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978-0-521-76910-5 - Five Justices and the Electoral Commission of 1877, Supplement to Volume VII

Charles Fairman

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HISTORY OF THE SUPREME COURT OF THE UNITED STATES Supplement to Volume 7

In this supplement to Volume 7 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, Charles Fairman examines the Electoral Commission of 1877, which was headed by Justice Joseph P. Bradley. In the disputed presidential election of 1876, the Supreme Court was involved through the appointment of five justices to the commission of fifteen created by Congress to resolve the stalemate arising from the political division between the Senate and House. Divided seven to seven along party lines, the decisive vote and opinion was that of the member appointed for judicial impartiality, Justice Bradley. In his study of the Electoral Commission of 1877, Fairman sheds new light on this controversial historical event, vindicating Justice Bradley against his detractors. This book represents an important revision of conventional narratives of the Electoral Commission, combining intensive research with all the fascination of a detective story.

Charles Fairman (1897–1988) was Professor of Law at Harvard Law School and the author of Volumes 6 and 7 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion: 1864–1888*. He was also the author of numerous articles and books, including *The Law of Martial Rule* (1930) and *Mr. Justice Miller and the Supreme Court* (1939). In 1948 he published his casebook, *American Constitutional Decisions*, and a year later, he published his classic article, “Does the Fourteenth Amendment Incorporate the Bill of Rights?”

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Foreword to the Cambridge Edition

WHEN JUSTICE OLIVER WENDELL HOLMES died, he left his entire estate to the Congress of the United States, which, after a long lapse, established the Permanent Committee for the Oliver Wendell Holmes Devise. The Committee consists of five members, four appointed by the President of the United States and the fifth, the chair, by the Librarian of Congress. More than half a century ago the Committee decided that its principal purpose would be to commission a multi-volume history of the Supreme Court of the United States. The Holmes Devise History was originally envisioned as an eleven-volume series, concluding with a volume on the Hughes Court and ending in 1941. More recently, the Committee decided to extend the coverage of the series and commissioned new volumes, one on the Stone and Vinson Courts, and another on the Warren Court. It is possible that further volumes will be commissioned for subsequent Courts.

The Holmes Devise History has had a complicated history. A few of the initially commissioned volumes appeared fairly promptly, but many were long delayed. A few of the authors abandoned their volumes. Others passed away before they could complete their volumes, and new authors were appointed. As of 2009, two of the original volumes, as well as the recently commissioned volume on the Warren Court, have yet to appear, though we hope to see them within the next few years. The series was initially published by Macmillan, but after that firm ceased to do business, the Committee was fortunate enough to be able to contract with Cambridge University Press to publish the remaining volumes—and, remarkably, to put the earlier volumes back into print. The Committee is deeply grateful to Cambridge for undertaking this large and important publishing project.

The conception of the Holmes Devise History has also changed substantially over the years. Under its original Editor in Chief, Professor Paul Freund of Harvard Law School, the individual volumes were conceived of as nearly encyclopedic. Authors were expected to cover all of the most significant cases

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decided by the Supreme Court of the United States, as well as to provide exhaustive biographical accounts of the Justices. After I became the Co-Editor with Paul Freund in 1978, however, authors were asked to take a more focused and analytical approach. More recent volumes are somewhat shorter and significantly more thematic, though I hope it is fair to say that each volume remains the major account of the Supreme Court during the period it covers.

I have been the Editor in Chief since 1990, and it gives me special pleasure to know that the entire series is now back in print and available to readers. The Holmes Devise project is one of the most ambitious in the history of American law, and I believe it is true to say of the Holmes Devise History that the whole is much more than the sum of its parts. While I cannot describe myself as a neutral party (I was, after all, a member of the Permanent Committee from 1974 until 1980), I also think it likely that Justice Holmes would have admired both the seriousness and comprehensiveness of the History of the United States Supreme Court, for it is much more than a handsome set for one's library shelves! I trust that it will prove useful to scholars, lawyers, and general readers for many years to come.

Stanley N. Katz

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Foreword

THE *History of the Supreme Court of the United States* is being prepared under the auspices of the Permanent Committee for the Oliver Wendell Holmes Devise with the aid of the estate left by Mr. Justice Oliver Wendell Holmes, Jr. Mr. Justice Holmes died in 1935 and the Permanent Committee for the Devise was created by Act of Congress in 1955. Members of the Committee are appointed by the President of the United States, with the Librarian of Congress, an *ex officio* member, as Chairman. The present volume is a supplement to the seventh volume in the series. The Committee hopes to complete the history expeditiously while maintaining the high quality of the scholarship. The volumes in the Holmes Devise *History of the Supreme Court of the United States* bring to this subject some of the best legal scholarship of the decades since Mr. Justice Holmes' death. They will also have such advantages (not anticipated at the time of the Justice's death) as can be secured from a more than ample measure of judicious deliberation. We hope that, when completed, the series will widen and deepen our understanding of the Supreme Court and bring honor to the memory of one of its great Justices.

Daniel J. Boorstin

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Editor's Foreword

SINCE SECESSION AND CIVIL WAR there have been three major constitutional crises in our history. In two of them, the Court reorganization plan of 1937 and the presidential tapes controversy of 1973, the Supreme Court found itself at the center of the storm. In the third, and possibly the most acute, the disputed presidential election of 1876, the Court was involved in a different and unique way. It was involved not as an institution but through the appointment of five Justices to the Commission of fifteen created by Congress to resolve the stalemate arising from the political division between the Senate and the House. Not until a few days before the date fixed for the inauguration did the Commission's eight-to-seven decision conclude the contest, in accordance with its congressional Charter, through its acceptance by the Republican Senate, notwithstanding rejection by the Democratic House. Divided seven to seven on recognized party lines, the decisive vote and opinion was that of the member appointed for judicial impartiality, Justice Joseph P. Bradley.

The place of this episode in a history of the Supreme Court presented a question. Since it fell outside the mainstream of the Court's business it might have been treated in passing as simply a peripheral duty imposed on certain of its members. The significance of this episode for the reputation and proper role of the Court, however, makes it impossible to divorce it from the Court's history. When the Commission first met, Representative James Garfield noted in his diary that Justice William Strong told him that "all the judges except one were very sorry to be called to the Commission." (The exception was presumably Justice Stephen J. Field, an indefatigable Democrat.) More particularly, obloquy has been heaped on Justice Bradley for what has been depicted as a last-minute change of position under covert political pressure.

Fortunately for this History, Professor Fairman has had a long-standing scholarly interest in this affair. His characteristically scrupulous and thoroughgoing study throws new light on the controversy which vindicates Justice Bradley against his detractors. Professor Fairman is able to show how the

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congressional critics had themselves taken Bradley's legal position when the question arose before partisan interests were engaged; how inherently incredible representations were made about Bradley's preparation of his opinion and delivery of it in an executive session of the Commission; and how malice and perhaps even hallucination have fed the assault.

This is a work that should give rise to a revision of historical understanding, a work that combines intensive research with all the fascination of a detective story.

The volume does not pursue the story beyond the labors of the Electoral Commission and into the politics of what is known as the Compromise of 1877. Justice Samuel Miller, returning from the inaugural ceremony, wrote that "the cannon are peacefully playing the last part in that drama. It is to me a great relief."

Paul A. Freund

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Preface

THE AUTUMN PRESIDENTIAL ELECTION of 1876 brought the nation to the brink of peril. It appeared that Samuel J. Tilden of New York, the Democratic candidate, would have a small majority of the electoral votes, but that Florida, Louisiana, and South Carolina were in political disorder and might make conflicting returns. The outcome might be a bare majority for Rutherford B. Hayes of Ohio, the Republican candidate. Neither the Constitution nor the statutes provided for such a situation.

The Second Session of the 44th Congress, convening on December 4, 1876, recognized the urgent need for a solution to permit the peaceful inauguration of a President on March 4, 1877. The House of Representatives (under Democratic control) and the Senate (with a Republican majority) each named a committee which, working in conjunction, would report a proper mode of counting the electoral votes.

In aid of that mandate on December 23 an order was made a compilation of the proceedings and debates of Congress relating to the counting of electoral votes from the first election to the present time. That was executed while Congress was in recess over the holidays.

When Congress returned the committees busied themselves in finding accord on a report. On January 8, 1877, they laid before the Houses a measure to create an Electoral Commission to which disputed returns would be submitted for decision. That became law on January 29. The Commission would be composed of five Senators, five Representatives, and five Associate Justices of the Supreme Court. Four of the Justices were designated as being assigned to the First, Third, Eighth, and Ninth Circuits; by them the fifth Justice would be chosen.

The resulting body would include Senators Edmunds, Frelinghuysen, and Morton, Republicans; and Thurman and Bayard, Democrats. From the House came Payne, Hunton, and Abbott, Democrats; and Hoar and Garfield, Republicans. The Justices would be Clifford and Field, known to be Democrats,

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and Miller and Strong, Republicans. The fifth Justice was Bradley, a Republican. The senior Justice, Clifford, would be President of the Commission. All the Commissioners took an oath impartially to examine and consider all questions and true judgment give, according to the Constitution and laws.

The Commission convened on January 31 and in the ensuing month decided conflicts from Florida, Louisiana, Oregon, and South Carolina. All decisions were by the eight Republican members, the Democrats all dissenting. The result was that there were 185 electoral votes for Hayes and 184 for Tilden.

Historians have generally treated the episode of the Electoral Commission as a shabby affair. For example, one wrote “There could be no question of the decision . . . since there were eight Republicans and seven Democrats. The commission was, in reality, no tribunal at all. . . . It was a comedy.”

To another, “The careful studies . . . long after the heat of the battle had passed indicate that Tilden was deprived of his rightful claim as President.” Reference was made to “the magnitude of the fraud.”

A third wrote, “even with the disputed states counted as Republican, Tilden had a plurality of 250,000 votes over Hayes. There is no longer any doubt that the election was ‘stolen.’”

One wrote in disbelief, “Bradley always claimed that his work on the Electoral Commission was as pure as the driven snow.”

It is high time that a much better-informed account be presented to the public.

Recall the order of December 23, 1876, for the compilation of proceedings and debates since the first election. *Counting Electoral Votes*, House Miscellaneous Document No. 13, 44th Congress, Second Session, is a document of 807 pages, produced by January 4, 1877. Of great significance is the little-known report of debates in the Senate in February 1875, near the close of the Second Session of the 43d Congress, renewed in March 1876 at the First Session of the 44th Congress. The Senate was searching for a prescription for the mode of counting electoral votes in advance of any awkward situation. No Senator could foresee where partisan advantage might lie if a controversy arose. Many solutions were proposed. A number of Southern Democrats insisted that counting of electoral votes should be decided by the President of the Senate, although that office then and for some years to come would be filled by a Republican. Near the close of the debate Senator Thurman said

There was not an allusion on any side that could be considered in any sense partisan. . . .

The sincerity and disinterestedness of what was said in the debates of 1875–76 give them a unique credibility. The most thoughtful and understanding participants were Thurman and Bayard, Democrats, and Frelinghuysen and Edmunds, Republicans.

Unfortunately it proved impossible to agree upon a measure to be sent to the House, and on August 15, 1876, the session came to an end.

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The ensuing autumn election showed to each party where its immediate interest lay. On November 15, 1876, Abram S. Hewitt, Democratic National Chairman, stated what would be the party's position:

Congress [should] go behind the [governor's] certificate and open the same to get into the merits of all cases. . . .

That was precisely what Thurman, Bayard, and other Democrats, and Frelinghuysen and other thoughtful Republicans, had been insisting *must not be done*.

Only one Senator in the debates had taken the view Hewitt established for the Democratic party: that was Boutwell of Massachusetts, a Republican.

If commentators had been sufficiently penetrating to study the Senate debates of 1875–76 they might have learned that the position seized by the Democrats after the election was in contradiction to the thoughtful opinion recently approved by their leaders. Also they might have discovered Democratic statements precisely in accord with what became Justice Bradley's judgment in the Commission.

Hewitt went on to become a reform mayor of New York City in 1887–88. His devoted service to Columbia College, his alma mater, caused President Nicholas Murray Butler to seek the production of an appreciative biography. Professor Allan Nevins, whose seven-league marches had covered wide areas of American history, undertook the writing of the book. No question is here raised as to the high quality of *Abram S. Hewitt, with Some Account of Peter Cooper* until it comes to Hewitt's account of the election of 1876 and the Electoral Commission. When Democratic submission to arbitration ended in the defeat of Tilden, some of his followers in their bitterness turned upon Hewitt for his management of the campaign. Henry Watterson denounced him as "a falsifier and charlatan." Hewitt himself took pride in securing acceptance of the Commission as "one of his chief public services."

In self-vindication in 1878 he wrote an account of the episode. This he revised in 1895 as the "Secret History" and left to be published only when all participants were gone.

When Nevins' biography appeared in 1935 this account was presented at length as true and reliable. So confident was he in the story that he failed to test it. Rather he went on to supply elaboration.

After painstaking study I became convinced that Hewitt's account was not reliable, and that Nevins in his infatuation with his subject had led historians astray. This I have undertaken to establish in the account that follows.

This brings to a close my *History of the Supreme Court, 1864–88*. I have been privileged to walk in my thoughts with great judges, notably Miller, Waite, and Bradley, magistrates ever mindful of the Constitution's cardinal purpose "to establish Justice," generous in spirit, and faithful to the end. They remain with me.

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PREFACE

My file of correspondence with my friend and counselor, Paul A. Freund, Editor-in-Chief of the *Holmes Devise History of the Supreme Court*, is three inches thick, and our conversations by telephone are too numerous to record. I have relied upon his wisdom, and am grateful for his never-failing helpfulness, especially in his assumption of the task of proofreading. Now that the work is finished there abides our bond of affection and respect.

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