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The 1876 Election: A Fictionalized Account

Jack M. Beermann*

After the 1985 death of Robert Todd Lincoln Beckwith extinguished the Lincoln line a lengthy manuscript, containing this episode, was found among his papers. The manuscript was inscribed with these words: "This is a history of what might have been. Real places and names have been used but many of the details, including widely-known events and personalities, have been fictionalized. My hope is that someday, many years from now, historians might discover this manuscript and become confused." The identity of the author is not revealed.

The 1876 election campaign was hard fought and contentious. When the votes were counted, Democrat Samuel Tilden had won an outright majority of popular votes, defeating Republican Rutherford B. Hayes by about a quarter of a million votes, 50.9 per cent to 47.9 percent. Tilden also appeared to have won the electoral vote by a margin of 203-167, but Republicans governors claimed Hayes had won three close states, Florida, Louisiana and South Carolina, and Hayes claimed an additional electoral vote in Oregon, where the Democratic governor had appointed a Democrat to replace an allegedly ineligible Republican elector.

In all four contested states, competing electoral vote certificates were submitted to the President of the Senate. This revealed a flaw in the Constitution: it contains no procedure for resolving controversies over the authenticity of electoral vote certificates. The Twelfth Amendment specifies only that the President of the Senate shall, in the presence of the Senate and the House of Representatives, "open all the certificates and the votes shall then be counted." Congress's only apparent role is, in case no candidate receives a majority of the electoral votes, to elect the President (in the House) and the Vice-President (in the Senate).

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Hayes needed to win all of the disputed votes to prevail. While both sides committed vote fraud, violent voter suppression aimed mainly at Black Republicans likely cost Hayes Louisiana, South Carolina and possibly Florida, and Hayes had clearly defeated Tilden in Oregon, which made the appointment of a Democratic elector there questionable. Tilden's supporters urged him to do whatever he could to ensure he was not cheated out of the presidency, including violence if necessary, but Tilden discouraged violence and instructed his followers to let the political process play out. Hayes argued that the constitutional solution was for the (Republican) President of the Senate, Thomas W. Ferry of Michigan, to decide which votes to accept. There is no doubt that if it were up to him, Ferry would have declared Hayes the winner, but even Republicans were reluctant to leave it to a single man to decide the election.

With no end in sight to the bickering over the election, in late January 1877, with Hayes's reluctant acceptance and apparent indifference from Tilden, Congress passed and President Grant signed the Electoral Commission Act, which authorized the formation of a fifteen member commission to decide which electoral vote certificates to accept. The commission would include fifteen members, ten Members of Congress split evenly between Senators and Representatives (and Democrats and Republicans) and five Supreme Court Justices, two Republicans, two Democrats and independent David Davis of Illinois. Upending this deal, the Republican-majority Illinois legislature elected Davis to the United States Senate, which Davis accepted as a better path to his own presidential ambitions, making him ineligible to serve on the commission. With only Republicans remaining on the Court, the commission's Justices selected Chief Justice Abraham Lincoln to serve as the commission's presiding officer. This eight to seven split in favor of Republicans virtually assured that the outcome would favor Hayes.

In preparation for the commission's proceedings, each candidate hired a team of distinguished lawyers, perhaps the greatest assemblage of legal talent in a single proceeding in the history of the United States. Commencing on February 1, 1877, with Chief Justice Abraham Lincoln presiding, despite the pre-ordained outcome, the proceedings took on a magisterial, yet solemn, air. Procedural regularity was unfailingly observed. Lawyers made their presentations calmly, earnestly, insistently and respectfully. The dispute was framed by opening statements from Stanley Matthews for the Hayes team and Charles O'Connor for the Tilden team. Matthews declared that the only question before the commission was "which certificates represent the votes of each states' lawful electors. This body should not look behind the certificates provided by the electors into alleged irregularities in the conduct of the election." And then he asserted that Republicans were the legitimate electors in the three disputed states and that the Democratic governor of Oregon had improperly appointed a Democratic elector when Hayes had clearly won the election there. For Tilden, O'Connor argued that the Commission should delve into the accuracy of the returns that resulted in the competing certificates: "The notion that this Commission may not ascertain the truth for itself is a common plea among persons who set up a falsely and fraudulently contrived title."

When evidentiary presentations began, David Dudley Field, lawyer for Tilden, offered evidence that Republican slates of electors were tainted by fraud in the conduct of the election. Mathews objected, arguing that the only issue properly before the commission was the identity of the electors, as recognized by state authorities. After they finished arguing, Lincoln prepared to submit the matter to a commission vote, first stating "before we vote, I feel compelled to clarify just what it is we are voting on. If Mr. Mathews' intent is for us to hear nothing at all pertaining to the conduct of the election, I would oppose his objection. When I was a young man

flatboating in Illinois, I encountered many difficulties, one of which was the necessity of loading a few dozen unruly hogs onto a barge that was bobbing on the Sangamon River. My partner had the ingenious thought that a blind hog would load easier than one who could perceive his destination, so he proceeded to sew seventy-two sets of eyelids shut, which turned out only to strengthen the resolve of our sulline cargo to remain on dry land. We were forced to sell those hogs for less than we paid for them, since the labor of unstitching their lids would fall on their new owner, as we were constrained to depart before we could undo our doings. Since then, I have always found decisionmaking with eyes open preferable to that with eyes shut, and thus I am inclined to allow the commission to hear at least some of the parties' evidence on each state's election, even if the ultimate question is resolved largely as urged by Mr. Mathews."

Setting the tone for the remainder of the commission's decisions, all eight Republicans sided with Mathews while all seven Democrats sided with Field, rendering vote fraud irrelevant while allowing the commission to peek at the extensive evidence of impropriety, if only for the historical record. This ruling took much of the wind out of the sails of the Democrats' arguments. Yet, the proceedings continued for four long weeks, punctuated by commission votes on evidentiary matters and the electors of each of the four contested states. As each consequential vote taken broke perfectly on party lines, remaining doubt about the outcome dissolved.

As the commission's deliberations progressed, Democratic leaders in Congress began planning efforts to obstruct the finalization of the vote. The idea was that if proceedings in Congress dragged on past March 4, the presidency would be deemed vacant and the incoming Democratic House of Representatives could elect Tilden. In the alternative, there was talk of renewed secession, or a confederation of Southern states that would ignore the federal

government for the next four years and seek a trade agreement with the United Kingdom, ever hungry for Southern cotton.

As word of this maneuvering became an open secret in Washington, Hayes instructed his supporters to approach leading Southerners to see if an arrangement could be made. The sides agreed to hold an off the record meeting to work out a compromise. Hayes's delegation included future President James Garfield, Stanley Matthews, John Sherman and Charles Foster. Southern Democratic interests were represented by a group that included Henry Watterson, Lucius Q.C. Lamar, Benjamin Harvey Hill and John Gordon. The parties agreed to meet at Wormley's Hotel in Washington, which they considered neutral ground. Proprietor James Wormley, a leading African-American businessman, maintained friendly relations with all sides in Washington. Wormley's hospitality was known world-wide, and he may have been the only African-American considered a friend by both Charles Sumner and Jefferson Davis. Sumner's affection for Wormley was so great that he presented Wormley with his personal copy of the Thirteenth Amendment that had been signed by more than 150 of the Members of Congress who voted to send it to the states for ratification. It was at Wormley's that Abraham Lincoln first dined out after the heartbreaking death of his son Willie, knowing that James Wormley would be a comforting presence in his time of distress.

The meeting took place beginning in the early afternoon of February 16, 1877, in an elegant dining room overlooking the Wormley property's beautiful grounds. The luncheon, served under Wormley's watchful eye, according to the printed menu, included Oysters, Mock Turtle Soup, Chicken Patties, Sheep's Head in an Egg Sauce, Small Potatoes, Tenderloin of Beef with Wild Mushroom Gravy, Sweetbread Croquettes with Peas, Roman Punch, Duck Salad, Ice Cream and Cake, Fruit and Coffee, all accompanied by the finest wines and liquors available

anywhere. The banquet was so distracting that the assembly did not get down to the business at hand until it was concluded. By then, the mood was buoyant and the alcohol nearly made fast friends of erstwhile political enemies.

After dessert, the group rose from the table and adjourned to a rectangle of couches under the hall's windows. No one noticed Wormley's framed copy of the Thirteenth Amendment hanging on a wall behind them. The discussion began in an alcoholic haze of cigar smoke, brandy or bourbon warming between the hands of some. Matthews made the opening gambit, saying "I trust we are all in agreement that Mr. Hayes is President-elect and nothing we do here today can alter that reality. What we need to accomplish now is an understanding that will facilitate the renewal of a fully-functioning national government, free from the discord that has infected our country for far too long."

Matthews' respondent was Benjamin Harvey Hill, who delivered what seemed to be a prepared speech of nearly 15 minutes, detailing the Democrats' grievances reaching back to the disenfranchisement of former rebels, the indignity of submission to the will of "Negro governments in rank conspiracy with carpetbaggers and scalawags who suppress the Southern white man and purloin every morsel of value they get their hands on, and the prolonged occupation of Southern territory by federal troops." Hill, a Georgian, had opposed secession because he feared that Civil War would end slavery. He served in the Confederate Senate as a strong ally of President Jefferson Davis. After the War he returned to the U.S. House, and when this gathering took place he was on the precipice of entering the U.S. Senate. He was among the greatest orators of his time, respected across the political spectrum for his political instincts and his honesty, but all knew that he had no sympathy for the view that Southern governments should respect the rights of Black people. And he even more strongly rejected the notion that the

federal government had any business legislating civil rights or intervening in Southern affairs on these matters. As he put it, “responsibility for the protections of the rights of the citizens of each state lies with the states, not in the national governors who have no sense of local conditions and local sensibilities, and at war’s end were not awarded the keys to our cities and villages.”

Federal enforcement of the civil rights laws in his and other Southern states, Hill proclaimed, was inconceivable and would likely be greeted “if not by renewed rebellion then certainly with resistance by whatever means right-thinking Southerners are able to muster.” He concluded with “a promise, gentlemen, that despite our friendly personal relations, if these injustices are not addressed, Mr. Hayes will not find his ascent to power easy, and if he manages to arrive at the acme, the landscape below may not be inviting.”

Mathews was outraged by this presentation, replying that “the gentleman certainly does not mean to suggest that the recent amendments to our Constitution are not as much a part of that great document as the provisions in the original text. The laws that the gentleman references were enacted in pursuance of those amendments and are effective throughout the country. Our Republican form of government does not admit of local variation on matters of the Constitution.”

As Mathews’ and Hill’s argument progressed, the mood in room was as dark as the view from the windows, where the sun had completed its journey below the horizon and little natural light remained. It seemed that their effort at resolution might fail. At this point, Ohio Senator and close Hayes ally John Sherman spoke up. He reminded the group that “we are not a legal commission presided over by President Lincoln and his colleagues. We are presented with two questions, one that admits of a single answer and one that presents possibilities for agreement. The former question is whether the Constitution and all the laws that have been passed under it, both predating and postdating the conflict, are in full force and effect throughout the country.

The answer to this must be in the affirmative lest we return to disunion and even conflict.

However, the degree to which those clothed in the uniform of the national government are the law's sole enforcers is another question altogether. It seems to me that if we can agree on these two principles—that all the laws are effective everywhere within the boundaries of the re-united United States of American and that each state should and will pledge their enforcement everywhere—we can also agree that the continued presence of federal troops in the Southern states is unnecessary and presents the potential only for interference and resentment.”

Hill piped up immediately, protesting that he could sign on to neither of Sherman's principles, but Lucius Q.C. Lamar grabbed Hill by the sleeve and quieted him down. Lamar was a shrewd political operator, and understood better than Hill what was on offer. He begged pardon and ushered his Democratic colleagues to the far corner of the room to confer.

Addressing Hill, he said “Ben, what they propose is that we pledge loyalty to the United States, which we have already done at War's end, and they will leave us alone.” Although it took a bit of persuading, Hill finally agreed that “Lucius, if you are correct, then although we may have to admit defeat in the battle for the presidency, we will have won the war for our future.” Back at the couches, Mathews was berating Sherman for making this “outrageous proposal. Would you,” he asked Sherman, “sit back while our Black citizens, such loyal supporters and for whom we fought the bloodiest war in our history, are re-enslaved?” James Garfield, who had remained virtually silent, until this time, supported Sherman's view. His words were prescient: “the fervor that supported national intervention into the affairs of the states has died down, and John's proposal, with which I know Rutherford endorses, is the only way we are might achieve the unity and stability we need going forward. And, as John knows better than any of us, the Treasury can no longer bear the expense without forcing the neglect of even more pressing needs. In my view,

the law will sooner adjust to these practical constraints than our Southern brethren will adjust to the continued presence of uniformed outsiders in their midst.”

When the Southerners returned to the table, little more was said. Both Hill and Mathews looked sullen yet resigned. The first to speak was Lamar, stating that “as it appears we are all in agreement on John’s two principles, and we are assured that this commitment is shared by Mr. Hayes, we foresee no further disruption when the electoral votes are counted at the conclusion of the Electoral Commission’s deliberations. We certainly agree to protect the legal rights of all citizens of the United States throughout the country and understand that federal troops are no longer needed.” Sherman then replied that he was “grateful for these assurances and the spirit of national unity from which they are derived. You can be assured that one of the first actions of the new administration will be to call the troops home, where they will reengage in our nation’s unified defense.” With these few words, uttered over final sips of brandy and bourbon among an overstuffed group of weary Washington insiders, the collective fate of millions of Black American citizens was placed at the mercy of white supremacists. It was perhaps the single largest slave auction in history.

Meanwhile, the commission pressed on. First the vote on Florida’s electors went to Hayes eight to seven followed by eight to seven on Louisiana, eight to seven on South Carolina, and a final vote of eight to seven awarding the single disputed Oregon elector to Hayes. The Oregon decision was, in the eyes of Tilden supporters, particularly galling because in that state, the certificate supplied by the electors was rejected after the Commission inquired into the evidence and rejected the Governor’s replacement of an allegedly ineligible Hayes elector with a Democrat. While in the other three states the Commission refused to look behind the

certificates, it took the opposite tack in Oregon so Hayes would prevail. An alternate certificate from three Republicans was accepted.

The Electoral Commission completed its work on February 23, sending along with its decision a lengthy statement by Chief Justice Lincoln, prepared with help from Republican Commission members Vermont Senator George Edmunds and Supreme Court Justices Joseph Bradley and Samuel Miller, outlining the commission's proceedings and explaining in detail the bases for its conclusions on each disputed elector. Lincoln stated that he was initially surprised by Congress's decision to create the commission over which he presided. *"Insofar as in a previous life curiosity led me to examine the process for electing our nation's chief magistrate, I had always understood that the President of the Senate was entrusted with sole discretion to open and tally the certificates provided by state electors, and that Congress's only role in the process was to bear witness to this solemn and glorious event, excepting of course the unlikely and unfortunate role of their chambers to select the President and Vice President from among viable candidates in case no contestant received, in the tally of the Senate's president, a majority. After the weeks of hearings before this commission, in which the disputants were given every opportunity to make their cases, which were listened to attentively by a group of fifteen commissioners sworn to impartiality and fidelity to the Constitution, I have come to understand that the gravity, complexity and extraordinariness of the situation begged for a solution as novel, as unanticipated and as carefully designed as this body, created as it was, by an act of Congress. Members of Congress have objected to the certificates chosen for tally by the President of the Senate, and we have been assigned the task of determining which of the certificates are the proper ones for including in the total."*

The Chief Justice then turned to the decision not to base the commission's determinations on the veracity of state returns or evidence of vote suppression and illegal casting of votes. *"We recognize that both Houses of Congress and the whole country knew full well that there were in the contested cases charges of fraud, perjury and forgery, and that it was expected that those charges would be heard and a true judgment would be given thereon. To inquire into all of this would have stretched the competence of this body beyond its limits, surpassed the constitutional role of the national authorities in determining the outcome of the presidential election and delayed our proceedings beyond the limits imposed by the expiration of the current incumbent's term as President. We would have been placed in the discomfiting position of deciding the country's most important political controversy possible in light of evidence that would have been by nature highly unreliable, as so much of the alleged improprieties would and could be testified to by only one side, by nature a partisan side, of the dispute. We have done our utmost to fulfill the function Congress assigned to us within the limits of the possible, guided by the signposts erected by the wise men who framed our Constitution."* He then explained that in each case, *"unfortunately, by a vote of the bare majority of this humble commission, the ruling was in favor of the certificates offered by the, in our view, properly and legally elected electors and, in the case of Oregon, the restoration of the original slate of electors selected by the people in their election."* The final tally, submitted to Congress, left Tilden stuck at 184 electoral votes, and put Hayes over the top with 185.

The Democrats on the commission also submitted an opinion roughly equal in length to that of the Chief Justice. It was signed by Commission Member and Supreme Court Justice Stephen Field but drafted, in large part, by Tilden lawyers Charles O'Connor and David Dudley Field. It began by going all the way back to the maneuvering that left the commission with a

Republican majority, which, they argued “*was clearly in defiance of Congress’s intent to entrust this investigation to a group that would not be dominated by one faction or the other. Once the seat became vacant it should have remained unoccupied. No recommendation at all would have been better than the sham that this process became.*” They then asserted that a sober examination of the evidence surrounding the elections in Florida, South Carolina and Louisiana “*could lead to only one conclusion, that the voters have chosen Samuel Tilden as President, while the state governments, in their last gasp of power, chose otherwise and superimposed their selection on the people through blatant and visible fraud, evidence of which was placed before this commission which chose, for obvious reasons, to ignore it and pretend it could not be seen. This body’s decision to ignore reality is, in my judgment, forbidden by every consideration of law and justice, and once revealed will shock the public sense, and when the knowledge of it reaches other lands, it will shock the wise and just throughout the civilized world. The refusal to hear and consider the most relevant evidence amounts to an abdication of the responsibility assigned to us by the Congress.*”

On the inconsistency between the majority’s treatment of the disputes in the Southern states and the dispute in Oregon, the statement read: “*This Commission has disappointed public expectation in its decisions. By a vote of eight to seven, this Commission has decided on purely technical grounds that Florida, Louisiana and South Carolina voted for Hayes, and by the same vote of the same members have, as I think, discarded these very same technical grounds to give the one disputed vote of Oregon to Hayes. I say this Commission has disappointed public expectation because the country expected of it that it would decide who had been elected President and Vice-President by the people. They did not expect of us that we would merely*

confirm the judgment of corrupt and illegal returning-boards who in effect put the presidency up to the highest bidder in the public market.”

After the Commission’s final votes were sent to Congress on February 23, the next step according to the Electoral Commission Act was for Congress to reconvene its concurrent session and then, if objections to the certificates were renewed, for each House to separately vote on the objections. Even though Congress faced an Inauguration Day deadline (March 4 at the time, but March 5 in 1877 because the Sabbath observing Hayes would not accept a Sunday inauguration) for completing this process, it did not reconvene until March 1. This was risky because the Constitution is silent on what happens if no new President is selected by Inauguration Day. News of the informal agreement reached at Wormley’s had spread throughout Congress, but renegade Democrats sensed an opportunity, theorizing that if they renewed their objections to the four disputed certificates approved by the commission, they might be able to delay the final determination until after March 4, at which point, their theory went, the presidency would either be decided by the House of Representatives as provided for in the Twelfth Amendment or, if the process of determining objections to certificates would continue, as of March 5 it would be in the new Congress which would be under complete Democratic control for the first since the presidency of James Buchanan. The electorate, it seemed, at least the white electorate, had tired of Republican policies and was ready to re-embrace white supremacy as a guiding principle in American society.

The proceedings before Congress began with Senate president pro tempore Ferry reading and tallying state electoral vote certificates in alphabetical order, beginning with Alabama. When he reached Florida, he announced that, consistent with the decision of the Electoral Commission, Florida’s four electoral votes are awarded to Rutherford B. Hayes.

Immediately, James Throckmorton, former Texas governor and now a lame-duck Member of the House, and Florida Senator Charles Jones rose to object on the ground that, in Throckmorton's words, "this certificate, and those from Louisiana and South Carolina, as well as the allocation of all three of Oregon's electors to Hayes, represent, by overwhelming evidence, fabricated and fraudulent vote returns. I am joined by my colleague Mr. Jones in urging the Congress to reject the conclusions of the commission, which contrary to our expectations, turned out to be a partisan charade, and award Florida's four electoral votes to James Tilden." In response, Ferry ruled that objections to certificates that had been ruled on by the Electoral Commission were out of order under the provisions of the Electoral Commission Act which required that Congress follow the commission's decisions. Therefore, he determined, there would be no separation of the Houses to debate and vote on the objections.

Things went smoothly until Ferry reached Wisconsin. As soon as he announced that the state's ten electoral votes were awarded to Hayes, by a certificate that had not been previously a subject of dispute, New York Congressman (and future Mayor of New York City) Abram Hewitt, the chairman of the Democratic National Committee, joined by Senator Jones, challenged the votes, although on just what grounds he did not say. Under the Act, Ferry had no choice but to direct that Senators re-convene in their chamber while the House debated the matter. In the Senate, only Jones insisted on being heard and his brief remarks focused on the fraud and intimidation that, in his view, rendered the Florida certificate of votes for Hayes "less trustworthy than the word of an imbecile." After a bit more grumbling, the objection was overruled by an overwhelming voice vote.

In the House, after nearly endless debate on procedural motions that would have stopped the objection in its tracks, Hewitt and Throckmorton engaged in a filibuster during which they

read from affidavits and newspaper accounts detailing fraud, violence and intimidation in Florida, Louisiana and South Carolina. They also read the Democrats' dissenting statement from the Electoral Commission report. Hewitt intended a three day filibuster which would allow the newly-Democratic House to elect Tilden on March 5. His plan failed. When Throckmorton took the reins of the filibuster at 3 am and began re-reading the packet of affidavits from Louisiana, House Speaker Samuel Jackson Randall cornered Hewitt and told him "It is time for us to confirm this election. On behalf of leadership, I offer you carrot and stick. Relent now and you shall have our support in your efforts to reenter this House or when you strive for further elective office. Continue and the barriers to your return will become insurmountable." Hewitt got the message and at about 4:15 am, with Throckmorton pleading fatigue and hunger, he halted his efforts and allowed the outgoing Republican House to vote to reject his objection. It was then, and only then, in the early morning hours of March 2, 1877, that Rutherford B. Hayes was declared the winner of the election of 1876 and would, without doubt, be inaugurated three days later as the nineteenth President of the United States. Actually, Hayes took the oath in the evening of March 3 at a dinner hosted by outgoing President Grant, to preempt a rumored attempt by Tilden to stage an inauguration in New York City on March 4.

The Wormley's agreement was never mentioned in any official setting, but it was certainly on the minds of Southern Members of Congress, who looked with hope to the day that their states would finally and absolutely throw off the yoke of "carpet-bag misrule" and become, once again, masters of their own destinies and the destinies of their fellow citizens unlucky enough to be members of the subjugated race. And masters they became. As soon as federal troops were removed, Democrats openly instituted their oppressive racial policies while white militia stormed the statehouses in Louisiana and South Carolina, drove out the Republican

governors and established Democratic white-supremacist governments that enforced the color line with an iron fist.

Author's note: This is a fictionalized version of the Electoral Commission's proceedings that draws, in large part, on official records, but of course without involvement of Abraham Lincoln. The Wormley's conference took place but my account includes substantial embellishments. This story also contains a somewhat truthful account of the Commission's decision and the proceedings in Congress. In addition to several historical accounts, I relied heavily on *The Electoral Count of 1877: Proceedings of the Electoral Commission and of the Two Houses of Congress in Joint Meeting Relative to the Count of Electoral Votes Cast December 6, 1876 for the Presidential Term Commencing March 4, 1877*, Washington Government Printing Office 1877, which is largely a transcription of the proceedings of the Electoral Commission of 1877 which was created by an Act of Congress to determine which electoral votes should be counted from the disputed states, Florida, Louisiana, Oregon and South Carolina. I accessed this volume online, including a copy that resides in the Harvard Law Library that was digitized by Google Books.

https://www.google.com/books/edition/Electoral_Count_of_1877/LxKEAWbQuccC?hl=en&gbpv=1&dq=electoral+count+of+1877&printsec=frontcover. *Electoral Count of 1877: Proceedings of the Electoral Commission and of the Two Houses of Congress in Joint Meeting Relative to the Count of Electoral Votes Cast December 6, 1876, for the Presidential Term Commencing March 4, 1877*. Washington, DC: Government Printing Office, 1877. An inscription indicates that Harvard's copy was donated to the library by Supreme Court Justice Nathan Clifford, who presided over the actual commission.