Garfield

Counting the Electoral Vote

Wash. 1877.

[FROM THE CONGRESSIONAL RECORD.]

COUNTING THE ELECTORAL VOTE.

SPEECH

OF

HON. JAS. A. GARFIELD,

OF OHIO,

DELIVERED

IN THE UNITED STATES HOUSE OF REPRESENTATIVES,

Thursday, January 25, 1877.

"A people who can understand and act upon the counsels which God has given it, the past events of its history, is safe in the most dangerous crisis of its fate."—*Guizot.*

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SPEECH.

The House having under consideration the bill (S. No. 1153) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon, for the term commencing March 4, A. D. 1877—

Mr. GARFIELD said:

Mr. SPEAKER: Nothing but the gravity of this subject would induce me to make a speech in my present condition of voice. But I must attempt it, and trust that the kindness of the House will enable me to be heard.

I desire in the outset to recognize whatever of good there is in this bill. It has some great merits which I cheerfully recognize. It is intended to avoid strife in a great and trying crisis of the nation. It is intended to aid in tiding over a great present difficulty, possibly a great public danger. It will doubtless bring out a result. And when it has brought out a result, it will leave the person who is declared to be the elect of the nation with a clearer title, or rather with a more nearly undisputed title, than any new method that has yet been suggested.

These are certainly great results. At a time like this, no man should treat lightly a bill which may, and probably will produce them all. Furthermore, I feel bound to say, if I were to speak of this bill only as a partisan—a word much abused just now—I should say that I am not afraid of its operation. The eminent gentlemen who are to compose the commission, eminent for their character and abilities, will, I have no doubt, seek to do, and will do justice under its provisions. And therefore, believing as I do that Rutherford B. Hayes has been honestly and legally elected President of the United States, I confidently expect that this commission will find that to be the fact, and will declare it. Should they find otherwise, all good men everywhere will submit to their decision.

But neither the wishes nor the fate of Mr. Hayes or Mr. Tilden should be consulted in considering this bill. I presume no one here is authorized to speak for either of these gentlemen on the question. I certainly am not. It is our business to speak for ourselves and for the people whom we represent.

Before considering the bill itself, I pause to notice one of the reasons that have been urged in its favor.

We have been told to-day in this Chamber, that there is danger of civil war if the bill does not pass. I was amazed at the folly which could use such a suggestion as an argument in favor of this or any measure.

The senate at Rome never deliberated a moment after the flag was hauled down which floated on the Janiculum Hill, across the Tiber. That flag was the sign that no enemy of Rome, breathing hot threats of war, had entered the sacred precincts of the city; and when it was struck, the senate sat no longer. The reply to war is not words, but swords.

When you tell me that civil war is threatened by any party or State in this Republic, you have given me a supreme reason why an American Congress should refuse, with unutterable scorn, to listen to those who threaten, or do any act whatever under the coercion of threats by any power on the earth. With all my soul, I despise your threat of civil war, come it from what quarter or what party it may. Brave men, certainly a brave nation, will do nothing under such compulsion. We are intrusted with the work of obeying and defending the Constitution. I will not be deterred from obeying it, because somebody threatens to destroy it. I dismiss all that class of motives as unworthy of Americans.

On this occasion, as on all others, let us seek only that which is worthy of ourselves and of our great country.

> Self-reverence, self-knowledge, self-control—
> These three alone lead life to sovereign power.
> Yet not for power, (power of herself
> Would come uncalled for,) but to live by law,
> Acting the law we live by without fear;
> And, because right is right, to follow right,
> Were wisdom in the scorn of consequence.

Let such wisdom and such scorn inspire the House in its consideration of the pending measure.

What, then, are the grounds on which we should consider a bill like this? It would be unbecoming in me or in any member of this Congress to oppose this bill on mere technical or trifling grounds. It should be opposed, if at all, for reasons so broad, so weighty as to overcome all that has been said in its favor, and all the advantages which I have here admitted may follow from its passage. I do not wish to diminish the stature of my antagonist; I do not wish to undervalue the points of strength in a measure before I question its propriety. It is not enough that this bill will tide us over a present danger, however great. Let us for a moment forget Hayes and Tilden, republicans and democrats; let us forget our own epoch and our own generation; and, entering a broader field, inquire how this thing which we are about to do will affect the great future of our Republic; and in what condition, if we pass this bill, we shall transmit our institutions to those who shall come after us. The present good which we shall achieve by it may be very great; yet if the evils that will flow from it in the future must be greater, it would be base in us to flinch from trouble by entailing remediless evils upon our children.

In my view, then, the foremost question is this: What will be the effect of this measure upon our institutions? I cannot make that inquiry intelligibly, without a brief reference to the history of the Constitution, and to some of the formidable questions which presented themselves to our fathers nearly a hundred years ago, when they set up this goodly frame of government.

Among the foremost difficulties, both in point of time and magnitude, was how to create an executive head of the nation. Our fathers encountered that difficulty the first morning after they organized and elected the officers of the constitutional convention. The first resolution introduced by Randolph of Virginia, on the 29th day of May, recognized that great question, and invited the convention to its examination. The men who made the Constitution were deeply read in the profoundest political philosophy of their day. They had learned from Montesquieu, from Locke, from Fènelon, and other great teachers of the human race, that liberty is impossible without a clear and distinct separation of the three great powers of government. A generation before their epoch, Montesquieu had said:

> When the legislative and executive powers are united in the same person or in the same body of magistrates there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.
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> * * * * * * *
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> There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting the laws, that of executing the public resolutions, and of trying the causes of individuals.

This was a fundamental truth in the American mind, as it had long been cherished and practiced in the British Empire.

There, as in all monarchies, the creation of a chief executive was easily regulated by adopting a dynasty, and following the law of primogeniture.

But our fathers had drawn the deeper lesson of liberty from the inspirations of this free new world, that their Chief Executive should be born, not of a dynasty, but of the will of a free people regulated by law.

In the course of their deliberations upon the subject, there were suggested seven different plans, which may be grouped under two principal heads or classes. One group comprised all the plans for creating the Chief Executive by means of some one of the pre existing political organizations of the country. First and foremost was the proposition to authorize one or both Houses of the National Legislature to elect the Chief Executive. Another was to confer that power upon the governors of the States or upon the Legislatures of the States. Another, that he should be chosen directly by the people themselves under the laws of the States. The second group comprised all the various plans for creating a new and separate instrumentality for making the choice.

At first, the proposition that the Executive should be elected by the National Legislature was received by the convention with almost unanimous approval; and for the reason that up to that time, Congress had done all that was done in the way of National Government. It had created the nation, had led its fortunes through a thousand perils, had declared and achieved independence, and had preserved the liberty of the people in the midst of a great war. Though Congress had failed to secure a firm and

stable Government after the war, yet its glory was not forgotten. As Congress had created the Union, it was most natural that our fathers should say Congress shall also create the Chief Executive of the nation. And within two weeks after the convention assembled, they voted for that plan with absolute unanimity.

But with equal unanimity they agreed that this plan would be fatal to the stability of the Government they were about to establish, if they did not couple with it so me provision that should make the President functions of independent of the power that created him. To effect this, they provided that the President should be ineligible for re-election. They said it would never do to create a Chief Executive by the voice of the National Legislature, and then allow him to be re-elected by that same voice; for he would thus become their creature.

And so, from the first day of their session in May, to within five days of its close in September, they grappled with the mighty question. I have many times, and recently very carefully, gone through all the records that are left to us of that great transaction. I find that more than one-seventh of all the pages of the Madison Papers are devoted to this Sampson of questions, how the Executive should be chosen and made independent of the organization that made the choice. This topic alone occupied more than one-seventh of all the time of the convention.

After a long and earnest debate, after numerous votes and reconsiderations, they were obliged utterly to abandon the plan of creating the Chief Executive by means of the National Legislature. I will not stop now to prove the statement by a dozen or pungent quotations from the masters of political science in that great assembly, in-which they declared that it would be ruinous to the liberty of the people and to the permanence of the Republic if they did not absolutely exclude the National Legislature rom any share in the election of the President.

They pointed with glowing eloquence to the sad but instructive fate of those brilliant Italian republics that were destroyed because there was no adequate separation of powers, and because their senates overwhelmed and swallowed up the executive power, and, as secret and despotic conclaves, became the destroyers of Italian liberty.

At the close of the great discussion, when the last vote on this subject was taken by our fathers, they were almost unanimous in-excluding the National Legislature from any share whatever in the choice of the Chief Executive of the nation. They rejected all the plans of the first group, and created a new instrumentality. They adopted the system of electors. When that plan was under discussion, they used the utmost precaution to hedge it about by every conceivable protection against the interference or control of Congress.

In the first place, they said the States shall create the electoral colleges. They allowed Congress to have nothing whatever to do with the creation of the colleges, except merely to fix the time when the States should appoint them. And in order to exclude Congress by positive prohibition, in the last days of the convention, they provided that no member of either House of Congress should be appointed an elector; so that not even by the personal influence of any one of its members could the Congress interfere with the election of a President.

The creation of a President under our Constitution, consists of three distinct steps First, the creation of the electoral colleges; second, the vote of colleges; and third, the opening and counting of their votes. This is the simple plan of the Constitution.

The creation of the colleges is left absolutely to the States, within the five limitations I had the honor to mention to the House a few days ago; first, it must be a *State* that appoints electors; second, the State is limited as to the number of electors they may appoint; third, electors shall not be members of Congress, nor officers of the United States; fourth, the time for appointing electors may be fixed by Congress; and fifth, the time when their appointment is announced, which must be before the date for giving their votes, may also be fixed by Congress.

These five simple limitations, and these alone, were laid upon the States. Every other act, fact, and thing possible to be done in creating the electoral colleges, was absolutely and uncontrollably in the power of the States themselves. Within these limitations. Congress has no more power to touch them in this work than England or France. That is the first step.

The second is still plainer and simpler, namely, the work of the colleges. They were created as an independent and separate power, or set of powers, for the sole purpose of electing a President. They were created by the States. Congress has just one thing to do with them, and only one; it may fix the day when they shall meet. By the

act of 1792 Congress fixed the day as it still stands in the law; and there the authority of the Congress over the colleges ended.

There was a later act, of 1845, which gave to the States the authority to provide by law for filling vacancies of electors in these colleges; and Congress has passed no other law on the subject.

The States having created them, the time of their assemblage having been fixed by Congress, and their power to fill vacancies having been regulated by State laws, the colleges are as independent in the exercise of their functions as is any department of the Government within its sphere. Being thus equipped, their powers are restrained by a few simple limitations laid upon them by the Constitution itself: first, they must vote for a native born citizen: second, for a man who has been fourteen years a resident of the United States; third, at least one of the persons for whom they vote must not be a citizen of their own State: fourth, the mode of voting and certifying their returns is prescribed by the Constitution itself. Within these simple and plain limitations the electoral colleges are absolutely independent of the States and of Congress.

One fact in the history of the constitutional convention, which I have not seen noticed in any of the recent debates, illustrates very clearly how careful our fathers were to preserve these colleges from the interference of Congress, and to protect their independence by the bulwarks of the Constitution itself. In the draught of the electoral system reported September 4, 1787, it was provided that Congress "may determine the time of choosing and assembling of the electors *and the manner of certifying and transmitting their votes.*"

That was the language of the original draught; but our fathers had determined that the National Legislature should have nothing to do with the action of the colleges; and the words that gave Congress the power to prescribe the manner of certifying and transmitting their votes were stricken out. The instrument itself prescribed the mode. Thus Congress was wholly expelled from the colleges. The Constitution swept the ground clear of all intruders; and placed its own imperial guardianship around the independence of the electoral colleges, by forbidding even Congress to enter the sacred circle. No Congressman could enter; and, except to fix the day of their meeting, Congress could not speak to the electors.

These colleges are none the less sovereign and independent, because they exist only for a day. They meet on the same day in all the States; they do their work summarily, in one day, and dissolve forever. There is no power to interfere, no power to recall them, no power to revise their action. Their work is done; the record is made up, signed, sealed, and transmitted; and thus the second great act in the presidential election is completed. I ought to correct myself: the second act *is* the presidential election. The election is finished, the hour when the electoral colleges have cast their votes and sealed up the record.

Still there is a third step in the process; and it is shorter, plainer, simpler than the other two. These sealed certificates of the electoral colleges are forwarded to the President of the Senate, where they rest under the silence of the seals for more than two months. The Constitution assumes that the result of the election is still unknown. But on a day fixed by law, and the only day, of all the days of February, on which the law commands Congress to be in session, the last act in the plan of electing a President is to be performed.

How plain and simple are the words that describe this third and last step! Here they are:

> 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.

Here is no ambiguity. Two words dominate and inspire the clause: They are the words *open* and *count*. These words are not shrouded in the black-letter mysteries of the law. They are plain words, understood by every man who speaks our mother-tongue, and need no lexicon or commentary.

Consider the grand and simple ceremonial by which the third act is to be completed. On the day fixed by law, the two Houses of Congress are assembled. The President of the Senate, who, by the Constitution, has been made the custodian of the sealed certificates from all the electoral colleges, takes his place. The Constitution requires a "person" and a "presence." That "person" is the President of the Senate; and that "presence" is the "presence" of the two Houses. Then two things are to be

done. The certificates are to be opened, and the votes are to be counted. These are not legislative acts, but clearly and plainly executive acts. I challenge any man to find anywhere an accepted definition of an executive act that does not include both these. They cannot be tortured into a meaning that will carry them beyond the boundaries of executive action. And one of these acts the President of the Senate is peremptorily ordered to perform. The Constitution commands him to "open all the certificates." Certificates of what? Certificates of the votes of the electoral colleges. Not any certificates that anybody may choose to send, but certificates of electors appointed by the States. The President of the Senate is presumed to know what are the States in the Union; who are their officers; and when he opens the certificates, he learns from the official record who have been appointed electors, and he finds their votes.

The Constitution contemplated the President of the Senate as the Vice-President of the United States, the elect of all the people. And to him is confided the great trust, the custodianship of the only official record of the election of President, What is it to "open the certificates?" It would be a narrow and inadequate view of that word to say that it means only the breaking of the seals. To open an envelope is not to "open the certificates." The certificate is not the paper on which the record is made; it is the record itself. To open the certificate is not a physical, but an intellectual act. It is to make patent the record; to publish it. When that is done the election of President and Vice-President is published. But one thing remains to be done; and here the language of the Constitution changes from the active to the passive voice, from the personal to the impersonal. To the trusted custodian of the votes, succeeds the impersonality of arithmetic; the votes have been made known; there remains only the command of the Constitution: "They shall be counted," that is, the numbers shall be added up.

No further act is required. The Constitution itself declares the result.

The person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed.

If no person has such majority, the House of Representatives shall *immediately* choose a President; not the House as organized for legislation; but a new electoral college is created out of the members of the House, by means of which each State has one vote for President, and only one.

To review the ground over which I have traveled: The several acts that constitute the election of a President may be symbolized by a pyramid consisting of three massive, separate blocks. The first, the creation of the electoral college by the States, is the broad base. It embraces the legislative, the judicial, and the executive powers of the States. All the departments of the State government and all the voters of the State co-operate in shaping and perfecting it.

The action of the electoral colleges forms the second block, perfect in itself, and independent of the others, superimposed with exactness upon the first.

The opening and counting of the votes of the colleges is the little block that crowns and completes the pyramid.

Such, Mr. Speaker, was the grand and simple plan by which the framers of the Constitution empowered all the people, acting under the laws of the several States, to create special and select colleges of independent electors to choose a President, who should be, not the creature of Congress, nor of the States, but the Chief Magistrate of the whole nation, the elect of all the people.

When the Constitution was completed and sent to the people of the States for ratification, it was subjected to the severest criticism of the ablest men of that generation. Those sections which related to the election of President not only escaped censure, but received the highest commendation. The sixty-seventh number of the Federalist, written by Alexander Hamilton, was devoted to this feature of the instrument. That great writer congratulated the country that the convention had devised a method that made the President free from all pre-existing bodies, that protected the process of election from all interference by Congress and from the cabals and intrigues so likely to arise in legislative bodies.*

The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system of any consequence which has escaped without severe censure or which has received the slightest mark of approbation from its opponents. The most plausible of

these, who has appeared in print, has even deigned to admit that the election of the President is pretty well guarded. I venture somewhat further and hesitate not to affirm that, if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be wished for. It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it not to any pre-established body, but to men chosen by the people for the special purpose and at the particular juncture. * * * They have not made the appointment of the President to depend on any pre-existing bodies of men who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust all those who from situation might be suspected of too great devotion to the President in office. * * *

Another and no less important desideratum was that the Executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to duration of his official consequence. This advantage will also be secured by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.—*From the sixty-seventh number of the Federalist.*

The earliest commentator upon the Constitution, St. George Tucker, of Virginia, writing at the beginning of the present century, made this clause of the Constitution the subject of special eulogy, and pointed to the fact that all the proceedings in relation to the election of a President were to be brief, summary, and decisive; that the right of the President to his office depends upon no one but the people themselves, and that the certificates of his election were to be publicly opened "and counted in the presence of the whole National Legislature." †

The electors, we perceive, are to assemble on one and the same day, in all the different States, at as many different places, at a very considerable distance from each other, and on that day are simply to give their votes; they then disperse and return to their respective habitations and occupations immediately, No pretext can be had for delay; no opportunity is furnished for intrigue and cabal. The certificates of their votes * * * are to be publicly opened and counted in the presence of the whole National Legislature. * * * There is no room for the turbulence of a *Campus Martius* or a *Polish diet*, on the one hand, nor for the intrigues of the sacred college or a Venetian senate on the other; unless when it unfortunately happens that two persons, having a majority of the whole number of electors in their favor, have likewise an equal number of votes, or where by any other means the election may devolve upon the House of Representatives. Then, indeed, intrigue and cabal may have their full scope; then may the existence of the Union be put in extreme hazard.—*Tucker's Blackstone, Appendix, pp.* 326-7.

The authorities I have quoted show that, great as was the satisfaction of the people with the mode of choosing a President, there was still an apprehension that trouble would arise from Congress by the only avenue left open for its influence, namely, the contingency in which the House might elect. Every other door was shut and barred against the interference of Congress or any member of Congress.

THE BILL.

Now, Mr. Speaker, contrast with the plan I have sketched, the theory of this bill. I have studied its provisions in the light of the Constitution; and I am compelled to declare that it assails and overthrows, to its very foundation, the constitutional plan. Congress, finding itself excluded from every step in the process of electing a President until the very last, from the mere fact that its presence is deemed necessary at the opening of the certificates and counting of the votes, takes occasion of that presence to usurp authority over the whole process from beginning to end. Coming only as an invited guest to witness a grand and imposing ceremony, this bill makes Congress the chief actor and umpire in the scene; and, under cover of the word "count," proposes to take command of every step in the process of making a President.

Recurring again to the illustration I have used, Congress having a simple part to play in reference to the little block that crowns the pyramid, proposes to reach down through all the others and supervise the whole from apex to base; or, rather, it proposes to overturn the whole pyramid and stand it upon its apex, so that it shall rest, not upon the broad base of the people's will, but upon the uncertain and despotic will of Congress.

This is usurpation in every meaning of the word. Though the Constitution has sought to keep Congress away from all the process of making a President, this bill creates and places in the control of Congress the enginery by which presidents can be made and unmade at the caprice of the Senate and House. It grasps all the power, and holds

States and electors as toys in its hands. It assumes the right of Congress to go down into the colleges and inquire into all the acts and facts connected with their work. It assumes the right of Congress to go down into the States, to review the act of every officer, to open every ballot box, and to pass judgment upon every ballot cast by seven millions of Americans.

I know the bill is not proposed as a permanent law; but I know equally well that if the Congress of our centennial year shall pass this bill, they will destroy forever the constitutional plan of electing a President. Pass this bill, and the old constitutional safeguards are gone. Congress becomes a grand returning board from this day forward; and we shall see no more Presidents elected by the States until the people rebuke the apostacy and rebuild their old temple.

Gentlemen on the other side of the House have expressed their indignation that one or two States in the Union have established returning-boards to examine and purge the returns from the ballot-boxes of their States; and I must say for myself that I would not tolerate such a board unless intimidation, outrage, and murder made it necessary to preserve the rights of voters. All the evils that have been charged against all the returning-boards of the Southern States, this bill invites and welcomes to the Capitol of the nation. It makes Congress a vast, irresponsible, returning-board, with all the vices of and none of the excuses for the returning boards of the States.

Now, if this general arrangement of the bill be not justly and fairly made, I should be glad to hear the distinguished gentlemen who approve it, show in what respect I have misrepresented or exaggerated its provisions.

The early practice, from the first count by John Langdon, by special direction of the constitutional convention, was in accordance with the view I have taken. These precedents have been too often quoted, to need repetition.

Mr. Speaker, our people have lived under the Constitution for eighty-seven years; and in all that time, until our Government was nearly wrecked by rebellion, the Congress has never ventured to touch, with the smallest of its fingers, the action of any recognized State of the Union in creating the electoral colleges, nor the action of the colleges themselves in electing a President.

Why, sir, in 1857, the electoral college in one of our States did not cast its vote on the day fixed by law; but the democratic President of the Senate counted the vote of Wisconsin and declared the result, in spite of all the clamor that was raised against him by both Houses; and that vote stands on record as a part of the official count.

For more than three quarters of a century. there has been but one ground on which Congress has ever challenged and excluded an electoral vote; and that ground was that some political organization calling itself a State, was not a State in law and in fact. When Missouri tried to vote before it was admitted into the Union, and when Indiana and Michigan tried to vote under, like circumstances, their right to an electoral vote was challenged. That challenge might be defended on the ground that Congress alone can admit new States into the Union; and no political society except the original thirteen States is entitled to an electoral vote, without previous recognition by Congress.

In 1865, while the fires of our great war were still blazing, when the vast war powers of the Constitution had been awakened from their sleep of half a century, and when eleven States had broken away from their normal relations to the Union, the Congress, without reflection, and, as they have since discovered, without the warrant of the Constitution, adopted the twenty-second joint rule for the sole purpose of keeping States from voting that were not yet restored to their places in the Union. This rule was based on the same principle on which Congress had challenged the right of Missouri, Indiana, and Michigan to vote; but unfortunately it did not in terms restrict objection to that ground alone. From that joint rule has sprung most of our present entanglement; and the Republican party is responsible. It was one of the many mistakes of that party during those years, when, too powerful for its own good or the good of the country, and flushed with victory, it went recklessly forward into acts that were unwarranted by sound policy, and of doubtful constitutionality.

But for the adoption of the twenty-second joint rule in the midst of war, and its continuation after the war had ended, the hasty judgments of Senators and Representatives would not now complicate and embarass this Congress in solving the present problem.

But it should not be forgotten that before this question arose, a Republican Senate confessed the wrong and abolished the rule. At the last session of Congress every Senator, without distinction of party, voted to declare it unwarranted by the Constitu-

tion. Even at this session, and in spite of the passion and heat of this presidential contest, all but four of the Senators who were present, voted that the rule was no longer valid or binding. Every precedent which Congress made during the last fifteen years under that rule, has come back to plague and disturb those who are seeking to find the way out of our present difficulties by following the Constitution and laws. Without reflection, men of both parties have committed themselves to the theory of the twenty-second joint rule; and their committals embarrass their action to-day. It is best for men and parties frankly to confess their errors and correct them.

But to return to the pending bill. Besides the general arraignment I have made, I find in this first section of the bill that it invites objections to counting the votes of the States. It commands the presiding officer that whenever a State is called, he shall call for objections; and as many objections as any two members of Congress, one from each House, may please to make, shall be filed, no matter what the ground of objection may be: and immediately the two Houses shall separate to consider all such objections. If both Houses agree so to do, the vote of any State shall be rejected.

The first section deliberately provides that though a State has appointed electors in perfect accordance with the law, and through its electoral college may have fulfilled all points of the law; though the certificates may be regular and perfect in every particular, yet on the objection of two members of Congress, the two Houses may throw it out, may stifle the voice of that State, may nullify the constitutional election of a President. A legislative body is not obliged to give reasons for what it may lawfully do. It can act for bad reasons if it choose. I know the presumption of law is that all functionaries will do their duty; but when we are conferring powers, we should ask what it is that we permit to be done. And the plain declaration of this first section is that Congress may at its discretion, for any reason good or bad, or for no reason, stifle the vote of any State. The Constitution commands that the votes *shall be counted;* this bill declares that the votes may be rejected. It is a monstrous assumption, a reckless usurpation of power. Congress may not use the vast powers herein granted; but a vote for this bill is a vote that Congress may thus act.

In opposition to this grant, I hold that neither House acting separately, nor both Houses acting concurrently, has any more authority to refuse to hear the voice of a State when it speaks through the law in electing a President, than Great Britain has to say that the State shall not vote. Yet this first section invites contests, and assumes the right of Congress, at will, to reject the vote of any State. If this section becomes a law, every close State will hereafter grow a luxurious croup of contests, and unload their noxious harvests in the National Capitol. Not as in the past, one in the century, but squadrons of Cronins will invade the electoral college at each future election.

From what part of the Constitution is this measureless assumption of power drawn? I have carefully read the debates in both Houses to find the source of this alleged authority; and I find but two clauses on which the allegation is based. The first is the simple fact of the presence of the two Houses at the opening and counting of the votes. How much power can be evoked from the world "presence?" We have seen that in all the previous steps in the process of electing a President, the little that Congress was permitted to do by the Constitution was merely to fix a date; and finally, in the concluding act, the agency of Congress is narrowed down to a mere shadow, to a presence. That is all. But a great deal of ingenuity and eloquence have been expended to add power to that "presence." We are told it would be trifling with the dignity of Congress to call the two Houses as mere spectators of a dumb show. It may throw some light upon this word "presence" if we inquire what the different States of the Union have done in the matter of opening and declaring the votes of their people for State officers. I have taken the pains to examine the constitutions of thirty-seven States of the Union, all except that of Colorado which I have not seen; and I find this: In thirty of the thirty-seven States, the act of opening the votes and counting and declaring them is definitely and absolutely described in their constitutions as an executive act. In thirty States of the Union, the duty is devolved upon executive officers. There are seven States, most of them the older States, in which the Legislature itself, acting jointly, or by means of joint committees, is the canvassing and returning board to examine the votes and declare the result.

Mr. HOAR. Does not my honorable friend know that in every American State in existence when the Constitution was adopted, the vote for Governor was counted by the two branches of the Legislature?

Mr. GARFIELD. I will answer my friend with a great deal of pleasure by saying

that in a majority of all the original thirteen States, in 1787, the Legislatures elected the Governors. The people did not elect their supreme executive officer: and, as a matter of course, when the Governor was elected by the Legislature, the Legislature managed the whole process from beginning to end. It is true that in the gentleman's own State, and in Connecticut, and in New Hampshire, the popular votes for Governor were, and in some States are still, returned, canvassed, counted and declared by the Legislatures themselves.

Mr. HOAR. My friend does not answer the question to its full extent. Does he not know that, in every one of the old thirteen States, the vote for Governor was counted by the Legislature, it being true that in some of them the Legislature cast the vote as well as counted it?

Mr. LAWRENCE. Let me say that it is not true of New York. On the contrary, the votes there were canvassed by officers designated, and the Legislature had no power over the subject.

Mr. GARFIELD. Allow me to read the provision of the constitution of my own State, made in 1802, under the immediate inspiration of the constitutional era, and the same language still stands in the constitution of Ohio with only a slight verbal change. Here is the provision:

> The president of the Senate shall open and publish them, [the returns] in the presence of a majority of the members of each house of the General Assembly.

Substantially the same language is used in the present constitutions of twenty-one States of the Union. In these States, it is the unbroken practice that the presiding officer of the senate or house does open and does publish and does declare the result; and only where a contest arises, regulated by law, is the result as declared by him, questioned at all. Though their constitutions require the presence of a majority of both houses, they have no function except that of witnesses. If the dignity of twenty-one Legislatures is not affronted by this provision, the dignity of our two Houses ought not to suffer by granting its presence one day in four years.

An incident occurred in the State of Ohio, nearly thirty years ago, which is worthy of mention. The election for governor was close and doubtful. In obedience to the constitution, both houses of the Legislature assembled, and the president of the senate proceeded to open and publish the returns. As the tellers were making the lists and footing up the votes an objection was made to counting the vote from one of the counties, and the business was delayed by tumult, when the president of the senate, taking the certificate from the hands of the tellers, completed the count and declared the result, in obedience to the constitution. He did not permit the performance of an executive duty to be prevented or hindered by the presence of legislative witnesses.

The claim is set up that the presence of the two Houses implies that they are to do something; that tney are to count the votes. Formulate that construction in definite words and it will read: "In the presence of the two Houses the votes shall be counted by the two Houses." That is, they shall count the votes *in their own presence.* Let us not charge the framers of the Constitution with such stupid tautology.

We have seen that in the third step two things were to be done, two acts to be performed; not acts of legislation, not laws to be devised, but acts to be done, executive acts. And the only executive officer present is the President of the Senate. One of these two acts he is expressly commanded to perform; he "shall open all the certificates." That is past question.

In reference to the other, the Constitution says it *shall be done.* We are asked why the language changes from the active to the passive voice. I have already suggested the reason: that when the roll of the States is called, each answers through the certificates which announce their votes for President and Vice-President. The States speak through the electoral colleges when the certificates are read; and nothing is left but the imperial command: the votes "shall be counted." Arithmetic does the work. It may be in the person of the President of the Senate, a teller, or a clerk.

What can be plainer than that our fathers intended that a certain, summary, and unquestioned result should be had? They determined to create a President; and adopted a plan, which, if not overthrown, would certainly accomplish the result. I am not controverting the position taken by my friend from Massachusetts. [Mr. HOAR,] and I think justly, that under the general clause in another section of the Constitution, Congress may regulate the method of doing anything that the Constitution

orders to be done. I admit most fully that Congress may regulate the act of opening the certificates, and may regulate the work of counting; but it cannot push its power to regulate beyond the meaning of the words that describe the thing to be done. It cannot ingraft a judiciary system upon the word "open." It cannot evolve a court-martial from the word "count." It cannot erect a star-chamber upon either or both of these words. It cannot plant the seeds of despotism between the lines or words of the Constitution.

I have no doubt that Congress, under the general clause referred to, may regulate how the opening of the certificates shall be done, whether in alphabetical or chronological order; and may make any regulation necessary and appropriate. I have no doubt that Congress may provide by law who shall count or add up the votes; how the lists of votes shall be recorded—whether on paper or parchment. I do not hold that the Constitution has made it the exclusive duty of the President of the Senate to count the votes. That is no part of my argument. It makes no difference who counts, only so that the counting is done. I am seeking to find what authority Congress may exercise in reference to the election of the President. I admit that Congress may legislate upon the subject wherever the Constitution has made legislation possible. But I insist that Congress can go no farther. In reference to the last act of the process, Congress cannot go beyond the just scope and meaning of the word "count." If gentlemen want to "stick in the bark" in their construction of this clause, let me follow their example for a moment. If you tell me that the power of the President of the Senate ends with the word "open," then I tell you that the presence of the two Houses is dispensed with at the same instant. He shall, in the presence of the two Houses, open all the certificates. Stop there. If at that point "the Constitution turns its back upon the President of the Senate," it also, at the same moment, turns its back upon the two Houses. The "presence" and the President disappear together.

But I do not propose thus to read the Constitution with a microscope. I admit the difficulty of the situation. I recognize honest differences of opinion in regard to the true construction of the clause. But after reading them all, I return to that clear and comprehensive exposition of ths venerable Chancellor Kent, which was full of wisdom and prophecy. It was his opinion, that in the absence of legislation on the subject, it would be the duty of the President of the Senate to count the votes and declare the result.

I do not object to an act of Congress to regulate all that can be regulated. I have never objected to such legislation. In 1868, on my motion, a resolution was passed by this House directing our Judiciary Committee to inquire into this question of such vital and transcendent importance, and report what legislation was possible. But no action was taken; and in the absence of legislation, we are remanded to the Constitution itself. If we obey it, we shall find a plain way out of our troubles.

Again I return to the bill before us, and call attention to the second section, to the case where there are two returns. And here again is an invitation to anybody to get up a contest by sending "papers purporting to be certificates of electoral votes." It does not limit the contest to double returns from the officers of a State; but two or more returns from anybody residing within the territory of a State, may be considered under the provisions of this section. If anybody within a State manufactures a return, calls it a certificate of votes of electors, and forwards it to the President of the Senate, he must receive it and treat it as a return, and submit it to the tribunal provided by this section.

[Here the hammer fell.]

The SPEAKER *pro tempore*, (Mr. HOOKER.) The time of the gentleman from Ohio [Mr. GARFIELD] has expired.

Mr. HUBBELL. I move that the time of the gentleman be extended.

Mr. GARFIELD. Am I not speaking in my own right and entitled to one hour?

The SPEAKER *pro tempore*. Tha gentleman was speaking in fifty minutes of the time of the gentleman from Maine, [Mr. HALE.]

Mr. GARFIELD. I supposed I was speaking in my own right; but if the Speaker rules otherwise I submit to his decision.

Mr. HOAR. I suppose that no other gentleman will desire to speak to-night, and I ask consent that the gentleman from Ohio [Mr. GARFIELD] have leave to proceed with his remarks.

The SPEAKER *pro tempore*. If there be no objection, the gentleman will be allowed to proceed.

There was no objection.

Mr. GARFIELD. I thank my friend from Massachusetts, [Mr. HOAR,] and also the House, for this courtesy.

Now, in the case of a double return, a course is to be taken wholly unlike that which is laid down in the first section, where the vote of the State is left at the mercy of the two Houses. But double returns from a State are to be sent to a mixed commission, consisting of an equal number of members from each House of Congress and the Supreme Court. That commission is virtually clothed with power to hear and determine the vote of any such State, and its decision is the law, final and conclusive, unless both Houses shall concur in reversing the decree.

The commission is authorized to do whatever the two Houses may do in reference to deciding the presidential election. That is, Congress delegates its power to fifteen persons. If it be a delegation of legislative power, it is clearly in conflict with the Constitution; for all authorities concur in the doctrine that legislative power cannot be delegated. If the power conferred on the commission be executive or judicial power, then the members of the commission are officers of the United States, and their appointment is a legislative appointment. But the Constitution has placed the appointng of all officers in the hands of the President and the heads of Departments.

When, in 1871, an associate justice of the Supreme Court, the late Judge Nelson, was appointed on the joint high commission to negotiate the treaty of Washington, his name was sent to the Senate and confirmed on the 10th day of February, as were the nominations of the Secretary of State and the Attorney-General to the same commission. It was found necessary in order to comply with the Constitution that those commissioners should be appointed by the President and confirmed by the Senate. If the commissioners here proposed are officers, how can you take five Senators and five members of the House and make them officers, when the Constitution forbids that a member of either House shall hold any office under the United States? Notice these difficulties that beset you at every step as you walk through the mazes of this bill.

But a far more important question is that of the powers conferred upon this commission. Here is certainly a new thing under the sun. This commission of fifteen persons is empowered to roam at will throughout the realms of the constitution and laws, and to assume whatever jurisdiction they think they are entitled to assume in reference to the subject. No jurisdictional limits are prescribed; but the commission is endowed "with the same powers now possessed by the two Houses acting separately or together." The two Houses of Congress say in effect to the commission: "We transfer our powers to you. Construe them for yourselves. Use or refuse them, as you please. If you choose to confine yourselves to the papers that have been delivered to the President of the Senate, halt there. If you conclude to enter the electoral colleges and overhaul them, enter. If you choose to content yourselves with such an examination, stop there; but if you wish to go deeper and embrace within the sweep of your examination all the States and all the officers of the States, all the ballot-boxes and all the ballots in them, do so. Take the Sherman report, take the Morrison report, take the Howe report, take the Palmer report, take the Florida report and the South Carolina report, and the Cronin report. Accumulate cart-loads of reports and documents upon your tables, and sit down at your leisure to digest and make the most of them."

Such, Mr. Speaker, is the scope of possible power given to this commission. But that is not enough. They may "take into view such petitions, depositions, and other papers, if any, as shall by the Constitution be competent and petinent in such consideration." They may also sent for persons and papers, because they have all the powers possesed by the two Houses or either of them; and this House certainly has shown its power to send for persons and papers beyond any of its predcecssors. [Laughter.]

Now, I would treat this bill with all respect, for I do most sincerely respect the men who made it. But when the members of this commission come to verify and explore their powers, they will find one limitation so thoroughly Pickwickian, that I am sure they will enjoy it as literature, if not as law. That limitation is in the brief and crisp language of the bill "*if any.*" The commission may do all these things enumerated; may exercise all the vast powers residing in the Constitution, or conferred upon either House of Congress, or both, "*if any.*"

In reading this clause, I was reminded of a speech delivered in the Hall about ten years ago, by a gentleman who was imploring us to receive our southern brethren who came knocking at the doors of Congress, and not keep them out any longer. A distinguished gentleman from Illinois rose and said:

I desire to ask the gentleman from New Jersey what he would do if our southern brethren, as he calls them, should come to our doors with certificates of election to Congress and ask to be admitted while their hands are still red with the blood of our brethren of the North?

Pausing solemnly for a moment, the orator replied:

If our southern friends come to the door of this House and ask to be admitted, I, sir, for one, am in favor of receiving them in the very spirit in which they come to us, *provided they come in that spirit.*
[Laughter.]

So the commission may do all and singular, and exercise all powers that are given, "if any;" but of the "if any" they must judge.

Now, Mr. Speaker, I call the attention of my distinguished friend from Massachusetts [Mr. HOAR] to what may happen if this bill should become a law. From a careful reading of its provisions, it appears entirely possible for the two Houses and the commission to prevent the declaration of any result whatever. Remembering that there are thirty-eight States, and that in each case, the President of the Senate must call for objections, and that upon each objection the two Houses must separate, and that the debate may proceed for two hours upon each objection, and that the House may take a recess for one day on each of these objections, a failure to reach a result is altogether possible. Suppose the case of Florida is reached, and one party finds itself disappointed in the judgment of the tribunal, and is so determined not to be pleased with the result that it prefers to prevent a completion of the count; how can such an attempt be prevented under the provisions of this bill?

There are but twenty-eight secular days from the day when the count begins, before this Congress will expire by limitation. I want to ask my friend from Massachusetts whether he thinks there is no danger in that direction; whether he does not also see that this bill may make it impoesible for the President of the Senate to obey the plain mandate of the Constitution that he "shall open all the certificates and the votes shall then be counted?" There may be no *then* left, in which to open the certificates near the foot of the list.

Mr. HOAR. As my distinguished friend from Ohio has invited my attention to his argument, he will allow me to ask him whether the case he puts is not precisely such a one as may happen under any government under the sun; whether in any government the constituent parts may not refuse to do their duty. And what would happen under his theory if the President of the Senate did not choose to count the votes? Does the gentleman suppose the two Houses of Congress are any more likely than any one man to perform their constitutional duty and thus permit the Government to go to pieces?

Mr. GARFIELD. My friend strengthens my argument. If the President of the Senate should refuse to open the certificates, the Senate can depose him in an hour, and put another President in his place who will obey the Constitution.

Mr. HOAR. Suppose the Senate should refuse to do it?

Mr. GARFIELD. Then you have a legislative body which you cannot control; and this illustrates the radical evil of this bill. It admits to a share in counting the votes, two uncontrollable legislative bodies; but when that duty is in the hands of one person he is liable to punishment for neglect or malfeasance in office. And precisely for that reason, my theory of the Constitution is safer and more practicable than that of my friend.

Mr. HOAR. Then the body that you cannot control is the only thing you have got to control him.

Mr. GARFIELD. Impeachment, expulsion, personal disgrace, all bear with tremendous force upon the individual officer. He is more amenable to public opinion and to the law that can seize him, and acts with a keener sense of personal responsibility than a legislative body, where responsibility is divided. The bad behavior of the two Houses is my friend's problem, not mine. When the Houses go wrong there is no remedy in a case like this. *Quis custodiet ipsos custodes?*

Mr. HOAR. That is a doctrine you cannot find in the American Constitution or the utterance of a single one of its framers.

Mr. GARFIELD. I think my friend will acknowledge that all executive officers are subject to impeachment and removal and punishment; but will he find anything in the doctrine of the fathers, in the Constitution or the laws, by which a legislative body can be punished for a dereliction of duty?

The radical and incurable defect of this bill is that it puts a vast, cumbrous machine in the place of the simple, plain, plan of the Constitution; it adopts a method which invites and augments the evils from which we now suffer. It assumes that seven members of the commisston will cancel another seven; and that the decision will finally turn upon the action of the fifteenth unknown member. In what respect is this better than to leave the President of the Senate to decide which is the true certificate, subject to be overruled by the concurrent vote of the two Houses? In one case, the decision may be made in secret, by a person who is yet unknown. In the other, it is made in the presence of both Houses of Congress, by the second highest executive officer of the nation. That there are difficulties in the present situation, I freely admit; that there may be doubt, honest doubt, in the minds of honest men as to who is elected President, I admit. But I think the bill introduced by my colleague from Ohio, [Mr. FOSTER,] which provides for submitting to the Supreme Court those questions of constitutional law about which we differ, would be far better. To the adjudication of that great and honored tribunal, all would bow with ready obedience; but this novel, dangerous, and cumbrous device is, in my judgment, unwarranted by the Constitution. If we adopt it, we shirk a present difficulty; but in doing so, we create far greater ones for those who come after us. What to us is a difficulty, will be to them a peril.

Mr. Speaker, I have trespassed too long upon the indulgence of the House; but I cannot withhold from the gentleman from Massachusetts [Mr. HOAR] the tribute of my admiration for the earnestness and eloquence with which he closed his defense of this measure. I even shared his enthusiasm, when, looking forward to the future of this nation he pictured to our imagination the gratitude of those who may occupy these Halls a hundred years hence, for the wisdom which planned and virtue which adopted this act, which my friend believes to be the great act of the century; an act that solves a great national difficulty, that calms party passion, that averts the dangers of civil war. Let us hope, Mr. Speaker, that they will not be compelled to add that, though this act enabled the men of 1877 to escape from temporary troubles, yet it entailed upon their children evils far more serious and perils far more formidable; that it transmitted to them shattered institutions, and set the good ship of the Union adrift upon an unknown and harborless sea. I hope they may not say that we built no safeguard against dangers except the slight ones that threatened us. It would be a far higher tribute if they could say of us: "The men of 1876, who closed the cycle of the first century of the Republic, were men who, when they encountered danger, met it with clear-eyed wisdom and calm courage. As the men of 1876 met the perils of their time without flinching, and through years of sacrifice, suffering, and blood conquered their independence and created a nation, so the men of 1776, after having defended the great inheritance from still greater perils, bravely faced and conquered all the difficulties of their own epoch and did not entail them upon their children.

"That no threats of civil war, however formidable, could compel them to throw away any safeguard of liberty; that the preservation of their institutions was to them an object of greater concern than present ease or temporary prosperity; that, instead of framing new devices which might endanger the old Constitution, they rejected all doubtful expedients, and planting their feet upon the solid rock of the Constitution, stood at their posts of duty until the tempest was overpassed, and peace walked hand in hand with liberty, ruled by law." [Applause.]

During the many calm years of the century, our pilots have grown careless of the course. The master of a vessel sailing down Lake Ontario has the whole breadth of that beautiful inland sea for his pathway. But when his ship arrives at the chute of the La Chine, there is but one path of safety. With a steady hand, a clear eye, and a brave heart, he points his prow to the well-fixed landmarks on the shore, and with death on either hand, makes the plunge and shoots the rapids in safety.

We too are approaching the narrows; and we hear the roar of angry waters below, and the muttering of sullen thunder overhead. Unterrified by breakers or tempest, let us steer our course by the Constitution of our fathers, and we shall neither sink in the rapids, nor compel our children to "shoot Niagara and perish in the whirlpool. [Great applause.]