be enough of a concession to stop the radicals from preventing the completion of the electoral count.[5] If the count was not completed, war might become a reality. The key to any agreement was the South.

The serious threat of civil war was the most influential factor in motivating Southern representatives to work for a compromise. L.Q.C. Lamar and Benjamin H. Hill, having survived the devastation of the Civil War, were much more willing to consider alternatives to war than were the radical Democrats of the North. Thoughtful Southerners like Lamar and Hill, aware that their section of the country could not withstand another war, realized that compromise was their only answer.

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[3]Flick, Tilden, pp. 409-410.

[4]Rhodes, History, VII, p. 243. Nevins, Hewitt, p. 334. Hunton, Autobiography, pp. 164, 193. New York Times, Aug. 9, 1886. For the reaction of Tilden supporters in the extreme refer to A.M. Gibson, A Political Crime: The History of the Great Fraud (New York: William S. Gottsberger, 1885), pp. 37-38.

[5]Henry V. Boynton to James M. Comly, Jan. 25, 1877, Comly Papers. Northern Democrats acceptable to compromise were influenced by business interests who wanted anything but war.

A Republican president was certainly acceptable. Four years under Hayes, said Lamar, would "leave us stronger in ourselves, steadier in our policy, and in closer and more friendly relations with the people of the whole country."[6] The South found enough Northern Democrats of a similar faith to devise a compromise

The justification for the Commission was the threat of war, not the search for truth. Realizing that a lawfully elected president was better than civil war, moderates were able to combine their forces to prevent any "revolutionary action by the radicals." The result was an act designed to meet a given situation, a specific crisis which had to be surmounted if the nation was to survive. A single term of office weighs little, said Adlai E. Stevenson, "in view of the perils that surely awaited the failure to secure peaceful adjustment."[7] Thus the compromise came not from principle but from practical necessity.

When the test came in Congress to see whether or not a compromise was desirable, the results were overwhelmingly in favor of the plan. Democratic moderates joined with a few Republicans to pass the Electoral Commission act. Although the bill drew support, some of it scattered, across the North, the South

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[6]Quoted in Mayes, L.Q.C. Lamar, p. 299, see also, pp. 297-298. Benjamin H. Hill, Jr., Senator Benjamin H. Hill of Georgia: His Life, Speeches and Writings (Atlanta, Ga.: H.C. Hudgins, and Co., 1891), pp. 74-76. Hunton, Autobiography, p. 194.

[7]Adlai E. Stevenson, Something of Men I have Known... (Chicago: A.C. McCourg and Co., 1909), p. 77. A few Republicans arrived at the same conclusion. Alexander K. McClure, Recollections of Half a Century (Salem, Mass.: The Salem Press, 1902), pp. 99, 101-102. L.B. Richardson, William E. Chandler, p. 198.

gave it an almost blanket endorsement. In the House of Representatives forty-six Southern Democrats voted for the measure and only seven deserted the ranks.[8] It was, said Andrew J. Kellar, the "interposition of members of Congress from the South who, anxious to serve their people rather than Tilden and Tammany Hall, compelled a change of front...."[9] A compromise was desired by many, but the South made the tribunal plan possible.

Although a fear of war was a primary factor it would be unwise to brand the Commission the product of cowardice. In speech after speech a long line of Democrats and Republicans declared that the salvation of the Union was paramount.[10] Patriotism gave birth to a measure of arbitration which solved the question of who was to be president while avoiding war. Given the situation and the system of election as prescribed by the Constitution, arbitration in some form was the only possible answer. Certainly it was not possible to envision either party surrendering its claim and allowing the other to take the Presidency without a conflict of some

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[8]The South being the eleven states which left the Union in 1860-1861. The voting analysis is based on my own computation of the final vote. Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, p. 1052. Three negative votes came from Alabama, and one each from Arkansas, Georgia, Mississippi, and Texas.

[9]Kellar to William Henry Smith, Feb. 2, 1877, William H. Smith Papers, Indianapolis. Refer also to the letter of David M. Key, New York Times, May 29, 1878, p. 5.

[10]See for example the speeches given on South Carolina, Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, pp. 2008-2020. Hoar, Autobiography, I, p. 370. H.P. Judson, "American Politics," Review of Reviews, VII (March, 1893), 167. For an evaluation of the importance of patriotism refer to William A. Dunning, Reconstruction, Political and Economic, 1865-1877 (New York: Harper and Brother, 1907), pp. 340-341.

kind. The tribunal plan was a temporary settlement giving one man a legal title. Nothing else was needed or desired.

President Grant played no small role in the acceptance of the compromise. Not only did the President give his formal approval to the measure, but he also worked diligently for the passage of the Commission bill. In the unsettled days before a decision was reached it was Grant's popular image, character, and desire for peace which helped to prevent revolution and ultimately gave the Republicans the Presidency.[11] Grant's administration may have been mismanaged and corrupt but on this occassion the Grant of Appomattox ruled.[12]

The Electoral Commission bill was a series of compromises designed to meet a given situation. The select House and Senate committees agreed that the two Houses should count the electoral votes. This agreement, however, was complicated by the fact that one House was Democratic and the other Republican. A second and more important compromise came when both parties agreed to a concurrent vote for rejection. Rather than return to the concept of the twenty-second joint rule the process was reversed. Under the plan the affirmation of one House would permit the votes of a given state to be counted while a concurrent negative vote was required for rejection. This latter compromise became the key to completing the count.

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[11]The Nation, XXIV (Feb. 1, 1877), 45. This conclusion is best stated by William B. Hesseltine, Ulysses S. Grant: Politician (New York: Frederick Ungar, 1935), p. 411. Richardson (ed.), Messages and Papers, VII, Jan. 29, 1877.

[12]Allan Nevins, Hamilton Fish: An Inner History of the Grant Administration (2 vol's.; New York: Frederick Ungar, 1957), II, pp. 854-855.

There was still another important factor. The most advantageous feature of the bill was that the Commission was to determine its own powers. Any attempt by Congress to detail the powers of the tribunal would surely have been defeated. It was, said James Monroe, "essential to the success of the measure that neither the members of the Commission nor those of the Two Houses should be able to foresee what powers the Commission would assume."[13] If the powers of the tribunal were explicitly defined, one party, it was feared, would gain an insurmountable advantage. The compromise provided no permanent answer to the problems raised in 1876-1877; it offered only a temporary means of escape. Any revision of the election procedure would have to be accomplished by Congress at a later date.

The compromises establishing the Commission were not permanently binding on the parties involved. Nonetheless, the temporary settlement had one great advantage: Someone would be president. The measure was, said The Nation, "an extraordinary one, called into existence for a special purpose, and vanishing when the purpose is accomplished, leaving no precedent behind and binding Congress to nothing...."[14]

Critics of the Commission act have repeatedly said that the measure was unconstitutional. At the time of its creation Oliver P. Morton argued that if the tribunal was a judicial or legislative body it was certainly unconstitutional because those functions cannot be delegated. Likewise, said Morton, if the tribunal was a

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[13]James Monroe, Atlantic Monthly, LXXII (Oct., 1893), 526.

[14]The Nation, XXIV (Jan. 25, 1877), 53.

court, the officers composing it must be appointed by the President of the United States with the advise and consent of the Senate.[15] Later writers used Morton's objections to decry Hayes's election. One historian maintained that Hayes's election was completely illegal, but then apologied for the illegality by saying "a de facto President is better than a de facto revolution."[16]

Some argued that the bill was constitutional under the "necessary and proper" clause. This, of course, was the argument used by party moderates in 1877. Even such strict constitutionalists as Alexander H. Stephens, who questioned the wisdom of working through the Electoral Commission, conceded that the establishment and functions of the tribunal were within the powers of Congress.[17] Some of the more modern-day historians and political scientists have adopted the same argument.[18]

Instead of attempting to determine whether the Commission bill was constitutional or unconstitutional one might regard it as a measure occupying a kind of legal twilight zone. In actuality the formulators of the bill themselves had doubts about its constitutionality, doubts that are revealed in the wording they employed. With

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[15]Foulke, Life of Oliver P. Morton, II, p. 459.

[16]McKnight, The Electoral System, p. 280. Refer also to Henry L Stoddard, It Costs to be President (New York: Harper and Brothers, 1938), p. 265.

[17]Alexander H. Stephens, "Count of the Electoral Vote," International Review, V (Jan., 1878), 110.

[18]Dumbauld, Constitution, p. 266.

respect to counting the votes, the measure gave the Commission "the same powers, if any, now possessed for that purpose by the two Houses...."[19] The words "if any" reflect the doubts shared by many concerning the constitutionality, not only of the Commission, but of the Congress itself, to formulate a procedure for settling the dispute. Indeed, those words might have been exploited by anyone in Congress who was intent upon defeating the bill, but Congress was in fact less concerned about its right to deal with the situation than with reaching a decision on how to deal with it. Although the problem of duplicate returns was not new, the political composition of the two Houses made rejection of the dual returns impossible without one party losing the election. In this respect the situation was indeed over. There is no evidence that the founding fathers ever contemplated dual returns; they seemed to have expected that the counting of the electoral votes would be merely a process of enumeration. Congress, unable to decide what its powers were, passed that task to a special tribunal--a questionable, though not unconstitutional procedure, in that Congress refrained from delegating either its legislative or judicial tasks. The House and Senate retained their power to make a final judgment on the findings of the Commission. In reality then, the Commission bill was beyond the scope of the Constitution, not against it, and must therefore be considered as an extra-constitutional enactment. The only possible method of correcting a void within the Constitution is by amendment, but the circumstances of 1876-1877 obviated such action. So moderates turned to a pragmatic device which enabled them to accomplish a task that could not be accomplished within the framework of the Constitution--the election of a President.

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[19] Statutes at Large, XIX, 229.

After the bill was adopted, politicians in both parties interpreted it as they saw fit. Two prominent Democrats, Abram S. Hewitt and Jeremiah S Black, firmly believed that Congress, and therefore the Commission, had the authority and duty to investigate the state returns.[20] Although the compromise measure did not specifically state that the Commission could go behind the returns, Democrats interpreted it as authorizing such action to discover who had been duly elected. Republicans viewed the act as prohibiting any investigation of the state returns. It was a case of each party believing what it wanted to believe, nothing more, nothing less.

Although the Electoral Commission act was designed for a particular crisis, the effects of the compromise were far-reaching. In denying the right of the President of the Senate to count the votes, Congress itself assumed that right. The power to count was given to the two Houses jointly assembled.[21] Furthermore,

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[20]Nevins, Hewitt, pp. 331-332. Black, Essays and Speeches, p. 353. The difference in interpretation led to a bitter fight between the two parties. Refer to Jeremiah S. Black, "The Electoral Conspiracy," North American Review, CXXV (July-August, 1877), 1-34; and, Edwin W. Stoughton, "The 'Electoral Conspiracy' Bubble Exploded," North American Review, CXXV (Sept., 1877), 193-234 for part of the literary duel which continued long after Hayes became President. Refer also to the New York World, Feb. 12, 13, 15th, 1877, and the New York Herald, March 5, 1877.

[21]Statutes at Large, XIX, 227-229. Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, p. 1039. J. Hampton Dougherty interprets the act differently. He was, however, concerned only with the problem of dual returns and failed to notice the greater ramifications of the act. Dougherty, The Electoral System, p. 214. For support of the right of Congress to count the votes refer to John Randolph Tucker, Constitution of the United States... (2 vols.; Chicago: Callaghan and Co., 1899), II, pp. 703-704.

Congress made rejection of electoral votes a positive rather than a negative process, for rejection could be accomplished only by the agreement of both Houses. In this regard, the bill negated the concept underlying the twenty-second joint rule.

While the Commission act made explicit that Congress had the power to count, the decisions of the tribunal restricted that power. Touching on that point, an editorial in The Nation said that Hayes became President because the Commission failed to view the evidence in the case.[22] By its decisions the Commission denied that Congress had the power to investigate the appointment of electors. The task of appointment was declared to be a sovereign duty of the states, immune from federal control or interference. The Republican argument, as presented by Evarts, was accepted almost in total.[23] It was ironic that the Republicans, by adopting this position, destroyed their own doctrine of federal intervention.

The effect of the Commission's decisions was important to the South. No longer would it be possible for the party in power to control Southern elections by pulling strings in Washington. For the sake of a temporary advantage the Republicans established a precedent that deprived them of a legal basis for controlling state elections. More importantly, by surrendering this control the Republicans gave up the power by which they had protected the political and civil

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[22]The Nation, XXIV (March 15, 1877), 156.

[23]Sherman Evarts (ed.), Argument and Speeches of William Maxwell Evarts (3 vols.; New York: The Macmillan Co., 1919), II, pp. 249-252. Hoar, Autobiography, I, pp. 371-373.

rights of the Negro. The return of local control in the South was an essential first step toward Negro disfranchisement. Republicans were well aware of the alternatives and of the consequences; they made a deliberate choice, a choice that doomed Southern Negroes to the countless indignities and injustices of unrelenting racial discrimination.

A partial vindication of the Commission came in 1887 when Congress reaffirmed a state's sovereignty over the appointment of electors. The Election Law of 1887 provided that a contest over the appointment of an elector must be settled at least six days before the meeting of the College. The governor of a state must inform the Secretary of State of the appointment of electors and give the results under the state seal. In order to reject a vote bearing the governor's certification both Houses must agree while acting seperately. In the case of dual returns, Congress must accept the vote bearing the certification of the state executive unless there is a concurrent vote to the contrary. If the Houses should happen to disagree, the "votes of the electors whose appointment shall have been certified by the Executive of the State under the seal thereof, shall be counted."[24] If neither return has the governor's signature, it is presumed that the vote is lost. Amazingly, the act which reaffirmed the decision of the Commission passed both Houses by a two-thirds majority and was signed by a Democratic President.

Since the disputed election, the Supreme Court has handed down decisions giving Congress the power to protect federal elections from fraudulent control by the states. In two important cases--Ex parte Yarborough, and Burroughs and

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[24]Statutes at Large, XXIV, 373-375. U.S., Codes (1964), Title 3, sections 5-18. The current law has not changed from 1887.

Cannon vs. U.S.--the Supreme Court ruled that the federal government has the right to protect the election of its officers from fraud and corruption. "If it has not this power," said Justice Miller in the former case, the nation "is left helpless before the two great natural and historic enemies of all republics, open violence and insidious corruption."[25] The decision suggests that the Court might sustain legislation relating to a federal canvass of the vote for electors if such legislation were passed.

In analyzing the Democratic argument before the Commission an inherent flaw is found. Democrats placed fraud and forgery in the same category when in actuality they cannot be so classified.[26] Forgery means that a certificate was signed by a person other than the legal authority. Thus, the certificate is null and void. Fraud, on the other hand, does not necessarily mean an instrument is null and void, but may be perfectly legal on its face. In combining forgery and fraud, as the Democrats did in the case of Florida, they made a legal error. The mistake permitted Republicans to argue that counsel had failed to prove either fraud or forgery. Since the Democrats failed to discredit the Republican certificate, the Commission accepted it on face value. To do otherwise would have necessitated going behind the returns.

In the case of Florida the Republican certificate, although possibly based on fraudulent returns, satisfied the provisions of federal and state law. The

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[25]Ex parte Yarborough, 110 U.S. 651 (1884). Burroughs and Cannon vs. U.S., 290 U.S. 534 (1934).

[26]For a continuation of this argument refer to Philip G. Clifford, Nathan Clifford: Democrat (New York: G.P. Putnam's Sons, 1922), p. 321.

Commission assumed the regularity of the Hayes certificate because it was valid on its face, thus placing the burden of proof on the Democrats. Nonetheless, the decision not to go behind the returns was in accordance with the law.[27] At no time were the Democrats able to show a solid precedent for federal intervention in state elections. At best they could only hope for a rejection of four votes from Florida. Yet they failed to argue in favor of rejection, choosing instead to work for the acceptance of the Tilden certificate. This, also, was a fatal error.

To contend that the Commission was legally correct in the Florida case is not to say that that body adhered faithfully to any coherent set of legal criteria. The tribunal was inconsistant in its rulings on the acceptance of evidence for ineligible electors. In the Florida case Justice Bradley joined with the Democrats in accepting evidence on the question of Humphreys' eligibility. Yet in the Louisiana case the Commission ruled by an eight to seven vote that it was not competent to decide if several Louisiana electors were federal officeholders. Evidence was accepted in the Florida case but refused in the case of Louisiana. The Democrats had every right to be disgruntled over such inconsistency, especially when the Commission reversed itself once again and accepted evidence with regard to Watts's eligibility in the Oregon case.

The problem of ineligible electors raises even greater questions than the mere acceptance of evidence. If Congress was unable to investigate the votes for

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[27] Some historians who give Florida to Tilden are Nevins, Hewitt, pp. 329-330; Flick, Tilden, pp. 415-416; and, L.B. Richardson, William E. Chandler, p. 193. For a more solid legal interpretation refer to W.W. Davis, Reconstruction in Florida, pp. 736-737.

an elector, how could it investigate the elector himself? According to the Republicans the provisions of the Constitution against federal officeholders being electors was not self-executing. Yet by their own admission they chose to regard the exclusion clause as self-executing on December 6th, but not on November 7th. They never attempted to explain how the clause could be operative on one day and not on another! Again, if the Commission could not accept evidence aliunde the papers opened by the President of the Senate, how could it accept evidence on the question of ineligible electors? The majority of the Commission failed to justify that inconsistency.[28]

If the Republican majority was guilty of inconsistency, Democratic counsel and the Democratic minority of the Commission were guilty of taking cases out of context and citing them as precedents. Oliver P. Morton forced George Hoadly to admit such an error before the Commission. Commissioners Abbott and Hunton did the very same thing in the Louisiana decision when they argued that the Returning Board was never legally constituted. As a precedent they cited Justice Miller's opinion in Schench vs. Peay (1868),[29] an opinion that does not apply because in that case the body passing judgment had not been legally constituted, whereas the Returning Board in the Louisiana case had a solid legal foundation. The Republican majority was correct when it said that a board can legally act so long as a quorum is present, unless the law specifies otherwise.

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[28]For a more detailed discussion on the question of the acceptance of evidence refer to John Goode, "The Electoral Commission of 1877," American Law Review, XXXVIII (Jan.-April, 1904), 1-20; 161-180.

[29]Schench vs. Peay, 21 Federal Cases, 667-671 (1868).

Democrats have long argued that the Commission reversed itself with the Oregon decision. At no time did Evarts or the other Republicans argue that the governor's certificate was unimpeachable. Republican counsel consistently asserted that the governor's certificate must conform to the results as certified by the returning board. The certificates from Florida and Louisiana were in agreement with the final canvass; the Oregon certificate was not. The Commission ruled that if the certification of the governor does not conform to the final canvass it may be impeached. This was the first time the Commissioners had to make such a decision, but they did not break with any previous decision in impeaching the governor's certificate, nor did they go behind the state returns.[30] To some the distinction between going behind the governor's signature and that of the canvassing board may appear to be a minor one. Nonetheless the distinction appears evident and the important fact was that the Republicans did not use a new argument or reverse a previous decision. In the final analysis, then, the Commission was perfectly consistent with its past rulings.

In the United States two requirements must be fulfilled before the votes for a candidate can be declared void. First, it must be shown that the voters knew that the candidate was ineligible for the office. Secondly, it must also be shown

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[30]David Dudley Field later admitted this fact. Refer to Field, The Vote that Made the President, p. 15. Abram S. Hewitt believed the Commission to be inconsistent in Oregon. Nevins (ed.), Writings of Hewitt, pp. 175, 192. Professor Nevins also believes the inconsistency but justifies it by accepting the argument of the time it would take to investigate the vote in any of the Southern states. Nevins, Hewitt, pp. 377-378. Although the time factor was important to Republicans it cannot be used to justify an inconsistency.

that the voters were aware of the rule of law making the candidate ineligible.[31] There is no tradition or law in this country for giving the office to the second highest competitor. Common law, in fact, negates any such idea.[32] In the case of Oregon the Democrats could not prove that the voters had a knowledge of the fact and law regarding eligibility. At best, then, Watts's vote should have been accepted. At worse, another election should have been held. The Democratic maneuver failed to force Republicans behind the returns. The Oregon case was handled in such a manner as to give every appearance of an open, bold-face, attempt at fraud on the part of the Democrats. The Commission rejected the Cronin certificate by a unanimous vote. Yet, when it came time to accept the vote of Watts the Democatic minority balked. This is undoubtedly the best evidence of Democratic partisanship.

A comparison of the Democratic argument in the Oregon and South Carolina cases shows a surprising inconsistency. In the Oregon case the Democrats held that the governor's certificate was final, a position which contradicted their arguments in the Florida and Louisiana cases. In the South Carolina case the Democrats openly admitted that local party members had used

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[31] People vs. Clute, 50 N.Y. 451 (1872).

[32] The King vs. Bridge, 1 M and S 76 (1813, K.B.). Refer also to the Yale Law Journal, XXXIV (May, 1925), 798.

intimidation and violence against the Negroes in the hope of carrying the state. Therefore, the election in South Carolina should be invalidated. In both cases partisanship on the part of the Democrats is obvious.[33]

Republican counsel was well-organized and had prepared a sound, consistent argument. William Maxwell Evarts presented the most cohesive argument throughout the proceedings. Evarts more than any other person realized that the arguments for both sides were based on partisanship and evidence of a circumstantial nature. Realizing also that the tribunal was not a court of justice but a board of arbitration, he presented coherent arguments from start to finish. The Democrats did not. They viewed the Commission as a court of law where both moral and legal arguments could be used. The Commission, however, as viewed by Evarts, was an arbitration board composed of politicians who were more interested in pragmatic results than moral arguments. In this case legal and political arguments carried the greater weight. Thus, in viewing the Commission correctly, Republican counsel bested the Democrats at almost every turn.[34]

Time and time again the Republican majority of the Commission has been accused of partisanship, but the fact remains that both sides were partisan. At no time did the members of either party break ranks on essential questions. Political

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[33]Proceedings, pp. 237-239. Justice Bradley went so far as to label all of the congressional investigations extremely partisan and "totally unauthorized by the Constitution." Ibid., pp. 266-267.

[34]Sherman Evarts (ed.), Arguments and Speeches, II, pp. 319-320, 326-327, 333-334. Evarts also realized that in terms of argument he was protecting the status quo. Going behind the state returns was akin to revolutionary change.

considerations determined the voting of the Commission, and, as George Boutwell has candidly noted, both the Republican majority and the Democratic minority failed to rise above party.[35]

Charges that the Supreme Court Justices on the Commission had shown partiality did great damage to the integrity of the Court and the judicial system. The decisions of the justices revealed a political prejudice that shocked people in both parties, and they destroyed, to some extent, the public faith in the ideal of judicial impartiality.[36] The Supreme Court did not quickly recover from that damaging blow.

It would be wrong and unfair to charge that all members of the Commission were at all times blindly partisan. In presiding over the Commission Justice Nathan Clifford showed "ability, impartiality, and urbanity...."[37] He did not permit dilatory motions or delays of any type to interfere with the proceedings. Republicans and Democrats agreed that his rule was fair and completely above partisanship.

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[35]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 2, p. 1681. Refer also to p. 1726 for the same opinion from a Democrat. H.P. Judson, Review of Reviews, VII (March, 1893), 169. Foulke, Life of Morton, II, p. 477. Rhodes, History, VII, pp. 283-284. Democratic charges of Republican partisanship are best found in Bigelow, Life of Tilden, II, p. 89.

[36]Ewing, The Florida Case, p. 39. Hugh McCulloch, Men and Measures of Half a Century (New York: Charles Scribner's Sons, 1889), p. 418. Stevenson, Something of Men I Have Known, pp. 14-18.

[37]Proceedings, p. 193.

Party loyality was of primary importance in the selection of men to the Commission. Every man on the Commission was of high repute and, except for Justice Bradley, their devotion to party was unquestioned. Each man remained consistent with the philosophy of his party throughout the proceedings. Political loyality was expected at the time by realists and the result was not surprising except to those who had hoped for a nonpartisan decision by the five Justices.

If the decision of the Commission was partisan, was Hayes's title to the Presidency valid? Unquestionably the decision not to go behind the state returns was in accord with the letter and spirit of the Constitution. Although the motives behind the decisions may have been partisan, the decisions were good law. Congressional control of elections would have been unwise and dangerous. Going behind the returns would give the party in power the means of self-perpetuation, making the possibility of revolution almost a certainty. Under such circumstances Hayes's title is not merely sound but unimpeachable.[38]

One man, Justice Joseph P. Bradley, has received the brunt of criticism for the decisions of the Electoral Commission. He has been accused of partisanship and of selling his vote to the highest bidder. The charges are not surprising considering the one inherent fault in the tribunal plan. Since the Commission was equally divided between Republicans and Democrats any decision rested upon

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[38]John W. Burgess voiced the same conclusion but for different reasons. Reconstruction and the Constitution, 1866-1876 (New York: Charles Scribner's Sons, 1902), p. 295. Refer also to Andrew C. McLaughlin, A Constitutional History of the United States (New York: D. Appleton-Century Co., 1935), pp. 708, 717. Rhodes, History, VII, p. 283.

the shoulders of the fifth Justice. Fearing such criticism Judge David Davis refused to serve, but Bradley, fully aware of the difficulty, accepted the position.

Following his vote in the Florida case, Bradley was accused of yielding to Republican pressure. Democrats charged that on the night before the decision, February 7th, Bradley had received midnight visitors who persuaded him to change his opinion in favor of the Republicans. Bradley's home was reportedly surrounded by carriages of leading Republicans and those of the Texas and Pacific Railroad lobby.[39] The rumors took on a truer ring after Abram S. Hewitt announced that a friend, John G. Stevens, had visited Bradley on February 7th and learned that the Justice favored going behind the returns. Hewitt attended the Commission meeting on February 8th and was dumbfounded when Bradley accepted the Hayes certificate.[40]

Bradley at first ignored the charges but later issued a complete denial. Every charge, he said, was a falsehood. The fact was that "not a single visitor called at my house that evening." The Justice denied ever speaking about his decision to anyone outside of the tribunal or to any interested Republican. Bradley added

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[39]New York Sun, Aug. 4, 1877. See also Aug. 29 and Sept. 1, 1877. John Bigelow reported that Tilden had an opportunity to buy one of the Justices for $200,000 at this same time. John Bigelow, Retrospections of an Active Life (6 vols.; Garden City, N.Y.: Doubleday, Page and Co., 1913), V, pp. 298-299. Bigelow diary, Feb. 9, 1877, p. 239, Bigelow Papers.

[40]Nevins (ed.), Writings of Hewitt, pp. 172-173.

that he kept to himself throughout the proceedings. Not even the other Commissioners realized his exact position until hearing his opinion at the end of each case.[41]

A major argument used by Bradley's critics is that the Justice rewrote the major opinions in the Florida case a number of times. Professor Allan Nevins doubts that Bradley ever rewrote the arguments or different opinions, reasoning that Bradley's quick mind did not require such an aid.[42] The fact is that Bradley did rewrite his opinion, sometimes being influenced by the Democrats and sometimes by the Republicans,[43] but there is no evidence that Bradley bowed at the last minute to Republican pressure. Bradley and his family repeatedly denied the existence of any "midnight visitors."[44] The reputation of the Justice has suffered greatly because of rumor and hearsay, not reason and evidence.

It was generally known that Bradley was a Republican before he was appointed to the tribunal. In expecting one man to rise above party affiliations while allowing fourteen other partisans to go unchallenged is grossly unfair. More importantly, no critic has ever evaluated Bradley's opinions. The Justice was

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[41]Newark Daily Advertiser, Sept. 5, 1877, an open letter from Bradley, dated Sept. 2, 1877.

[42]Nevins, Hewitt, p. 372. Nevins finds such a practice "hard to believe." See also p. 378, n. 1.

[43]There are at least three different opinions in the Bradley Papers.

[44]"Memorandum for Mr. Charles Fairman" by Charles B. Bradley, dated sometime in 1937, Bradley Papers.

consistent in all but one instance, that being the decision not to accept evidence with regard to the eligibility of the Louisiana electors. The basis of his opinions were firmly entrenched in legal precedent and existing law. In the final analysis Bradley was less partisan than the other fourteen members. He sided with the Democrats on one major issue and numerous minor issues. On the basis of evidence produced to date, Bradley's reputation should stand unblemished by any wrong-doing.[45]

The compromise of 1877 was a series of political and economic agreements by which various southern factions were appeased. In return for supporting an all-white Republican party in the South, Southerners received national offices, federal aid or internal improvements, and the removal of federal troops from South Carolina, Louisiana, and Florida. Troop removal, of course, meant the restoration of home rule in each state. Although all three compromises were undoubtedly important, historians have long argued over their priority.

Initially historians attributed the compromise of 1877 to a meeting of politicians at the Wormley Hotel in late February. That conference, however, was merely the last of a long series of meetings and arrangements which had already determined the nature of the settlement. C. Vann Woodward has shown that Republicans and Southerners had engaged in discussions as early as January, 1877, and that the

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[45]Rhodes is one of the few historians who has accepted Bradley at his word, History, VII, p. 282. Most critics have contented themselves with innuendo attacks. Cf. Nevins, Hewitt, p. 378, n. 1.

provisions of the compromise were well-known by people across the country long before the Wormley Conference.[46]

The standard interpretation of the compromise is that of Vann Woodward. He contends that economic interests, particularly those of the Texas and Pacific Railroad, were the pivotal issues in the compromise.[47] This interpretation, which is based on the impressions of a few politicians and businessmen , fails to recognize that any economic concessions from the federal government would mean little or nothing to the Southern states unless they controlled their own state governments. For this reason one cannot discount the newer thesis of Rembert W. Patrick, who insists that troop removal and home rule were of central issues in the compromise.[48]

The South viewed the election of 1876 as a possible end to the twelve-year struggle for home rule. Southerners insisted that their liberties were abridged and their rights violated so long as federal bayonets remained. Their one absorbing goal was troop removal.[49] John A. Kasson, recognizing the importance of this issue, suggested to Hayes that promoting sympathy for the Southern desire for home rule could produce useful results for the Republicans.[50] Hayes politely

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[46]C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction (Boston: Little, Brown and Co., 1951), p. 208. The author emphasizes the importance of the economic considerations in affecting the compromise.

[47]Ibid., passim.

[48]Rembert W. Patrick, The Reconstruction of the Nation (New York: Oxford University Press, 1967), p. 273.

[49]Mayes, L.Q.C. Lamar, pp 304-305.

[50]Kasson to Hayes, Dec. 17, and 27, 1876, Hayes Papers.

acknowledged Kasson's suggestion but made no commitment. The Republican leadership was already committed to such a course of action.

When the Hayes-Tilden conflict threatened civil war, Southerners worked for a peaceful settlement. They were the prime movers behind the formation of the Electoral Commission. A number of Southerners thought that war would further devastate their section and delay the restoration of home rule. Realizing the situation they favored the return of local state control to placing Tilden in the White House.[51] In supporting the Commission bill the Southern leaders chose peace over war. At the same time, as discussions progressed, they worked for whatever advantages they might get, and were delighted to receive federal subsidies and national offices.

A filibuster conducted by Democratic radicals delayed the counting procedure in the House of Representatives. Republicans, although alarmed by the filibuster, had assurances from Southern Democrats that the delays would be short.[52] Southerners, said Boynton, would respect the law and proceed with the count.[53] Boynton's reference to "the law" referred to the constitutional provisions (Art. II, sec. I and the Twelfth Amendment) pertaining to counting the votes and the Electoral Commission

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[51] Bigelow (ed.), Letters of Tilden, II, pp. 465, 536-537. /Home/, Harper's Weekly, LII (March 28, 1908), 7.

[52] Henry V. Boynton to William Henry Smith, Feb. 11, 1877. Boynton did become worried later, Boyton to Smith, Feb. 22, 1877, typed copy, Hayes Papers.

[53] Ibid., Feb. 11, 1877.

act. Benjamin Hill bluntly told the Southerners that they had to obey the Constitution and the Commission act even if they did not like the results. Any undue delay, he said, would not secure the inauguration of Tilden. More importantly he argued that the Commission was a southern instrument whose decision the South was honor-bound to accept.[54] Hill and Lamar were able to secure over forty Southern votes to kill the filibuster.

What had discouraged Republicans the most was northern support for the filibuster. Party moderates like Abram S. Hewitt and Samuel J. Randall had given their support to the movement. Until February 23rd, Randall's rulings from the chair were partisan and in league with those who advocated delay. He permitted the House to take a series of recesses and his speeches in the party caucus were "fire-eating." Yet on February 23rd, Randall astounded his colleagues by ruling a second recess motion dilatory. From that date Randall worked to complete the count, which was slowed at times for partisan reasons. The Democrats, realizing that nothing could prevent Hayes's inauguration, sought concessions from the Republicans.

On March 1, 1877, William M. Levy, a representative from Louisiana, made a speech which for all practical purposes ended the filibuster. "The people of Louisiana," he said, "have solemn, earnest, and, I believe, truthful assurances from prominent members of the Republican Party, high in the confidence of Mr. Hayes, that in the event of his elevation to the Presidency, he will be guided by a

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[54]Hill, Jr., Benjamin H. Hill, pp. 74-77.

policy of conciliation toward the Southern States, that he will not use the Federal authority or the Army to force upon those States governments not of their choice, but in the case of these States will leave their own people to settle the matter peaceably, of themselves."[55] The South had obviously secured concessions, which was exactly what the filibuster had been designed to accomplish. Once the concessions had been won, the filibuster died.

Republican mistakes were an important factor in aiding the Democratic cause. An inflamatory editorial in the Ohio State Journal on February 22nd, advocating the use of federal troops in Louisiana to keep the carpetbag government in power, greatly increased the bargaining power of the Democrats. Hayes had spoken of a "policy of conciliation" toward the South, yet such an editorial in a leading Republican paper was hardly indicative of conciliation. The fight for concessions was in progress and now a reconfirmation was desired. The Wormley conference was merely to reassure Southern Democrats that there was no change in Republican strategy and that the concessions would be granted. The assurances this time were given by Charles Foster, Stanley Matthew, and William Evarts, sources "high in the confidence of Mr. Hayes."[56]

Southerners viewed the decisions of the Electoral Commission as reinforcing state supremacy in the area of federal elections. In theory the Commission helped to assure local self-government, but what was needed were practical and real

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[55]Cong. Rec., 44th Cong., 2nd Sess., 1876-1877, V, pt. 3, p. 2047.

[56]House, Misc. Doc. No. 31, 45th Cong., I, pp. 978-990; III, pp. 595-633, cf. p. 619. Boynton to William H. Smith, Feb. 27, 1877, Smith Papers, Columbus.

assurances that home-rule could be achieved immediately. The Republican concessions which formed the compromise of 1877 were the needed assurances. Hayes, once, in office, would remove federal troops from the South thus insuring the collapse of the Nicholls and Chamberlain governments. L.Q.C. Lamar wrote to Hayes on March 22nd demanding that the new President carry out the bargain. In a very indignant letter, Lamar reminded Hayes that his administration rested on Southern support and, if that support was to continue, the troops must be immediately removed.[57]

At no time were Southerners ready or able to endorse any revolutionary measures to inaugurate Tilden. They desired only to regain control of their state governments, which, of course, meant the removal of federal troops. In speeches in and out of Congress they made perfectly clear their desire for a peaceful inauguration. Little wonder that Henry V. Boynton could inform William Henry Smith that he had thirty-six Southern Congressmen "lined up to prevent any revolutionary measures.[58] Moderates of both parties realized by early December that counting the electoral votes could be completed only by some sort of compromise; otherwise, war would result. Time was needed to arrange the tribunal plan, and once it was formulated

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[57]Lamar to Hayes, March 22, 1877, Hayes Papers.

[58]Boynton to Smith, Dec. 20, 1876, Hayes Papers; Dec. 22, 1876, Smith Papers, Columbus. The germ of the Commission bill was introduced by George McCrary on December 10, 1876.

and agreed to, a peaceful inauguration was assured. When a few Republicans offered Southern Democrats a cabinet post and federal subsidies, the South was happy to accept. But the key issues were troop removal and home rule.

Southern Democrats committed themselves to a policy of peace when they first advocated compromise and accepted the Electoral Commission. Although disappointed with the Commission's decision, the prospect of home rule smoothed over any pain at the loss of Tilden. Hayes's letter accepting his party's nomination and Republican assurances guaranteed the achievement of the South's primary goal, home rule. Assured of their aims, the Southern Democrats continued to work for a peaceful inauguration and, at the same time, received congratulations for saving the Union.[59]

The decisions of the Electoral Commission, though influenced by partisanship, were based on sound constitutional law and should be recognized as such. It should also be noted that the decision to submit the election to arbitration rather than war was, in actuality, the first of a series of compromises called the compromise of 1877. Without the decision to arbitrate the election, the resulting compromise would never have been possible. The neglect of the Commission has resulted in a misunderstanding of the overall compromise of 1877. The Commission act was the first of a series of compromises. Its importance lies in the fact that a peaceful inauguration was more desirable than war. Patriotism led to a practical solution of a constitutional problem. In the end partisanship ruled supreme but all parties were at least temporarily satisfied. Hayes was inaugurated and the South gained home rule plus a few unexpected concessions.

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[59]Harper's Weekly congratulated the South for its tremendous patriotism, XXI (March 10, 1877), 182. Hunton, Autobiography, p. 195.

BIBLIOGRAPHICAL ESSAY

Manuscripts

The most important collection of manuscripts for any study of the disputed election of 1876 is located in the Rutherford B Hayes Memorial Library, Fremont, Ohio. The most valuable letters are those by Hayes, William E. Chandler, Zachariah Chandler, William Dennison, James A. Garfield, L.Q.C. Lamar, Richard C. McCormick, Stanley Matthews, Carl Schurz, Samuel Shellabarger, and John Sherman. In addition the Hayes Library has copies of the more important letters between other leading Republicans. The Hayes diary is also a significant document for understanding the man and his times. The manuscript collection is currently over the one million mark, making the library one of the most important centers for materials on Nineteenth century America.

The correspondence between Hayes and William Henry Smith is essential to any understanding of Republican strategy. The letters are in three different locations: the main collection is in the library of the Ohio Historical Society, Columbus, Ohio; a smaller collection is in the William Henry Smith Memorial Library of the Indiana Historical Society, Indianapolis, Indiana; and a third collection, consisting mainly of copies, is held by the Hayes Memorial Library. The Hayes Foundation has obtained copies of a sizeable number of the more significant letters.

The most valuable manuscript pertaining to the private deliberations of the Electoral Commission is the diary of James A. Garfield in the Library of Congress, Washington, D. C. The diary, although decidedly Republican in outlook, is extremely interesting and informative. Garfield's comments from November, 1876, through March, 1877, are most revealing on the political crisis and eventual formation of the Commission.

The papers of Samuel J. Tilden in the New York Public Library, New York City, have been sifted by the trustees of the estate to remove derogatory items. Nonetheless, the general correspondence does show the type of advice Tilden was receiving, and it is the best collection for radical Democratic thought. The Tilden collection also has a large number of public and private documents relating to the proceedings before the Commission, and it is particularly strong on the Florida case.

Justice Joseph P. Bradley's papers, an edition of which is being prepared for publication, are in the New Jersey Historical Society library, Newark, N.J. They contain his personal notes from the public sessions of the Commission, and a few items pertaining to the private discussions of the tribunal are valuable for understanding Bradley's final decisions. Included in this collection are the judge's rewritten opinions on the Florida case and the drafts of his decisions on Louisiana, South Carolina, and Oregon. There is unfortunately only a very small correspondence between Bradley and politicians outside New Jersey. Moreover, the Bradley diary is nothing more than a pocket date-book containing schedules of meetings and court sessions.

Another very useful set of papers are those of James M Comly in the library of the Ohio Historical Society, Columbus, Ohio. Comly was evidently a relay post for minor politicians who wished to reach Hayes The more important correspondence comes from Henry V. Boynton and Grant's Postmaster-General, J.N. Tyner Comly's papers are of value for an understanding of Hayes's Southern policy, its formation and ultimate demise.

The situation in Florida was handled by William E. Chandler, a New Hampshire politician whose papers, located in the Library of Congress, have a wealth of information on the way in which Florida was held for Hayes. Among the Chandler papers is an important undated manuscript pertaining to his role in the court fight over Florida's electoral votes. Also, Chandler left a personal recollection of his role in the sending of the telegrams which saved Hayes from defeat.

For the Democratic point of view in Florida the reader should turn to the Edward Louden Parris collection in the Hayes Memorial Library. Parris was the chief counsel for the Democratic party in Florida, and his papers contain copies of the cipher telegrams sent between Parris and Tilden headquarters, as well as copies of the various court decisions pertaining to the legality of the Hayes and Tilden electors.

Of immense value for attitudes and opinions of the Democrats regarding the Electoral Commission Act is the correspondence of Samuel J. Randall in the University of Pennsylvania Library, Philadelphia, Pa. Both local and national politicians complained to Randall, the Speaker of the House, about the tribunal's partisanship, but he received only a few letters condemning his personal acts.

A considerable body of the correspondence shows disappointment over Tilden's defeat, but satisfaction and relief that civil war was avoided.

The papers of two of the major participants were disappointing. Thomas F. Bayard's collection in the Library of Congress contains little of value except for some seventeen handwritten pages of notes on the Florida case. Since Bayard left no record of his outgoing mail, historians must rely on his public speeches for determining his views. The same is to be said for the papers of William Maxwell Evarts, also in the Library of Congress. Evarts did not maintain very adequate records until he became Hayes's Secretary of State in March, 1877. There is little information pertaining to the formation of the Commission or Republican legal strategy.

Some insight can be gained from reading the "Memoirs of Thomas C. Donaldson" in the library of the Indiana Historical Society, Indianapolis, Indiana. Donaldson was a political gadfly who managed to learn enough inside information to make his life interesting. Among other things in the "Memoirs" is an important eyewitness account of the final congressional session which declared Hayes to be the legally elected President.

The diaries of John Bigelow, in the New York Public Library, and Hamilton Fish, in the Library of Congress, are of limited value. Bigelow's diary is a general commentary on Tilden's movements and thoughts, is extremely partisan in its outlook and must be carefully weighed in light of known contradictions and mistakes in fact. Fish, on the other hand, was more reserved and dignified in what he confided to his diary. His comments on the role of President Grant in the formation and passage of the Commission bill are particularly valuable.

The papers of Jeremiah S. Black, in the Library of Congress, and Allen G. Thurman, in the Ohio Historical Society, Columbus, Ohio, are extremely disappointing. The Thurman collection contains not a single reference to the Commission or any of Thurman's activities during late 1876. There is reason to suspect that a sizable portion of Thurman's papers were either destroyed or have been misplaced. Black's collection contains a few incomplete legal drafts on Louisiana and some newspaper clippings pertaining to his role as counsel. None of the materials in this collection affords much insight into either the man or the disputed election.

The papers of David Davis in the library of the Illinois State Historical Society, Springfield, Illinois, and those of Zachariah Chandler in the Library of Congress are of limited value. Davis used every possible means to protect his historical image. Chandler, on the other hand, kept only a small set of records. Both are valuable for highly individual opinions or for their rather limited outside correspondence. Chandler did answer letters telling of armed Democrats with considerable calm.

Perhaps the greatest disappointment of all was the number of important politicians of the period who either kept only limited records or destroyed their material. The collection of George F. Hoar in the Massachusetts Historical Society in Boston is the one exception. Unfortunately this massive body of documents is neither indexed nor cataloged, and seems to contain only a few scattered references to the Commission. There may be a wealth of information in the collection, but until it is organized historians will have to wait patiently.

Josiah G. Abbott, Nathan Clifford, and Thomas W. Ferry preserved nothing of value. Their collections, located respectively in Boston, Portland, Maine, and Ann Arbor, Michigan, amount to mere souvenirs and a few legal opinions.

George F. Edmunds destroyed all of his personal papers shortly before his death, an act which accounts for his being an "unknown." Henry B Payne also destroyed his papers. Justice Samuel F. Miller kept a collection of letters which would probably be valuable, but the family has misplaced them. The papers of William Strong may have met the same fate. One can only hope that additional letters and papers will be found and properly preserved.

Oliver P. Morton, Justice Stephen Field, and Eppa Hunton each had a collection at one time or another. Over the years, however, each collection was either destroyed or greatly reduced. Hunton's papers were destroyed by fire in 1910, while the Morton collection in the Indiana Division of the Indiana State Library, Indianapolis, is inadequate for the years after 1870. Justice Field's mementoes contain only a few recollections, none of which pertains to his role on the Commission. Similarly, Frederick T. Frelinghuysen failed to keep any records of his experiences during the crisis. His papers, in the Library of Congress, consist of only a few drafts of diplomatic papers dating from 1882-1883.

The manuscript material on the Electoral Commission is scarce, and search for more should be encouraged. At the same time there is important material available for those who are willing to dig and the rewards are more than gratifying.

Public Documents

The main source for the acts of the Electoral Commission is a separate volume of the Congressional Record, entitled The Proceedings of the Electoral Commission, which contains the official record of what transpired before the tribunal. For some unknown reason a stenographer was not permitted to record the private deliberations of the commissioners. Nonetheless, the Proceedings give the legal arguments of counsel and the rather brief written opinions of the individual members of the Commission. For the debate pertaining to the formation of the Commission, refer to the Congressional Record.

A House subcommittee has gathered all of the important documents relating to the history of the Electoral College to 1876 into one volume, Counting Electoral Votes, 44th Cong., 2nd Sess., Misc. Doc. No. 13. This volume is a shortcut through the masses of government publications and is indespensible in tracing the debates and history of the College. A somewhat shorter account can also be found in Hinds' Precedents of the House of Representatives, (5 vols.), 59th Cong., 2nd Sess., 1906-1907.

Numerous reports of the House and Senate committees of the 44th Congress, 2nd Session are of importance to a study of this type. House Report No. 108 contains the recommendations of the special Senate and House committees which formulated the Commission bill. The position of House Democrats is best stated in Report No. 100, parts 1-2. J. Proctor Knott chaired the committee and was responsible for urging Democrats to base their case on the twenty-second joint rule. The testimony taken by Knott's committee is found in House Misc. Doc. No. 42.

Congressional investigations of the elections in the South produced a mass of material. For Florida refer to House Report No. 143, parts 1-2, and Senate Report No. 611, 4 parts. Any study of Louisiana should begin with House Report No. 261, Condition of the South, 43rd Cong., 2nd Sess., 1875. House documents include Report No. 100, part 3, and Report No. 156, parts 1-2, of the 44th Cong., 2nd Sess. The feelings of the Senate are to be found in Executive Document No. 2, 44th Cong., 2nd Sess., which contains the so-called "Sherman Report," given by the visiting statesmen upon their return from Louisiana. House Report No. 175, part 1, shows the weakness of the Democratic position in South Carolina. The Senate committee investigating the election of 1876 in South Carolina left no written report of their findings. The testimony collected by the committee, however, is extremely interesting and useful. Refer to Senate Misc. Doc. No. 48 of the 44th Cong., 2nd Sess., for some enlightening opinions of government under radical control. Senate Report No. 678 is the only document pertaining solely to Oregon. Oliver P. Morton led investigations into numerous other states, for his findings see Senate Report No. 627, and Misc. Doc. No. 44.

Two other documents are of the utmost importance. The House conducted an extensive investigation of the election of 1876 two years later. The so-called Potter Committee was searching for evidence of Republican wrong-doing but was ultimately forced to focus on the cipher telegrams of leading Democrats. House Misc. Doc. No. 31 of the 45th Cong., 3rd Sess., contains their findings. Finally, the Senate requested a study of the number and usage of U.S. marshals in the election. Senate Executive Doc. No. 6, part 2, contains the report of the Attorney General on this matter. Both of these documents are partisan in their outlook, but contain

enough essential information to make them worthwhile. In seeking the speeches of Grant, one should refer to James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents, 1789-1897, 12 vols. (1900).

The Hayes-Tilden contest produced over 8,000 pages of congressional testimony and reports. In the main the information was sought in order to support one party or the other. Nonetheless, through a careful reading and use of the index pertinent information is available to the serious student.

Memoirs, Reminiscences, and Collections

The amount of material stemming from personal recollections, though spotty, is absolutely massive. T. Harry Williams has edited Hayes: The Diary of a President, 1875-1881 (1964) while Charles R. Williams has edited the complete diary in the Diary and Letters of Rutherford Birchard Hayes, (1922-1926). Both are valuable in learning the thoughts and feelings of one of the principle figures in the contest Lamentable, however, is the poor annotation of both editors. Eppa Hunton's highly partisan Autobiography, privately published in 1935, is extremely valuable but historians must use it with care, for Hunton dictated the work some fifty years after the disputed election. The Miscellaneous Writings of Joseph P. Bradley (1902), edited by Charles Bradley, gives the reader some insight into the man, while the editor's comments are solid and thought-provoking.

Samuel S. "Sunset" Cox has left a partial record of the "behind closed doors" battles leading to the compromise resulting in the Commission. His Three Decades of Federal Legislation (1865) is extremely valuable. John Bigelow appointed himself the defender of Samuel Tilden. Bigelow's Retrospections of An Active Life,

6 vols., (1913), and his edited works, Letters and Literary Memorials of Samuel J Tilden, 2 vols., (1908), and The Writings and Speeches of Samuel J Tilden, 2 vols, (1885) give the Democratic position throughout. The interested reader should also refer to Bigelow, et. al., Presidential Counts (1877) for the Democratic position on counting the electoral votes Along the same lines, Manton Marble's A Secret Chapter of Political History (n.p., 1878) is a spiteful account of the Commission.

Jeremiah S. Black's Essays and Speeches, (1885), edited by his son Chauncey Black, is a mere collection of articles and letters published elsewhere. In addition the work lacks any type of editorship or annotation. James G. Blaine's Twenty Years of Congress, 2 vols., (1886) is useful for its description of some of the leading personalities of the period. Similarly, George F. Hoar's Autobiography of Seventy Years, 2 vols., (1903) says little of the Commission but presents several arguments of the tribunal's legality. Two works by Alexander K. McClure, Recollections of Half a Century (1902) and Our Presidents and How We Make Them (1902) suggest the greatest possibility of war and thus approves of the tribunal because it saved the nation from self-destruction. Hugh McCulloch's Men and Measures of Half A Centruy (1889) presents the opposite opinion, concluding that all would have ended peacefully if the Republicans had left everything alone.

The Selected Writings of Abram S. Hewitt, edited by Allan Nevins (1937) is significant for Hewitt's "Secret History" dictated in 1895. It is a defense of the author's actions from charges advanced by John Bigelow and also contains an assessment of the Commission. Hewitt attacks Justice Bradley with restrained vigor. John M. Palmer's Personal Recollections (1901) gives a good account of the "visiting statemen" in Louisiana. Adlai E. Stevenson shows his good will toward, and disappointment in, the Commission in his Something of Men I Have Known (1909)

Henry Watterson's Marse Henry: An Autobiography (1919) is indeed colorful and shows a radical becoming a practical moderate. The work contains a good number of antidotes not available elsewhere. Henry L Stoddard's As I Knew Them (1927) and Edward P. Mitchell's Memoirs of an Editor (1924) give a few worthwhile glimpes from men who are on the outer fringes of the political arena. A good description of Grant's role in the contest may be found in George W. Child's Recollections (1890).

Two works on the Commission by David Dudley Field, written to show Republican wrong-doing, have valuable autobiographical material: The Vote that Made the President (1877), and The Electoral Votes of 1876 (1877). A better-balanced work is Ben Hill (1891), by Benjamin H. Hill, Jr., which is primarily a collection of the Georgia Senator's speeches and correspondence during the crisis. In the same vein, Perry Belmont has some interesting comments about the Commission in his An American Democrat (1940). Belmont served as Thomas F. Bayard's personal secretary during the period.

There are a considerable number of published memoirs which contain only scattered references to either the election of 1876 or the tribunal. George S. Boutwell's Reminiscences of Sixty Years in Public Affairs (1902) barely mentions the Electoral Commission but does indicate his support for it. Joseph Benson Foraker's Notes of A Busy Life, 2 vols., (1916) contains a few worthwhile comments. Mrs. John A. Logan attempted in her Reminiscences (1913), to glorify her husband, but she made numerous mistakes and took indefensible positions. For anyone interested in "waving the bloody shirt" Robert G. Ingersoll's Works, 12 vols., (1901) will more than satisfy.

A few sympathetic yet critical comments about Tilden are in Harry Thurston Peck's Twenty Years of the Republic (1929). Glimpses of Justice Miller are in Samuel W. Pennypacker's Autobiography of a Pennsylvanian (1918). John Sherman's Recollections, 2 vols., (1886) barely mention the tribunal and give inadequate coverage to the crisis. O.O. Stealey's Twenty Years in the Press Gallery (1906) is much more valuable. The author has given some excellent sketches of the more important personalities.

Three works should be mentioned for their overall candor and clearness. Lew Wallace's Autobiography, 2 vols., (1906) contains a precise statement on the Florida canvass and the role of visiting statesmen; John Wallace's Carpet-Bag Rule in Florida (1888) has an excellent chapter on the election of 1876; and John R. Lynch's The Facts of Reconstruction (1913) has a frank discussion of intimidation of Southern Negroes. Lynch's first-hand experiences are very revealing.

Sixty Years of American Life (1917) by Everett P. Wheeler gives a very Democratic account of the election controversy. Wheeler maintains that the entire crisis was a Republican bluff. Sherman Evarts' edition of his father's Arguments and Speeches, 3 vols., (1919) is useful, as is Walter Allen's Governor Chamberlain's Administration (1888), a highly sympathetic documentary of a would-be reformer in a corrupt state.

Students interested in the conception of the electoral system should consult Max Farrand, ed., Record of the Federal Convention, 3 vols., (1911). The Federalist contains pertinent comments by Hamilton, Jay, and Madison and should not be overlooked. Of the numerous critiques of the Constitution, Justice Joseph Story's Commentaries, 2 vols., (4th Ed , 1873) is among the best. John Randolph

The Constitution, 2 vols., (1899) was written by one who participated in the work of the Electoral Commission.

Newspapers and Journals

Newspapers throughout the country reported the establishment of the tribunal. The New York Times was the first major paper to editoralize against any outside agency counting the electoral votes. The solidly Republican Chicago Tribune, on the other hand, argued in favor of the Commission. The Atlanta Daily Constitution gave the plan a blanket endorsement. Both the New York World and New York Sun were somewhat timid in their endorsement. The Sun showed the bitterness of the Democrats for Tilden's defeat by constantly referring to "Fraudulent Hayes."

Harper's Weekly favored the compromise and state rights, and showed, more than any other journal, a willingness to resort to expediency to secure Hayes' election. The Nation, with a much more objective viewpoint, favored a deference to legality all along the way. In the end The Nation conceded a legal title to Hayes and proceded to work for electoral reform.

The only source on the work of the elect House and Senate committees that formulated the tribunal plan is "A Grave Crisis in American History," Century Magazine, LXII (Oct., 1901) by Milton Harlow Northrup, who was secretary to the House committee. The position of the Democratic party is set forth in Jermiah S. Black's article, "The Electoral Conspiracy," North American Review, CXXV (July-Aug., 1877), while that of the Republican party is in Edwin Stoughton's reply, "The 'Electoral Conspiracy' articles defend extreme positions and contain several unsupported claims.

From time to time some of the leading participants exchanged views in articles on the disputed election. George F. Edmunds' article in Century Magazine, LXXXVI (June, 1913) was answered in the same issue by Henry Watterson, whose intriguing article in the May, 1913 issue of Century had evoked Edmunds' response. He also published a similar article in the Saturday Evening Post, CXCI, in May, 1913. Abram S. Hewitt maintained his faith in the tribunal plan in the International Review, V, in 1878. Although those articles added little to the history of the Commission, they help explain the roles and positions of their authors. An article by James Monroe, "The Hayes-Tilden Electoral Commission," in the Atlantic Monthly, LXXII (Oct., 1893) offers good background material and some very pertinent comments. Josiah Abbott wrote a minority report for the Democratic Commissioners which was never released until 1892. Robert B. Brown's "How Tilden Lost the Presidency," Harper's Weekly, XLVII (July 30, 1904) is brief but informative.

Insight into the election in South Carolina is given by an anonymous author in the Atlantic Monthly, XXXIV (Feb., 1877), and by R. Means Davis' letter to the Editor in The Nation, LVI (Feb. 23, 1893), which asserts that the Republicans did split their ticket, allowing Wade Hampton to run some 1,500 votes ahead of the Tilden electors

Some ideas on leading Southerners are in John C. Reed's "Reminiscences of Ben Hill," South Atlantic Quarterly, V (April, 1906). Alexander H. Stevens presents the old Anti-Federalist concept of a per capita count in the International Review, V (1878). John Goode clearly explains the threat of civil war and acknowledges the respect of Americans for law and order in "The Electoral Commission of 1877," American Law Review, XXXVIII (Jan.-April, 1904), an article which

concludes with an emphasis on the importance of home rule to the South. Jacob Dolson Cox gives his version of Hayes's "Southern Policy" in the Atlantic Monthly LXXI (June, 1893). Cox contends that Hayes did not sell the Negroes to gain the Presidency.

Electoral reform was the long-sought goal of Oliver P. Morton. After the election he wrote two articles, explaining a new method of electing the president in the North American Review, CXXIV-CXXV (May, July-Aug., 1877) Morton's sound plan of election is currently under consideration by a sub-committee of the U.S. Senate. Benjamin F. Butler also wrote on the subject in the North American Review CXXXIII (Nov., 1881). Charles R. Buckalew's "The Electoral Commission," North American Review, CXXIV (March, 1877), contains valuable recommendations on electoral reform

Periodicals, newspapers, and journals of the period are filled with revelant materials. One major problem, however, is that the leading participants intentionally withheld details about the Compromise of 1877. Nevertheless, historians are slowly amassing a considerable amount of information on the role of each participant.

Secondary Sources

Paul L. Haworth's The Hayes-Tilden Disputed Presidential Election (1906) is the only full-scale attempt to examine the famous crisis of 1876. Though written from a decidedly Republican viewpoint, it is a work which cannot be overlooked. C. Vann Woodward has presented the most widely accepted interpretation of the compromise of 1877 in Reunion and Reaction (1951) and in his Origins of the New South (1915) Both contain a lucid description of the compromise with an emphasis

on economic factors. For a recent challenge of Vann Woodward's thesis, see Rembat W. Patrick, The Reconstruction of a Nation, (1967), in which the author argues that troop removal and home rule were the essential ingredients of a compromise.

Biographies are a key to understanding the personalities of the major figures in this controversy. The best work on Hayes is Harry Barnard's Rutherford B Hayes (1954). H.J. Eckenrode's biography of the nineteenth president is biased and poorly written. The study of Hayes by Charles R. Williams, the President's son-in-law, is not critical and contributes little to an understanding of the subjects personality. For a short article on Hayes's nomination by the Republican party refer to Kenneth E. Davison's "The Nomination of Rutherford Hayes..." Ohio History, LXXVIII (1968).

Samuel J. Tilden has attracted only one fairly good biographer, Alexander C. Flick (1939). The work of John Bigelow, The Life of Samuel J. Tilden, 2 vols, 1895 contains no criticism of the subject and is severely harsh on Abram S Hewitt for failing to secure Tilden's election. Bigelow's The Supreme Court and the Electoral Commission (1903) is a bigoted attack on the Court in general and Justice Bradley in particular.

Biographies are available on seven of the fifteen Commission members. Philip G. Clifford's Nathan Clifford (1922) is a good, fairly critical study of the President to the Commission, but the author has relied exclusively on the narrative of James Ford Rhodes for the history of the tribunal Charles Fairman's Mr. Justice Miller (1939) is more a study of the Court than of Miller, and it fails to deal with either adequately. The Life of Oliver P. Morton, 2 vols., 1899, by William D. Foulke,

is an excellent though somewhat outdated study. Morton surely deserves a new biographer. Frederick H. Gillett's George Frisbie Hoar (1934) is poor, but a new biography is forthcoming.

Charles N. Gregory's study, Samuel F. Miller (1907) is adequate, but the author has little on his subject's role on the Commission. There are two studies of the life of Thomas F. Bayard. Edward Spencer's Bayard (1880), the only full treatment of Bayard's life, is eulogistic and uncritical. Charles C. Tansill's Congressional Career of Thomas F. Bayard (1946), a fully documented work, contains a number of factual errors which are minor blemishes in a valuable study. The biography of Stephen J. Field (1930) by Carl B. Swisher shows at least the partial effect of the partisanship of the Commission on the Court. It is regrettable that Profession Swisher did not pursue the topic.

Professor Allan Nevins' Abram S. Hewitt (1935) is an excellent study written from a Democratic viewpoint. Nevins seems to have revised his thinking somewhat for his Hamilton Fish, 2 vols. 1957, praises Grant and ignores the rumors against Justice Bradley. Ulysses S. Grant (1935) by William B. Hesseltine is the standard study of the President as a politician. It praises Grant for his role in the crisis. Chester L. Barrows' William M. Evarts (1941) builds upon Evarts' reputation as a lawyer, but contains some mild criticisms of the subject. Brainerd Cyer's Evarts (1933) avoids criticism and can only be classified as a "labor of love." Benjamin H. Hill is still in need of a good biographer for Haywood J. Pearce, in his book Hill (1928), failed to comprehend the Senator's role as pacifier in the election crisis.

Willard L. King's David Davis (1960) has an intriguing thesis on Davis' election to the Senate but offers no substantiating evidence. An even more outlandish thesis concerning the compromise of 1877 is offered in David M. Abshire's David M. Key (1967) which spoils a generally acceptable work. Lucius Q.C. Lamar (1896) by Edward Mayes, though outdated, is valuable for the large number of documents contained in the book. Wirt A. Cate's Lamar (1935) fails to appreciate Lamar's role as a Southern leader and is a generally poor biography. Leon B. Richardson's William E. Chandler (1940) is a first-rate life. The author attributes too much to his hero, but the volume is outstanding. Another valuable work is Edward Younger's John A. Kasson (1955), a study that reflects the author's versatile knowledge of the life and trims of his subject. Zach Chandler is in need of a critical study and until one is produced, the so-called biography by the Detroit Post and Tribune (1880) will have to suffice. A favorable and very readable account is given by Hampton M. Jarrell in Wade Hampton and the Negro (1949). Further study in this particular period is needed.

Commentaries on the electoral system are rare indeed. J. Hampton Dougherty's The Electoral System (1906) is the best study to date, but it lacks documentation and is not analytical. The Electoral System (1878) by David A. McKnight is a purely second-rate work. The author is a strict constitutionalist who tries to pick his way between the Democratic and Republican positions of 1876 and gets lost in the process. A fairly good sketch of the Presidential system of election is found in F.A.P. Barnard's "How Shall the President be Elected," North American Review, CXL (Jan., 1885). Although brief, the study touches upon every major proposal for election. For a rather detailed discussion of congressional interference in the

election process, Charles C. Tansill's "Congressional Control of the Electoral System," Yale Law Journal, XXXIV (March, 1925) is a first-rate superbly-documented study which stresses the dangers of federal control.

A.M. Gibson's A Political Crime (1885) is a restatement of the more radical Democratic position, flavored with countless contradictions. Nonetheless, the work contains some valuable documents and comments. The Florida Case (1910) by E.W.R. Ewing is highly partisan but valuable in that the author asks some unanswerable questions pertaining to contradictions in the decision of the Commission. Frederick Trevor Hill gives a broad and rather simplified explanation in his article, "Decisive Legal Battles," Harper's Monthly Magazine, CXIV (March, 1907). The title is quite deceiving but the article is well worth reading. An objective article by Joseph M. Rogers, "How Hayes Became President," McClure's Magazine, XXIII (May, 1904) is based on conversations with three of the participants. Though somewhat outdated it is valuable.

Detailed studies of the four disputed states are lacking, but two works deserve mention. Fanny Z. Bone's series of articles in the Louisiana Historical Quarterly, XIV-XV, show an analytical approach to the subject. The best work on Florida is William W. Davis' Civil War and Reconstruction in Florida (1913). Francis B. Simkins' South Carolina During Reconstruction (1932) gives the state to Wade Hampton and to Hayes. Unfortunately it deals very generally with the election and lacks much-needed detail.

There are presently four studies on the Presidency that are of value. Edward Stanwood's A History of the Presidency, 2 vols., (1926) is excellent. The author discussed all of the proposed remedies for the electoral system. It Costs to Be

President (1938) by Henry L. Stoddard contains a few personal comments about the election of 1876. Edward S. Crowin's The President (1957) and Joseph E. Kallenbach's The American Chief Executive (1966) are general studies with a few comments on Hayes and Tilden.

Several of the more important monographs on the Reconstruction era deal with the disputed election. Vincent P. DeSantis has produced a significant study entitled Republicans Face the Southern Question (1959), but it pays too little attention to Negro disfranchisement. Claude Bowers' The Tragic Era (1929) is presently under heavy attack, as are William A. Dunning and the multitude of his graduate students who wrote in his tradition. Dunning's Reconstruction (1907) was a ground-breaking work that remains important. Of considerable less importance is Hodding Carter's The Angry Scar (1959). John W. Burgess' Reconstruction and the Constitution (1902) is sound and thought provoking; and his Political Science and Comparative Constitutional Law, 2 vols., (1891) contains an excellent chapter on the Election Law of 1887.

James Ford Rhodes' History of the United States, 7 vols., (1906) is grossly underrated for its contribution to the disputed election. Rhodes had a number of conversations with members of the Commission and his comments deserve careful consideration. George Bancroft attended the public sessions of the tribunal but says very little about it in his History of the United States, 8 vols., (1892). James Schouler's History of the United States, 7 vols., (1913) has high praise for the Commission act but condemnation for its members. Ellis P. Oberholtzer's History of the United States, 5 vols., (1917-1937) contains an enormous amount of detail but has some grave factual errors. Finally, Woodrow Wilson's

Disunion and Reunion (1893) disregards the Commission except for a few comments concerning partisanship.

There are some good studies available on the Constitution. Edwin S. Corwin's The Constitution (1954) is a solid, general treatment of the document. His analysis of the election procedure is extremely valuable. Likewise, Andrew C. McLaughlin's A Constitutional History of the United States (1935) is still pertinent to an understanding of the Constitution. Perhaps the best general discussion of the evolution of the Electoral College is in Edward Dumbould's The Constitution (1964), a valuable work that contains most of the important court cases affecting the Constitution. A work very similar in nature is Charles Warren's The Making of the Constitution (1929).

Unpublished Doctoral Dissertations

Selig Adler has an interesting study on the "Senatorial Career of George Franklin Edmunds, 1866-1891" (University of Illinois, 1936). Based largely on Edmunds' public speeches, Adler's work includes an important chapter on his subject's role and defense of the Commission. Similarly, John S. Hare's work, "Allen G. Thurman" (Ohio State University, 1933), is valuable because of its use of some lost or destroyed Thurman papers. The author used Haworth's narrative of the disputed election and includes some of the latter's errors.

"The Political Career of Samuel J. Randall" by Albert V. House, Jr. (University of Wisconsin, 1934) is intriguing and well done. The work deals primarilywith Randall's Speakership of the House. The author intimates a number of conclusions beyond his topic but seems to have had an excellent grasp of his

materials. Edgar L. Gray's "The Career of William Henry Smith" (Ohio State University, 1951), is a well documented study based primarily on the Smith papers. The author stresses the economic package in the compromise of 1877 without too much supporting evidence. "James M. Comly" (Ohio State University, 1936) by Eugene H. Kleinpell shows the close relationship between Hayes and Comly. There is an explanation of the editorial in The Ohio State Journal in late February, 1877, and how it hurt the Republicans. Frank John Krebs's "Hayes and the South" (Ohio State University, 1950) uses the Boynton-Smith-Kellar correspondence as its basis. Krebs neglects the Commission completely and fails to explain how Republicans gained Southern support for Hayes's policy.

Two remaining dissertations are of limited value. "David Davis, 1815-1886" by Harry Edward Pratt (University of Illinois, 1930) contains copies of Davis' letter declining to be on the Commission. The dissertation is limited in its scope and somewhat out of date. Paul A. Weidner's "Justices Field and Miller" (University of Michigan, 1958) is valuable only for its bibliography. The work is an analysis of legal opinions and is not concerned with the Justices' activities outside of the Supreme Court.