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2003 ALBRITTON LECTURE: THE SUPREME COURT AND THE DISPUTED ELECTION OF 1876

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Two years ago I was scheduled to give the Albritton lecture here at the University of Alabama. I was prevented from speaking because the University was a party to a case then pending before the Court. Last year, the night before I was to visit I fell and injured my leg, requiring surgery from which I am still recovering. I am glad that this—the third time—is the charm.

I shall talk to you this morning about a disputed Presidential election—not the one of 2000, with which you are all undoubtedly familiar, but the one of 1876. In that year Rutherford Hayes, the Republican candidate, ran against Samuel Tilden, the Democratic candidate. The electoral votes of four states—South Carolina, Florida, Louisiana, and Oregon—were disputed. The magic number of electoral votes needed to win the Presidency is now 270, but then it was 185. The Republicans conceded that Tilden had won 184 electoral votes, and so he needed to receive only one of the disputed votes in order to become President. Congress submitted the matter to an Electoral Commission consisting of five Senators, five Representatives, and five members of the Supreme Court; that Commission, by a vote of eight-to-seven, awarded all of the disputed electoral votes to Hayes, and he became President. I shall focus particular attention on the role of the Supreme Court Justices sitting on the Commission, and conclude with a discussion of the larger question of the wisdom of members of the Supreme Court taking on extrajudicial duties.

In the centennial year of 1876, the Republicans had occupied the White House since the election of Abraham Lincoln in 1860. The Democratic Party had been almost done in by the Civil War, and the Presidential elections of 1864, 1868, and 1872 had not even been close. But 1876 looked like it might be different. The Panic of 1873—as depressions and recessions were called in the nineteenth century—had brought with it hard times, and the Democrats had gained control of the House of Representatives in the

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election of 1874. The scandals which occurred during the eight-year Presidency of U.S. Grant—beginning in 1869—shocked not only Democrats but Republicans, and the cry of "reform" was in the air.

Republicans up until now had "waved the bloody shirt" as the expression went, denouncing the Democrats as rebels and traitors, and charging them with some justification of wanting to undo the post-Civil War efforts being made to bring the newly freed slaves into society as citizens. The Democrats were building what would become the "solid south"—guaranteed large Democratic majorities in the states (such as Alabama) which had seceded—obtained in part by intimidation of black voters. Federal troops still supported reconstruction governments in the states of South Carolina, Florida, and Louisiana.

The Republican candidate was Rutherford B. Hayes of Ohio; like many other Republican candidates in the post Civil War era he had been a Union General in the Civil War; he had also been a member of Congress, and Governor of the State of Ohio. Henry Adams, the New England author and critic, described Hayes as "a third-rate nonentity whose only recommendation is that he is obnoxious to no one." Adams was scarcely fair to Hayes in this hypercritical evaluation, and at this particular time in the Republican Party, being obnoxious to no one was a very strong recommendation.

The Democratic candidate was Samuel Tilden of New York. Tilden was a lifelong hypochondriac, and a rather cold and unlovable individual. He never married, and there does not appear to have been much intimacy in his life. He was a highly successful corporate lawyer who made a great deal of money practicing his profession, and, as one critic put it, feeding off the corpses of dead railroads. But he had also had an impressive career as a reformer, somewhat belatedly joining the attack on the Tweed Ring in New York City, and then while Governor of the State smashing the "Canal Ring" in upstate New York. In those days, candidates did not tour the country speaking on their own behalf, but left that to surrogates. Tilden would not have been nominated today, because he was not telegenic. Hayes was very likely less intelligent than Tilden, but considerably more likeable.

On the evening of election day, as telegraphic returns came into Republican headquarters in New York, Tilden had run better than expected in the north, carrying his own state and several others; although the Pacific Coast states had not yet been heard from, he appeared to be the victor. Zach Chandler, Chairman of the Republican National Committee, disappointedly turned in about 10 o'clock in the evening with a bottle of whiskey, as he was wont to do. But Dan Sickles, Republican leader in New York, came by headquarters to check the returns, and there he met John Reid, editor of the *New York Times* and a strong Republican partisan. Checking the returns carefully, it appeared that if Hayes carried the Pacific Slope states as expected, Tilden was assured of only 184, and not 185 votes. There was uncertainty about the vote in South Carolina, Florida, and Louisiana, where federal troops were still stationed to guard the polls. They roused Chandler from a drunken stupor, and issued a statement saying that Hayes appeared to

have been elected with 185 votes. They then sent out telegrams to Republican leaders in Florida, South Carolina and Louisiana, saying that if they could hold their states for Hayes, he would be elected. The dispute had begun.

South Carolina appeared to be legitimately Republican, but both Florida and Louisiana were extremely "iffy." Tallies of votes by counties or parishes throughout the state were sent to a "returning board" for the entire state. This board could not only tally the votes, but had authority to throw out votes on account of fraud, voter intimidation, or other improprieties. Louisiana's incumbent Republican Governor Kellogg himself had been named Governor in 1872 after his rival garnered nearly 10,000 more votes.

In Florida, the Democrats relied upon economic intimidation to force blacks and white Republicans to vote Democratic. The Republicans, who controlled the election machinery by virtue of the incumbent Republican governor, countered with fraud—planning simply to stuff the ballot boxes with enough extra votes to ensure a Republican victory. Some similar antics went on in South Carolina, but it appeared that that state had authentically voted for Hayes.

On November 8, 1876, the result of the election was proclaimed by the press to be in doubt—due to the quick thinking of the Republican functionaries the previous evening. Both the Democrats and the Republicans quickly sent teams of party statesmen to Louisiana and Florida to witness the proceedings of the returning boards. There were no early morning flights out of Reagan National Airport to Miami in those days, as there were in November, 2000. Indeed, Miami was not even incorporated as a city until 1895, and its population in the 1900 census was less than 2,000. So the statesmen moved more slowly, by railroad and steamship, to their destinations in the disputed states. In Florida, rampant fraud on both sides was reported, and it appeared that out of over 48,000 votes cast, one party would win by less than 100 votes. On December 6th, the Hayes electors were declared the winners by over 900 votes. But an alternate slate of electors was returned for Tilden. Similar duplicate slates were reported from Louisiana and South Carolina.

The United States Senate at this time was controlled by Republicans, and the House of Representatives by Democrats. An earlier rule for joint sessions of the two bodies had provided that electoral returns would be accepted unless both houses object to them, but that rule had been allowed to lapse. Since Congress was the ultimate authority for deciding who had been elected, both parties scrambled for advantage. Finally the plan which ultimately prevailed took shape: the appointment of an Electoral Commission.

There was general agreement that there should be five members of the House on the Commission, five from the Senate, and five members of the Supreme Court. It was perfectly clear from these discussions that the ten Congressional members would be divided evenly between Democrats and Republicans. But there was more difficulty in deciding how the Justices of the Supreme Court should be chosen. Almost agreed to was a proposal to

take the six senior Associate Justices (three Republican appointees, two Democratic appointees, and Justice David Davis, who was regarded as an Independent) and eliminate one by lot. Tilden's representatives took the proposal to him, and he was reportedly "livid." He thereupon coined one of the few bons mots ever attributed to him, saying:

"I may lose the Presidency, but I will not raffle for it."

Finally a plan was agreed to whereby the Supreme Court members would be Republican appointees William Strong and Samuel Miller and Democratic appointees Stephen Field and Nathan Clifford. These four would choose a fifth member of the Court, and it had been tacitly understood that their choice would be David Davis of Illinois. David had been appointed by Lincoln, but he was regarded as a genuine Independent and ambitious for a Presidential nomination himself. In late January, this plan had passed one House of Congress and was slated to pass the other.

But meanwhile, in Springfield, Illinois, the Illinois legislature with the support of all but two Democrats, elected Justice David Davis to represent Illinois in the Senate. Davis now declined to serve as the fifth Justice on the Electoral Commission. The other four members urged him to reconsider; he refused, and they then chose Justice Joseph Bradley, who had been appointed by President Grant in 1870. The Democrats would have preferred Davis, but Bradley was the least distasteful choice they had among the remaining Justices.

The selection of the fifteenth member of the Commission was a momentous one. Not only would he be regarded as the "casting vote" on the Commission, but the law creating the Electoral Commission was crafted in such a way that the Commission's rulings would in fact determine the result of the election. Its report to Congress could be overturned only by disapproving votes in both the House of Representatives and the Senate. Since the House was controlled by the Democrats, and the Senate by the Republicans, it was inconceivable that the Commission's report would be disapproved by both Houses no matter which way it ruled. And now Bradley was the fifteenth member.

If we step back a moment and look at how the drama is developing, we see something in addition to a high-level political drama being played out; we see a very reassuring example of how the United States 125 years ago was a largely classless society, albeit of white men, with opportunity for even the poorest. Joseph Bradley was born one of 16 children to parents who engaged in subsistence farming in a small hamlet south and west of Albany, New York. Samuel Tilden was born to slightly more affluent parents about 30 miles away; his father sold patent medicines for a living. Hayes, whose mother was already a widow at the time of his birth, came from the small town of Fremont in northwestern Ohio.

When Joseph Bradley at age 18 decided if he were ever to get an education, he must leave the farm, he walked from Albany, New York, to New

Brunswick, New Jersey, in order to begin his education at Rutgers. Hayes' family was neither impoverished nor affluent; when he attended Kenyon College, in Gambier, Ohio, he walked the 60-mile distance in both winter and summer. One of these three men would decide which of the other two would serve as chief magistrate of the United States.

Bradley's position on the Electoral Commission may have been advantageous to the Republicans, but it was not at all advantageous to him or his reputation. If he voted with the Republicans, he would be condemned as a party hack, rather than an honest jurist. If he voted with the Democrats he would doubtless be praised as an independent arbiter, but denounced by all the elements of his own party which had placed him where he was. As it happened, he would be subject to largely undeserved opprobrium from a hostile Democratic press.

The Electoral Commission began its meetings on February 1, 1877, and it was not until a week later that it made its first ruling on the case from Florida. Both parties had retained the ablest counsel in the nation, and oral arguments before the Commission went on for several days. Finally counsel were told to argue the question of whether the Commission was authorized to "go behind" the certificate of the electoral votes sent in by the Governor of the state, and attempt a recanvass of challenged votes itself. The Democratic argument was easier to understand than the Republican one; they claimed that the state Returning Board in Florida had fraudulently disallowed perfectly valid vote tallies sent into it, and also pointed out that Florida courts, after the Republican electors' votes had been sent into the President of the U.S. Senate, had held that the Returning Board acted illegally in awarding the state's electoral votes to Hayes. They insisted that the Commission must "go behind" the certificates and ascertain for itself whether the Florida Returning Board had acted fraudulently in disallowing votes.

The Republican argument was that, in the first place, the Commission, as a creature of Congress, could do nothing by way of "going behind" the returns that a joint session of Congress could not do. They pointed to the relevant Constitutional provisions, which seemed to leave the matter in the hands of the states. The Constitution authorized each House of Congress to inquire into disputed elections of its own members, but gave no similar authority in the case of a state's choice of Presidential electors. Finally, said the Republicans, allowing even Congress itself to "go behind" the certificates would open up an avenue for partisan maneuvering in Congress in the case of any future disputed election.

On February 6th and 7th, the members of the Commission delivered their opinions in a closed session. Bradley voted with the Republicans, and the Commission decided by a vote of eight-to-seven that it would not receive any evidence "going behind" the certificates sent to the President of the Senate. This ruling, in effect, assured Hayes of the electoral votes of Florida and Louisiana. South Carolina had concededly gone for Hayes, and the challenge to a single Oregon elector on technical grounds was rejected.

The Senate quickly accepted the Commission's decision, but it was not until the early morning of March 2nd—two days before inauguration day—that the House finally voted and Hayes was declared elected. The two Democratic Supreme Court Justices boycotted the inauguration, and one, Nathan Clifford, would not set foot in the White House during Hayes' entire term as President. But Hayes was a better President than some of his detractors predicted, and the nation as a whole settled down to a more normal existence. The political processes of the country had worked, admittedly in a rather unusual way, to avoid a serious crime.

Many Democrats were understandably bitter about the result, and Democratic newspapers denounced the members of the Commission who voted to give the disputed electoral votes to Hayes. Bradley, in particular, was picked out as a villain. Several months after Hayes' inauguration, the *New York Sun* carried a story saying that the night before he was to cast his vote in the Florida case, Bradley had shown a friend a copy of an opinion which favored Tilden. Sometime between midnight and sunrise, the story said, Republican politicians came to Bradley's house and persuaded him to change his vote. This was a far more serious calumny than the charge of voting with his party; if it were correct, he had yielded to party pressure against his honest judgment.

The charges were based entirely on rumor and hearsay, and Bradley flatly denied them. It is difficult after all this time to sift truth from innuendo and falsehood, but, at least in my opinion, Bradley is to be believed. But this episode raises the question of the extent to which Supreme Court Justices should, or ought to, take on highly visible extrajudicial duties. Of the five Justices named to the Commission, only Field really wanted the office. Bradley, who did not want it, was slandered because of the way he voted. Does a Justice have a duty to take on such a responsibility? Will his service affect his own reputation, or that of the Supreme Court?

The practice began with the first President, George Washington, appointing the first Chief Justice, John Jay, as special envoy to England to negotiate differences between the two countries leftover from the Treaty of Paris which ended the Revolutionary War in 1783. Jay sailed for England in the spring of 1794, and did not return until over a year later. When he returned, he discovered that he had been elected Governor of New York *in absentia*—imagine that happening today! He resigned the Chief Justiceship and assumed the New York Governorship. There is no indication that he was missed in the work of the Supreme Court during this time, but this is probably because the Court itself got off to a very slow start in its first decade. During that time, it decided a total of 60 cases—not 60 cases per year, but 6 cases per year. It would not be until the Chief Justiceship of John Marshall, from 1801 to 1835, that the Court became sufficiently important to be a co-equal partner with Congress and the Executive in the federal government. Since then, Supreme Court Justices have on numerous occasions served on minor commissions and boards, and also on international arbitra-

tion panels. But as the Court's work increased in the latter part of the nineteenth century, questions were raised about the wisdom of this practice.

On occasion Justices were called upon to perform duties that had overt partisan implications—the prime example being the Electoral Commission of 1876. In the twentieth century, there are three examples worth noting: the Roberts Commission, formed immediately after the Japanese attack on Pearl Harbor in 1941, Justice Jackson's assuming the role of prosecutor in the Nuremberg War Crimes Trials in 1945, and the Warren Commission, charged with inquiring into the assassination of John F. Kennedy in 1963.

Within two weeks after the Japanese bombed Pearl Harbor, President Roosevelt appointed Justice Owen Roberts to chair a five-person Commission to investigate the Pearl Harbor attack. The other members of the Commission were Secretary of War Henry L. Stimson, Secretary of the Navy Frank Knox, Chief of Naval Operations Admiral Harold Stark, and Army Chief of Staff General George C. Marshall.

In the wake of the attack on Pearl Harbor, some suspected President Roosevelt of allowing the attack in order to galvanize the American public into supporting America's entry into the war. The composition of the Commission led many to believe that its purpose was to absolve President Roosevelt and those in Washington from any blame for failing to anticipate and prevent the attack on Pearl Harbor.

The Commission lived up to those expectations. When the Roberts Commission released its report, the headline in the *New York Times* read, "ROBERTS BOARD BLAIMS KIMMEL AND SHORT; WARNINGS TO DEFEND HAWAII NOT HEEDED." The Commission charged two senior military commanders in Hawaii—Admiral Husband Kimmel and Lieutenant General Walter Short—with dereliction of duty. (Fifty-eight years later, the Senate voted 52 to 47 to approve a resolution stating that Kimmel and Short had performed "competently and professionally.").

The conclusions of the Roberts Commission have been questioned ever since its report was published. Some labeled it a whitewash that merely used Kimmel and Short as convenient scapegoats, while others thought its conclusions valid based upon the information available to it. For sixty years, authors and historians have debated how much of the blame for lack of preparedness at Pearl Harbor lay in Washington, and how much in Hawaii. The debate still goes on.

In the spring of 1945, the European portion of World War II had nearly ended. British and American forces marched into Germany from the west, and Russian troops approached Berlin from the east. Adolf Hitler committed suicide in his bunker, and in early May the German Armed Forces surrendered. VE Day had arrived.

President Franklin D. Roosevelt, who had guided the United States through the War, did not live to see that day. He died suddenly on April 13th, and was succeeded by his Vice President, Harry S. Truman. Two weeks later, Justice Robert H. Jackson of the Supreme Court was asked by Truman to be the chief prosecutor for the United States at the war crimes

trials of high German officials, which would take place in Nuremberg, Germany. Jackson agreed, and led a delegation of United States lawyers and judges to Europe for that purpose. In late May, Jackson left for Europe for meetings with representatives of the USSR, Great Britain, and France, and except for rare trips back to the United States he would remain there through the summer of 1946.

These four powers would supply the judges and prosecutors for the Nuremberg Tribunal which would convene in October, 1945. The prosecution took four months to put on its case, and the defendants took several additional months to put on theirs. In late September, the Tribunal rendered its judgment: twelve of the defendants were sentenced to hang, long prison terms were imposed on six, and three were acquitted.

Jackson had been absent for the entire 1945-1946 term of the Court. His service at Nuremberg was criticized by some of his colleagues, and by members of Congress and members of the bar. Some thought that the whole idea of such a trial was just another form of the victors imposing punishment on the vanquished by use of *ex post facto* legal doctrine. Some thought it improper for a sitting judge to act as a prosecutor in a criminal case. Jackson's colleague William O. Douglas (there was no love lost between these two) said:

> "When Stone died in 1946, Bob Jackson was on leave of absence from the Court as U.S. prosecutor at the Nuremberg trials. . . . He was gone a whole year, and in his absence we sat as an eight man Court. I thought at the time he accepted the job that it was a gross violation of separation of powers to put a Justice in charge of an executive function. I thought, and I think Stone and Black agreed, that if Bob did that, he should resign. Moreover, some of us—particularly Stone, Black, Murphy, and I—thought that the Nuremberg Trials were unconstitutional *by American standards*." [Douglas, William O. *The Court Years*, Random House, New York, 1980, p. 28.]

Nearly 40 years ago, on November 22, 1963, President John F. Kennedy was shot to death in Dallas, Texas. Within hours of the assassination, Lee Harvey Oswald was arrested and subsequently charged with killing President Kennedy. On November 24, while being transferred to jail, Oswald was gunned down in the basement of the Dallas police headquarters by a local nightclub owner, Jack Ruby.

On November 29, President Lyndon Johnson issued Executive Order 11130 appointing a Commission to investigate and report upon the assassination of President Kennedy and the subsequent murder of Lee Harvey Oswald. The Commission was chaired by Chief Justice Earl Warren and included Senators Richard B. Russell and John Cooper, Congressman Hale Boggs, then-Congressman Gerald Ford, former C.I.A. director Allen Dulles and John J. McCloy, former U.S. High Commissioner of Germany. Former

Solicitor General J. Lee Rankin served as the Warren Commission's General Counsel.

The following September, the Commission produced an 888-page summary of its findings known as "The Warren Report." The Commission concluded that Oswald acted alone in killing the President and that Ruby acted alone in killing Oswald.

Although the Warren Report was supported by 26 volumes of evidence and testimony, from almost the moment it was issued it came under wide criticism from a variety of sources. Hundreds of books and articles have attempted to prove that the Warren Commission got it wrong and that President Kennedy's assassination was the result of a conspiracy. The alleged participants in the conspiracy range from the C.I.A. and the F.B.I. to anti-Castro Cuban groups to the mafia. The 1991 movie JFK, loosely based upon New Orleans district attorney Jim Garrison's prosecution of Clay Shaw for conspiracy, promoted the theory that Shaw, who was a respected New Orleans businessman, David Ferrie, an airplane charter pilot, and Oswald were part of a conspiracy orchestrated by the United States military and the C.I.A.

Amid the mounting criticism of the Warren Report, Chief Justice Warren refused to respond or defend the Report, simply telling his staff that the Report spoke for itself. In 1967, according to a Gallup Poll, 60% of Americans doubted that Oswald was the lone gunman in Dallas.

It is difficult to deduce from these examples just what principles should guide Justices in accepting this sort of assignment. Jay in 1795, and Jackson in 1945, both missed a full year of the work of the Supreme Court. But in 1795 the Court had very little to do, and in 1945 it had a great deal to do. Two twentieth century Chief Justices have vigorously criticized the practice of Justices' taking on this kind of assignment. Charles Evan Hughes said:

> "It is best for the Court and the country that the Justices should strictly limit themselves to their judicial work, and that the dignity, esteem, and indeed the aloofness, which attach to them by virtue of their high office as the final interpreters of legislation and constitutional provisions should be jealously safeguarded."

Chief Justice Stone, who succeeded Hughes in that office said:

> "Apart from the generally recognized consideration that it is highly undesirable for a judge to engage actively in public or private undertakings other than the performance of his judicial functions, there are special considerations which I think must be regarded as controlling here.

* * *

> A judge, and especially the Chief Justice, cannot engage in political debate or make public defense of his acts. . . . [W]hen he participates in the action of the executive or legislative departments of government . . . [h]e exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office."

But in my view, the Electoral Commission of 1876 was a special case. Before it was created, there were threats of armed marches on Washington to settle the issue of who would be President. It was clear that Congress—the Republican Senate and the Democratic House—could not settle the matter despite efforts to do so. Any commission would have to have some members from outside of Congress, and it was only natural to look to the Justices of the Supreme Court for that purpose. The availability of the Justices was crucial in persuading Congress to enact the Electoral Commission law, and their service on the Commission made possible a peaceful resolution of the Hayes-Tilden contest. Perhaps it was not good for them individually, or for the Court, but it was assuredly good for the nation.