PROLOGUE

> "There is now no law, and there has never been a law, providing what shall be done in case of a contested election of presidential electors."
>
> Representative James A. Garfield, March 24, 1868

IN APPROACHING THE DISPUTED Presidential election of 1876 one should bear in mind certain basic constitutional provisions.

By Section 1 of Article II,

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Then by the language of the Twelfth Amendment, adopted in 1804,

> The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, . . . ; they shall name in their ballots the person voted for as President, and in distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. . . .

Here it becomes relevant to quote from Article I, on the organization of Congress, that

> The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.
>
> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President. . . .

Resuming quotation from the Twelfth Amendment,

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. . . .

Counted by whom? Inferentially by the President of the Senate? But he would be a prominent politician, perhaps himself a candidate for the Presidency, or for reelection as Vice President. Was that an acceptable answer?

The Twelfth Amendment continues, establishing the possibility of election by the House:

> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. . . .

Under this provision in 1824 the election had been by the House. Jackson had received 99 electoral votes; John Q. Adams, 84; W. H. Crawford, 41, and Henry Clay, 37. On resort to the House, Adams received the votes of 13 States to 7 for Jackson.

If electoral proceedings were ever again brought to this extremity, conceivably a majority of the States, dominated by one party, though woefully misrepresentative of the nation as a whole, might elect the President. A far more worrisome possibility was that conflicting certificates might be sent up from a State in disorder.

On March 24, 1868, Garfield offered a resolution in the House of Representatives:

> That the Committee on the Judiciary be directed to inquire into the expediency of providing by law for the settlement of contested elections for electors of the President and Vice President of the United States, and that they report by bill or otherwise.

He explained,

> It seems to me it would be a great calamity should the time ever come when one State of the Union, perhaps holding the balance of power,

should appear in the Electoral College by two sets of electors, and there was no provision to settle the question.[1]

The resolution was adopted, but no such measure was reported.

The likelihood was that if such a deadlock occurred in the course of the next few Presidential elections it would be in one or more of the Southern States restored to representation, and that hostility to blacks would be at the root of the difficulty.

When Garfield spoke it was not quite three years since Lee's surrender, Lincoln's death, and the accession of Andrew Johnson to the Presidency. Under Provisional Governors the rebel States had enacted black codes and maintained pre-war institutions for white rule, minus "slavery." When the 39th Congress convened on December 4, 1865, the President's message had announced that "gradually and quietly" he had brought the insurrectionary States to the point where they were prepared "to resume their places in the two branches of the national Legislature, and thereby complete the work of restoration."[2]

At that moment ratification of the Thirteenth Amendment had been completed:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

Eight of the States not yet restored to representation had been counted for ratification.

If Johnson's prescription had been followed by Congress the errant States would have been subject to no additional restraint beyond the abolition of "slavery." They would have joined their friends the Northern Democrats, with the prospect that in the reapportionment following the Census of 1870 the former "Slave States" would gain in relative strength over the "Free States" in the House of Representatives and the Electoral College, inasmuch as former slaves would be counted as "free persons," no longer at three-fifths of their number.[3] It would have seemed possible soon to elect a Democratic President, well disposed to claims by the South. For a people defeated in their rebellion, what more could be asked?

Congress, each House dominated by Unionists, determined first to establish additional guaranties to secure the results of the war. A Joint

[1] Cong. Globe, 40–2, 2083.

[2] Cong. Globe, 39–1, App. 1, 2.

[3] Constitution, Art. I, Sec. 1, cl. 3.

Committee on Reconstruction set about framing a Fourteenth Amendment. Meanwhile the Civil Rights Act of April 9, 1866, carried over a veto, declared persons born in the United States to be citizens, with equal right to contract, sue, give testimony, and to have equal benefit of laws for the security of person and property.[4] Also over a veto, a Freedmen's Bureau Bill had extended military jurisdiction to protect the civil rights of citizens in the South.[5]

On June 13, 1866, the Fourteenth Amendment was submitted to the States. It made clear that blacks born in the United States were citizens thereof; no State should deprive any person of life, liberty, or property without due process of law, or deny equal protection of the laws. It did not secure black suffrage, but Section 2 sought to reduce the representation of any State in proportion to the number of adult males it excluded. Section 3 would bar from holding office, but not from voting, all persons who had given aid to the rebellion *after having taken an official oath to support the Constitution*.

Tennessee, under Republican control, made haste to ratify, and on July 24 was restored to representation under a joint resolution reciting that the consent of Congress was requisite to readmission.[6]

The line had been drawn for the autumn election of Members to the 40th Congress: would the voters in the loyal States endorse the work of the 39th Congress—or would they support President Johnson and the Democratic party? The President went on an electioneering trip to Chicago and St. Louis, with stops along the railroad line. He reverted to his unguarded acrimony—mortifying his well-wishers and alienating the voters.

The election in November 1866 was an unprecedented triumph for the Republican party, which in the 40th Congress would have a preponderance of nearly 3 to 1 in the House and nearly 4 to 1 in the Senate.[7]

When the 39th Congress returned for its Second Session it found the unreconstructed States rejecting the Fourteenth Amendment as degrading: they supposed that if they held together the Amendment must fail for want of ratification by three-fourths of the thirty-seven States. Kentucky, Maryland, and Delaware were also rejecting.

Congress was not going to allow itself to be frustrated so easily. Proceeding from measures considered at the First Session, it settled on a bill "to provide for a more efficient Government of the Rebel States," which being carried over a veto became the Act of March 2, 1867.[8] When a State had by impartial suffrage framed a constitution in conformity with

[4] 14 Stat. 27.
[5] 14 Stat. 173.
[6] 14 Stat. 364.
[7] *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, VI, 117–33, 182.
[8] 14 Stat. 428.

the Constitution of the United States, and had ratified the Fourteenth Amendment, it would be entitled to representation in Congress. Meanwhile the States were divided into five military districts, each under a general officer. Any civil government then existing would be subject to the paramount authority of the United States in all respects.

The 40th Congress met on March 4, 1867, and on March 23 passed a Supplementary Act providing detailed steps whereby a State might be readmitted to representation.[9] An impartial registration would be held of adult males qualified to vote. Then the commanding general would call an election for delegates. Those in favor would vote *for a convention,* those opposed would vote *against a convention;*

> Provided, That such convention shall not be held *unless a majority of all such registered voters shall have voted on the question* of holding a convention. [Emphasis supplied.]

Thus if obstructionists registered, and then stayed away from the election in a number amounting to a majority of those registered, they would defeat the Congressional plan and cause the State to remain under the control of the commanding general—a result they considered highly desirable: black suffrage would be averted, and time would have been gained for a Democratic victory at the polls, or perhaps the Supreme Court would hold the Reconstruction measures unconstitutional. But if they failed in their obstruction, they would have surrendered constitution-making to white Radicals and blacks—a result Congress had not intended.

The experience in Georgia was typical: The returns from registration were

96,333	whites
95,168	colored
191,501	total

Of those registered, only 106,410 came to the polls. They voted as follows on calling a convention:

For:			Against:		
32,000	whites		4,000	whites	
70,283	colored		127	colored	
102,283	total		4,127	total	

Of the whites registered, 37 percent came to vote; of the colored, 74 percent. The great mass of conservative whites had spurned the proceedings.

[9] 15 Stat. 2. A reasoned discussion of the various solutions considered in reaching the two statutes is set out in VI, 333–43.

The convention called by General Meade met at Atlanta on December 9, 1867. The constitution it framed was submitted to the people on March 11, 1868, and was ratified by 89,007 votes against 71,309 opposed.[10]

Proceeding under the Congressional plan, seven States had by the end of July 1868 ratified the Fourteenth Amendment and been declared by Congress to be readmitted to representation: Arkansas, North Carolina, South Carolina, Louisiana, Alabama, Florida, and Georgia. In June and July their Representatives had been seated and (except for Georgia) so too had their Senators.

Virginia and Mississippi had run into difficulties,[11] and Texas had been coming along slowly. Those States—and Georgia—would not be restored until 1870.

CONTRETEMPS IN GEORGIA (1868)

PERVERSE ACTION IN GEORGIA now gave early warning of commotion that could arise between House and Senate over the counting of a State's electoral vote.

The legislature chosen under the State's new constitution met on July 4, 1868. On the twenty-first it ratified the Fourteenth Amendment. All seemed to be in order for Georgia to resume its place in the Union. Six Representatives—two Democrats and four Republicans—had been seated. A seventh seat had been contested, and remained vacant.

On September 15, however, the lower house of the legislature expelled its twenty-five black members by vote of 83 to 23. The Senate followed suit. The vacancies were to be filled by those who had stood next in the polls. "The [white] Radicals and Democrats seem to be united on this question," the *Augusta Chronicle & Sentinel* reported, "for without the aid of the former it would have been impossible. . . ." "WELL DONE," said the *Atlanta Constitution;* "we congratulate the people of Georgia on their return to a 'white man's government.' . . ."

When the 40th Congress met on December 7, 1868, for its third and short session that must end by March 3, there was indignation over the action in Georgia but uncertainty what to do about it. One reaction was that there should be a constitutional amendment to secure *the right to hold office,* as well as the right to vote, against denial on account of race. This concern would loom large when in a few days debate began on a Fifteenth Amendment.

Quite aside from that, should Congress now declare that Georgia,

[10] VI, 412–13.

[11] VI, 406–32.

by reason of the action of its legislature, was not entitled to readmission to representation? For want of time, that matter was deferred.

One question, however, demanded instant attention: when the result of the recent Presidential election was announced, should Georgia's nine electoral votes be included? In December 1868 all the world knew that Grant and Colfax, the Republican candidates for President and Vice President, had been elected and would be so declared with 214 electoral votes. The Democratic candidates, Seymour and Blair, would have 80 or 71 votes, depending on whether Georgia's votes were included or excluded.

On February 6, 1869, Senator George F. Edmunds introduced a concurrent resolution to meet the situation:

> Whereas the question whether the State of Georgia . . . is entitled to representation is now pending and undetermined, [if the counting or omitting of the electoral votes from Georgia] shall not essentially change the result, the Presiding Officer would announce what the result would be in the one case and in the other, but that in either case _____ is elected President. . . .[12]

The Senate adopted this proposal and the House concurred.[13]

On February 10, 1869, at a joint convention, the President pro tem. of the Senate, Benjamin F. Wade of Ohio, began opening the certificates, which were then announced by one of the tellers. When, last of all, Georgia was reached, Representative Benjamin F. Butler of Massachusetts objected on four grounds: first, that the electors had not met and voted on the day fixed by law; other objections were that Georgia had not been readmitted; that it had not fulfilled the requirements of the Reconstruction Acts; and that the election in Georgia in November had not been free and fair. Edmunds addressed the chair: the objection was out of order, since in regard to Georgia the concurrent resolution had changed the rules. Representative Butler: "the votes must be counted or rejected by the convention of the two Houses," notwithstanding any prior concurrent resolution; "this is a matter of constitutional law and in other times may make great trouble. . . ." The President pro tem.: "Objection being made, the Senate will retire to their Chamber to deliberate. . . ."[14]

What was the question to be decided? Butler's first objection, that the electors had not voted on the day fixed by law, was something quite aside from the status of Georgia. Hence, in his view, it fell outside the scope of the concurrent resolution. Edmunds' contention was that the

[12] Cong. Globe, 40–3, 934. Edmunds used a form that had been adopted in certain other instances where the decision of a difficult question would make no substantial difference.

[13] Ibid., 978, 971–72.

[14] Ibid., 1049–58.

concurrent resolution governed the entire matter: the announcement should be that Georgia's vote, counted or not, would make no difference. If the House were to vote to sustain Butler's objection and say "No" to counting the votes, and the Senate were to sustain Edmunds' position, there would be a variance between the decisive "No" and the evasive "No matter."

And so it happened. In the House, the question was put, Shall the vote of Georgia be counted? The response was 41 yeas (almost all from Democrats) to 150 nays. In the Senate, Edmunds proposed "that under the special order . . . the objections . . . are not in order." On that resolution the vote was 32 yeas to 27 nays.

When the Senators returned to the Hall of the House, Wade resumed the chair and announced,

> The objections of the gentleman from Massachusetts are overruled by the Senate, and the result of the vote will be stated . . . under the concurrent resolution. . . .

The difference between the two Houses would have been awkward enough, but the statement that the Representative's objections were *overruled by the Senate* proved to be fighting words.

Butler precipitated what soon became a disgraceful commotion. "I do not understand that we are to be overruled by the Senate in that way. . . . I know I speak the sentiment of the House. Do I not?" There were cries of Yes!, Yes!, also of Order! Order! while the President reiterated that "The tellers will perform their duty under the concurrent resolution as directed." The reporter interjected "great confusion," "laughter," "great uproar"; "Renewed shouts of 'Order!' " Butler: "I move that this convention now be dissolved, and that the Senate have leave to retire." The President: "The tellers will now declare the result." Senator Conkling, a teller, "amid great noise and disorder" then announced the result, that Grant had received 214 votes, Seymour 80 or 71, etc.

As soon as the Senate had withdrawn and the Speaker had resumed the chair, Butler was on his feet with a resolution, that what the President pro tem. had done "was a gross act of oppression and an invasion of the rights and privileges of the House." Debate followed until adjournment that day (Wednesday, February 10), and was continued on Thursday and Friday.

The discussion ranged widely. Shellabarger of Ohio, Republican, inferred from the text of the Constitution that "in the absence of legislation," the counting of electoral votes would be *by the President of the Senate;* "the opening and counting together" seemed to be one act. Surely, replied Thomas of Maryland, a Democrat, "It cannot be that

[Representatives and Senators] should sit by here and permit the President of the Senate to make a false count . . . thus, perhaps, throwing the country into confusion.'' He concluded that ''Congress had the power, by law or by joint resolution, not only to prescribe the manner in which the vote should be counted, but to inquire into the validity, the sufficiency, the actuality of the votes that might be presented to the Vice President to be counted. . . .''

Garfield recalled that there was need to provide by law for the settlement of contested elections for electors of the President: a year before he had raised that matter in a resolution still before the Judiciary Committee. On the immediate question, however, it was his view that the concurrent resolution on Georgia governed ''to the exclusion of all other rules.'' The language of Wade's announcement was not strictly correct, but it was not ''worth while to dispute about the mere form of words.'' Butler, he said, had displayed ''a manner and bearing of unparalleled insolence.'' If the President pro tem. had faltered before the ''unseemly clamor,'' we might have ''found ourselves in chaos after the 4th of March next, with no President-elect. . . .''

During the debate Butler became less audacious. He modified his motion to omit the censure. ''I have never believed . . . that Ben Wade meant to do . . . a wrong act.''

Logan of Illinois brought a cessation by an appeal ''to reflect, as cool, honorable, just men who would not knowingly wrong anybody''; he moved ''to lay this whole subject on the table,'' and so it was ordered by vote of 130 to 55.

If such a storm could be raised by one Congressman against a Senator of his own party, where the difference was over a nice question of no practical consequence, how intense would be the controversy eight years later when the Presidency was at stake after an election viewed as decisive for the future and the Houses were controlled by opposing parties!

THE SENATE IN SEARCH OF A RULE, 1875–76

ACCOUNTS OF THE DISPUTED ELECTION have ignored the effort of Senators in February 1875, renewed in March 1876, to frame a proper measure to regulate the counting of electoral votes, including cases where conflicting returns were sent up from a State. It was an exercise in innocence and truth, in patriotism and faith. Wisdom, however, had to wait on dilatory Time, and when the crisis arose there still was no regulation, and the interest of party became paramount. We shall be enlightened to learn Members' sincere views as disclosed before the test came.

(When in December 1876 it became evident that the election had produced a controversy, House and Senate each appointed a committee to seek a mode of resolving the difference. Henry B. Payne of Ohio was chairman of the select committee of the House. He caused a volume of precedents to be compiled, a book of 807 pages, *Counting Electoral Votes. Proceedings and Debates in Congress relating to the Counting of Electoral Votes,* including proceedings in the constitutional convention of 1787 [House Document No. 13 Miscellaneous Documents, 44th Cong. 2d Sess.] In addition to citing the *Congressional Record* we shall cite also to the equivalent place in *Counting*.)

Back in February 1865 when the counting of electoral votes was at hand the two Houses resolved that the States in rebellion were ineligible to join in the voting; accordingly it was declared by the 22d Joint Rule that "no vote objected to shall be counted except by the concurring vote of the two Houses."[15]

Ten years later, on February 4, 1875, the Southern States being restored to the Union, but with some internal disorder, the Senate near the close of the Second Session of the 43d Congress took up a concurrent resolution reported by Morton from the Committee on Privileges and Elections:

> That the twenty-second joint rule . . . is hereby repealed.

But then Morton said that in the light of consultation with other members he offered a substitute:

> That the twenty-second joint rule . . . be so amended that no objection to the reception and counting of any electoral vote or votes from any State shall be valid unless such objection is sustained by the affirmative vote of the two Houses.[16]

Bayard of Delaware, Democrat, spoke at once, "without having given the examination or consideration to this subject that its importance demands. . . ."

> I confess that I do not see where the power can possibly be found which is assumed by the joint rule, either as it now stands or as it is proposed to be amended, giving the two Houses of Congress right to say whether votes shall be counted or not be counted. The Constitution declares that the electors of the States, chosen in such manner as the people in those States shall see fit to direct by law, shall have their certificates of election signed and certified *by themselves;* and when they have been

[15] Cong. Globe, 38–2, 505, 608.

[16] Cong. Rec., 43–2, 969; *Counting*, 444.