

1969

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### Recommended Citation

Shofner, Jerrell H. (1969) "Florida Courts and the Disputed Election of 1876," *Florida Historical Quarterly*. Vol. 48 : No. 1 , Article 5.

Available at: <https://stars.library.ucf.edu/fhq/vol48/iss1/5>

## FLORIDA COURTS AND THE DISPUTED ELECTION OF 1876

by JERRELL H. SHOFNER \*

WHEN THE ELECTION of November 7, 1876 failed to resolve the presidential contest between Republican Rutherford B. Hayes and Democrat Samuel J. Tilden because of uncertain results in Florida, Louisiana, and South Carolina, both national parties sent prominent representatives to the three southern capitals to observe and work for their partys' interests. With Tilden only one electoral vote short of victory, the Republicans needed every one of the nineteen disputed votes. Because there had been less violence and corruption in Florida and because only a few votes separated the parties, many politicians believed it to be the crucial state. Under Florida law, a state canvassing board was empowered to exercise quasi-judicial authority in its examination of returns from the thirty-nine county canvassing boards. It could rule on the validity of those returns and decide whether or not to exclude them from the count. On the board there were two Republicans-Secretary of State Samuel B. McLin, a Southerner and long-time resident of Florida, and Comptroller Clayton A. Cowgill, an ex-Union army surgeon from Delaware-and one Democrat, Attorney General William Archer Cocke, a Virginian who came to Florida in 1863.

Under influence of the many "visiting statesmen" who crowded into Tallahassee on behalf of the national parties, the canvassing board decided to count the votes for presidential electors first and take up the state elections afterward. The Republican majority of the board, over the protests of the Democratic member, threw out about 2,000 votes and declared a majority of about 924 for the Republican presidential electors. This majority was large enough to assure a victory for the Republican gubernatorial candidate, Marcellus Stearns, who had run several hundred votes behind Hayes. In achieving this result the Republican majority on the canvassing board had acted so unfairly

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that the Democrats sought court action to correct what they believed to be a demonstrable injustice.<sup>1</sup>

The ensuing litigation pertained only to the gubernatorial election, but the Republican presidential victory had been achieved by the same canvassing board methods which the Democrats were attacking. As a result the nation continued to watch Florida developments for several weeks after the canvassing board adjourned and the electoral college met on December 6.

Before the canvassing board convened on November 27, the Democrats had insisted that it should use quasi-judicial powers and rule on the validity of returns. After losing the presidential count by this procedure they found it necessary to change their argument over the state count. George W. Biddle and David W. Sellers, Democratic visiting statesmen from Philadelphia, called on the board to hear evidence. Although the Northerners' view was consistent with precedent, R. B. Hilton, a Democratic elector, and George P. Raney, a Florida Democratic executive committeeman, suggested that the Democrats offer no evidence and refuse to participate in a quasi-judicial count before the state canvassing board. They preferred to insist on a simple ministerial count and seek redress in the courts if the board decided against them.<sup>2</sup> The Northerners were afraid the courts might not act once the board decided and they would have lost the election without a fight.

Samuel Pasco, Democratic state chairman, and other Florida Democrats deferred to the northern attorneys, and the Democrats demanded a full hearing before a quasi-judicial canvassing board. Then, in his last argument before the board on December 5, Sellers denied the board's authority to accept or reject county returns. At that time, his position was contradictory to everything the Democrats had done concerning the electoral count.

When the board decided against the Tilden electors, most of the Northern Democrats left Tallahassee, believing that Florida was lost and the case closed.<sup>3</sup> Former United States Senator

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1. Jerrell H. Shofner, "Florida in the Balance: The Electoral Count of 1876," *Florida Historical Quarterly*, XLVII (October 1968), *passim*.

2. Robert B. Hilton to Manton Marble, January 7, 1877, Samuel Tilden Papers, Box 13, New York Public Library.

3. S. G. Thompson to Marble, December 12, 1876, George W. Biddle to

David L. Yulee, a Florida Democrat, and C. Gibson, a visitor from Missouri, suggested that the Democratic electors meet and cast their electoral votes for Tilden and apply for a *quo warranto* action against the Hayes electors. This was done on December 6 while the Republican electors were assembling to cast their votes for Hayes. Congress consequently received two electoral certificates from Florida: one met all the legal requirements and declared Florida's four electoral votes for Hayes while the other was signed by the attorney general instead of the governor and gave Florida's votes to Tilden. As the canvassing board began considering the votes for state officials, Hilton and Raney took the initiative in Democratic circles. In behalf of Democratic gubernatorial candidate George F. Drew, they obtained an injunction from the circuit court forbidding the canvassing board from counting the returns except by merely totalling the votes shown on the county returns without any alterations. Such a method would have meant a majority for Drew and the state ticket. Gibson, who remained in Tallahassee after December 6, wrote Tilden that a circuit court decision for the Democratic state candidates would benefit the Democratic presidential case if Congress should later decide to investigate the electoral certificates before they were counted.<sup>4</sup> Neither Tilden nor his associates showed interest in the case, however.

Ignoring the circuit court injunction, the board continued ruling on the validity of returns and excluding them when necessary. Its work was completed on December 8 with the results favoring the Republican state candidates. Attorney General Cocke refused to sign the resulting certificates and wrote a lengthy protest against the entire canvassing board proceeding. Circuit Judge Pleasant W. White cited the board for contempt and ordered a hearing for December 11, but action on this case was postponed at the request of the Democratic lawyers.<sup>5</sup>

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Marble, December 15, 1876, John R. Read to Marble, December 15, 1876, Manton Marble Papers, Library of Congress.

4. David L. Yulee to Hilton, November 27, 1876, Box 9, David L. Yulee Papers, P. K. Yonge Library of Florida History, University of Florida, Gainesville; Charles Gibson to Samuel J. Tilden, December 9, 1876, Tilden Papers, Box 13.

5. *New York Herald*, December 12, 1876; *Augusta (Georgia) Chronicle and Sentinel*, December 12, 1876; Marcellus L. Stearns to William E. Chandler, December 9, 1876, William E. Chandler Papers, Library of Congress.

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The Republicans were not concerned about an adverse court decision. They knew that Judge White was a pronounced Democratic partisan who would give every benefit of doubt to his political cohorts, but they gave notice that any circuit court decision would be appealed to the state supreme court which, like the state canvassing board, was composed of two Republicans and one Democrat. The supreme court was recessed but the justices agreed to hold a special session beginning December 12 because an early decision of the case was important to the state and nation.<sup>6</sup> Chief Justice E. M. Randall was a Republican, originally from Wisconsin. He had been appointed by Governor Harrison Reed in 1868, and he had often aided Reed from the supreme bench during his hectic administration. In 1876 Randall was hoping to replace North Florida District Judge Philip Fraser who had recently died. Randall and Governor Stearns, who was seeking reelection, were personal and political enemies. Associate Justice R. B. Van Valkenberg, the other Republican, was from New York, but he had been living in Jacksonville since the beginning of Reconstruction. O. B. Hart appointed him to the court in 1873. James D. Westcott, Jr., was the Democratic member. He had been appointed by Reed in 1868 after a brief term as attorney general. He was politically ambitious and had received significant Republican support for the United States Senate in 1873. He was also interested in the vacant federal judgeship, and it was believed that he had the support of Republican Senator Simon B. Conover for the post.<sup>7</sup>

At the urging of Judge White, R. L. Campbell, a Pensacola lawyer who had joined Hilton and Raney on the Drew case, agreed to drop the contempt case in the circuit court and enter the supreme court for a writ of mandamus ordering Cowgill and McLin to perform a ministerial count.<sup>8</sup> This method meant that the board would have to accept the county returns as certified from the counties without considering evidence or excluding votes. Board compliance with this court order would mean a state victory for the Democrats. Believing their chances

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6. *Atlanta Daily Constitution*, December 12, 1876.

7. *Macon Georgia Weekly Telegraph and Journal and Messenger*, December 11, 1876.

8. Pleasant W. White to Francis P. Fleming, July 23, 1901, Box 28, Manuscript Collection, P. K. Yonge Library of Florida History.

before the court good, the Republican board members agreed to abide by the court's decision. The *New York Times* expressed relief that the case had been transferred to the supreme court whose "decision will be respected, for it is beyond a suspicion of partisan action."<sup>9</sup> The *Times* also pointed out that the litigation pertained only to state officials and its result would have no effect on the presidential election.

The nation continued to watch proceedings in Tallahassee. William E. Chandler, who had managed the Republican case before the state canvassing board, wrote Governor Stearns that public opinion was favorable in the North and the Republicans should fight boldly in Florida. In answer to Governor Stearns' request, Chandler asked General Lew Wallace to return to Florida and assist the Republican lawyers there. Wallace did not arrive until December 17. In the interim J. P. C. Emmons of Jacksonville represented the Republican board members. Chandler sent funds to the now bankrupt Florida Republican party, part of which was used to pay Emmons \$500 a week. Unlike Chandler and his national associates, neither Tilden nor any of his supporters showed any concern with the Florida proceedings until the local Democrats had won their case. As late as November 24, Manton Marble, former editor of the *New York World* and friend of Tilden, who had visited Tallahassee, advised the Democratic presidential candidate not to be "zealous for appeal in the Supreme Court of Florida."<sup>10</sup>

The Congress which met in December 1876 had a Republican majority in the Senate and a Democratic majority in the House of Representatives. The Democrats wanted information which would strengthen their case when Congress met in February to count the disputed electoral votes and the Republicans sought information to defend their position from attack. Both houses sent investigating committees to Louisiana, South Carolina, and Florida. The majority party in each house dominated its committee and both submitted majority and minority reports depending on partisan interpretations of their work. The Senate

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9. *New York Times*, December 12, 1876.

10. Stearns to Chandler, December 11, 13, 1876, F. B. Sherwin to Chandler, December 14, 1876, M. Martin to Chandler, December 21, 1876, Stearns to Chandler, December 22, 1876, Chandler Papers; *Atlanta Daily Constitution*, December 19, 1876; Marble to Tilden, December 24, 1876, Marble Papers.

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committee chairman, A. A. Sargent, later said that William E. Chandler was the author of the majority report. A Florida Republican stated that Sargent was the best replacement for Chandler that the party could have sent to Florida.<sup>11</sup> Both Senate and House committees were travelling in Florida taking sensational testimony while the court case was being argued. The publicity given the committees, together with the judicial proceedings, created suspense and uncertainty about the Florida case during December and January.

The writ of mandamus was issued by unanimous decision on December 14. Drew, claiming 24,613 votes to 24,116 for Stearns, argued that the board had usurped judicial functions and powers by going behind the county returns and accepting evidence. It had erred in rejecting the Manatee County return and in refusing to canvass Jackson, Monroe, and Hamilton counties according to the face of the returns. On December 16 McLin and Cowgill filed an answer. The Manatee return was so irregular that they were unable to determine the true vote. In Jackson, Hamilton, and Monroe, evidence had demonstrated that their returns were false and fraudulent. Cocke filed a separate answer saying that the order did not apply to him since he had voted to count the returns in question. The court refused to accept the answer from McLin and Cowgill because it was "argumentative and evasive." They were ordered to amend their answer and include specific grounds for their actions by noon, December 18.<sup>12</sup>

The Republican board members refused to answer the court order, claiming that the court had no jurisdiction. The board had met, performed its duty, and ceased to exist, they insisted. Having ceased to exist, no court could reach the board or its members. The Democratic attorneys answered that the board had not completed its duties properly and therefore its life had not ended. Counsel argued the case until December 22 when Cowgill and McLin decided to file their amended answer to the court. But on the following day they again declined to deliver

11. Leon Burr Richardson, *William E. Chandler: Republican* (New York, 1940), 197; Chandler to Rutherford B. Hayes, January 24, 1877, Sherwin to Chandler, December 21, 1876, Chandler Papers.

12. 16 *Florida Reports* 19-20, 27, 29 (1876); *Washington National Republican*, December 18, 1876; *New York Daily Tribune*, December 18, 1876.

their answer and the court issued a peremptory writ directing them to count the votes as shown on the county returns and declare the results. They were to complete the count by December 27.<sup>13</sup>

The unanimous decision of the supreme court surprised the Democrats and alarmed Republicans. Although it specifically concerned only the gubernatorial election, a decision that the board had no power to throw out returns would indirectly affect the presidential election which had been decided by that procedure. The *New York Times*, which had praised the Florida court for its impartiality, termed the decision a "judicial crime." The Democrats had been uncertain about Judge Van Valkenberg's ruling, but they had expected Randall to support the Republicans because of his interest in the North Florida federal judgeship.<sup>14</sup>

Senator Sargent, however, thought the decision would have been the same no matter how the case was handled. He observed, "There are rivalries and jealousies here that have too much influence even on judicial minds . . . . The state is gone and forever." Governor Stearns declared, "This beats us in the state but we shall try to save Hayes. The opinion is a surprise to everyone here." Secretary of State McLin, who was also an aspirant for the vacant judgeship, wrote, "Randall was only glad of an opportunity to sacrifice Stearns. The traitor would have destroyed the electoral vote if necessary to make his spite on Stearns and one or two others."<sup>15</sup>

Senator Sargent advised northern Republicans that the principle of the decision left enough discretion for the board to save the electoral votes, but that the court proceedings would have to be watched closely. The local Republicans were without funds for lawyers and were no longer interested after having lost the local election. Worried about the *quo warranto* pending before Judge White against the Hayes electors, Sargent suggested providing a good lawyer with funds to try the case if it came up,

13. 16 *Florida Reports* 52 (1876); *New York Times*, December 24, 1876; *Atlanta Daily Constitution*, December 23, 1876; C. E. Dyke to C. W. Jones, *New York World*, December 23, 1876.

14. *New York Times*, December 29, 1876; Hilton to Marble, December 23, 1876, Marble Papers.

15. Aaron A. Sargent to Oliver P. Morton, December 22, 1876, Stearns to Chandler, Samuel B. McLin to Chandler, December 24, 1876, Chandler Papers.

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because "a judgment against our electors during the next month might ruin the nation."<sup>16</sup>

McLin and Cowgill first decided to resist the court's order and apply to the United States courts for relief if state authorities arrested them. The Democrats had been careful to avoid any reference to the presidential electors which might bring the federal courts into the affair. But McLin and Cowgill had observed a similar controversy in South Carolina in late November. Federal Judge Hugh L. Bond ordered the release of South Carolina canvassing board members who had been arrested for disobeying a state court order. Bond reasoned that a federal issue was involved because part of the board's duties were to count votes for federal officers according to a federal law, and they had been arrested for acts committed in performing these duties.<sup>17</sup> The Florida canvassing board members believed they could invoke this precedent if necessary.

Governor Stearns announced that the court decision settled the state election and advised the board to comply with it. Cowgill agreed with Stearns and the matter seemed to be settled without anyone going to jail. McLin notified Cocke and Cowgill to meet with him on December 27 and carry out the court order. Meanwhile, Senators Chandler, Oliver P. Morton of Indiana, and John Sherman of Ohio had considered the Florida court activities in light of national public opinion. They decided that even though the court was not dealing with presidential electors, the state and national Republican majorities both depended on the canvassing board's power to exclude returns. An adverse decision against the state Republican candidates would reflect on the national election. Chandler wrote Lew Wallace that the country would stand for a total disregard of the court order, but if the board once admitted that the court could direct its actions there was nothing to prevent a similar decision pertaining to the presidential election.<sup>18</sup>

16. Sargent to Morton, December 22, 1876, Chandler Papers.

17. Washington *National Republican*, December 23, 1876; Hilton to Marble, December 31, 1876, Tilden Papers, Box 14; Francis Butler Simkins and Robert H. Woody, *South Carolina During Reconstruction* (Chapel Hill, 1932), 521-22.

18. *Atlanta Daily Constitution*, December 27, 1876; *New York Daily Tribune*, December 27, 1876; *Cincinnati Commercial*, December 27, 1876; *Washington National Republican*, December 27, 1876; *New York World*,

On December 26, Chandler and his fellow Republicans took measures to prevent the court order from being obeyed. Wallace and Governor Stearns were instructed to disregard the Florida Supreme Court's order. It is not clear whether Stearns acquiesced in this move, but Secretary McLin notified the canvassing board members not to meet according to his earlier notice because he and Cowgill were filing a motion to set the mandamus aside. George H. Williams, former attorney general under President Grant, arrived in Tallahassee on December 28 to assist in legal matters and also to assure Florida Republicans of administration support. Senator Sherman telegraphed Federal Judge William B. Woods at Montgomery, Alabama, that the presence of a federal judge at Tallahassee might be necessary to secure justice. He asked if Woods would go to Tallahassee since there was no federal judge in that district. Woods replied that he would go wherever duty required.<sup>19</sup>

The Democrats attempted to create public opinion against this new maneuver and destroy the canvassing board members' confidence in national support. Democratic newspapers printed a report that Judge Woods would refuse to go to Tallahassee and intervene if McLin and Cowgill were arrested for contempt of court. Woods denied the report, but only after the crisis had passed. Attorney General Cocke disregarded McLin's notice that the board would not convene and reported to the secretary of state's office at the appointed time. He obtained McLin's permission to count the votes alone and announced the results showing a 497 majority for Drew and a ninety-four majority for the Tilden electors.<sup>20</sup>

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December 21, 1876; *Savannah Morning News*, January 1, 1877, quoting Tallahassee *Floridian*; *Chicago Times*, December 27, 1876; 16 *Florida Reports* 52-54 (1876); Chandler to Lew Wallace, December 25, 1876, Chandler Papers.

19. *New York Daily Tribune*, December 27, 1876; *Cincinnati Commercial*, December 28, 1876; *New York Herald*, December 26, 1876; *New Orleans Daily Picayune*, January 4, 1877, quoting *Chicago Times*; *Washington Sentinel*, December 30, 1876; *Augusta Chronicle and Sentinel*, December 28, 1876; *Atlanta Daily Constitution*, December 28, 1876; William B. Woods to John Sherman, January 1, 1877, Sherman Papers, Library of Congress.
20. Tallahassee *Weekly Floridian*, January 2, 1877; *Augusta Chronicle and Sentinel*, December 29, 1876; *Macon Georgia Weekly Telegraph and Journal and Messenger*, December 26, 1876; *Cincinnati Commercial*, December 28, 1876; *New Orleans Daily Picayune*, January 4, 1877; *Savannah Morning News*, January 1, 1877; Tallahassee *Weekly Floridian*, January 2, 1877; Woods to Sherman, January 8, 1877, Sherman Papers.

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The two Republican board members then decided to obey the court order under protest and gratuitously to include a recount of the electoral votes showing a Hayes majority according to the method prescribed by the court. At four o'clock, December 28, McLin and Cowgill answered the writ, protesting that the board had ceased to exist and that the court could not revive it. The protest was accompanied by a certificate showing a majority for Drew and Noble A. Hull. The vote was 24,179 to 23,984. The certificate also showed a 208 majority for Hayes over Tilden. This had been accomplished by counting the Republican version of the Baker County return, which the board had unanimously thrown out during the original count, and excluding the entire Clay County return on the ground that it was irregular on its face.<sup>21</sup> Judge Cocke refused to join in the board action pertaining to the presidential count.

On January 1, 1877, Supreme Court Justice Westcott, speaking for a unanimous court, refused to accept the canvassing board's answer and directed a strict compliance with the peremptory writ by five-thirty that same afternoon.<sup>22</sup> When the board corrected its answer, the court accepted it. This response to the court order elected Drew and Hull as governor and lieutenant governor. R. H. M. Davidson, Democratic candidate for the first congressional district, won over W. J. Purman. The Republican candidate for the second district, Horatio Bisbee, Jr., retained a majority over J. J. Finley, but Finley contested and was later seated by the House committee on privileges and elections. Both houses of the legislature had Democratic majorities. There was no reference to the presidential electors.<sup>23</sup>

All federal troops had been withdrawn from Tallahassee on

21. 16 *Florida Reports* 63 (1876); *Macon Georgia Weekly Telegraph and Journal and Messenger*, December 26, 1876; *New York Daily Tribune*, December 28, 1876; *Thomasville (Georgia) Times*, December 30, 1876; *Atlanta Daily Constitution*, December 29, 1876; *New York World*, January 18, 1877.

22. 16 *Florida Reports* 63 (1876).

23. *A Historical and Legal Digest of All the Contested Election Cases in the House of Representatives of the United States from the First to the Fifty-Sixth Congress, 1789-1901*, 56th Cong., 2nd Sess., *House Document No. 510*, Serial No. 4172, p. 326; A. B. Hawkins to Matt W. Ransom, February 21, 1877, Ransom Papers, Southern Historical Collection, University of North Carolina at Chapel Hill; E. I. Alexander to Patterson Sanders, February 13, 1877, W. Carlton Smith Collection, Madison, Florida; Wallace to Chandler, January 1, 1877, Chandler Papers.

December 9, except one infantry company which remained until January 18, 1877.<sup>24</sup> General Thomas H. Ruger watched the Florida situation from his South Carolina headquarters, but instructed the company commander in Tallahassee not to interfere unless the civil authorities were unable to preserve order and then only on request from local officials. Governor-elect Drew asked Stearns to have some federal troops present on the capitol grounds during the inauguration.<sup>25</sup> Governor Stearns made no attempt to carry on a government in conflict with the new Democratic administration as had been rumored. Despite the assembly of a large crowd of Negro and white citizens, Drew and Hull were inaugurated peacefully on January 2, 1877.<sup>26</sup> President Hayes' subsequent removal of troops from Louisiana and South Carolina in April, long regarded as part of the "compromise of 1877" and the "end of Reconstruction in the South," had nothing to do with Democratic accession to power in Florida. Some of the legends which still circulate in Tallahassee and elsewhere in Florida about the dramatic inauguration are embellishments of the actual events.

Newspapers in neighboring states hailed a great Democratic victory in Florida.<sup>27</sup> Drew's inauguration satisfied many members of both parties. Wilkinson Call, a Tilden elector, denounced some of his fellow Florida Democrats as unwilling to work for Tilden's election once they had won the state offices. This was one reason the Democratic lawyers had not insisted on a recount of the electoral votes under the court order.<sup>28</sup> Hilton, Raney, Campbell, and probably Samuel Pasco were satisfied with the state victory regardless of the outcome of the presidential con-

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24. *New York Herald*, December 9, 1876; *Jacksonville Daily Florida Union*, January 20, 1877; Edward C. Williamson, "The Era of the Democratic County Leader: Florida Politics, 1877-1893" (unpublished Ph.D. dissertation, University of Pennsylvania, 1954), 43.
  25. Adjutant General to Captain Mills, December 20, 1876, Thomas H. Ruger to Stearns, December 22, 1876, adjutant general to Captain Mills, December 30, 1876, Ruger to Mills, January 2, 1877, Telegrams Sent, Records of U. S. Army Commands, Department of the South, Record Group 98, National Archives; *Washington National Republican*, January 3, 1877.
  26. *St. Louis Dispatch*, January 3, 1877; *New York Times*, January 4, 1877; *Chicago Daily Tribune*, January 4, 1877; James E. Yonge to Tilden, January 2, 1877, Tilden Papers, Box 13.
  27. *Savannah Morning News*, January 3, 1877; *Atlanta Daily Constitution*, January 5, 1877.
  28. Wilkinson Call to Marble, January 5, 7, 1877, Tilden Papers, Box 13.

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troverisy. Jesse T. Bernard, a Democratic lawyer just elected mayor of Tallahassee, wrote a Republican friend in Philadelphia expressing his satisfaction with Drew as governor and Hayes as president. The recipient of this news forwarded it to Hayes, noting his amazement at the speed with which Bernard and other southern democrats were dropping Tilden in lieu of the governorship.<sup>29</sup> Governor Stearns' secretary wrote Senator Chandler, "I believe it possible to have this incoming State administration thoroughly in accord with the Hayes government."<sup>30</sup> The Republican Jacksonville *Florida Union* editorialized: "If we have got to have a Democratic State government, we rejoice that there is so little of the old Democracy in it."<sup>31</sup>

The election of Drew, who had been defeated initially by the same count which defeated Tilden, encouraged the national Democrats but it did nothing for their legal position. When the Republican-controlled supreme court decided for the Democratic state candidates, Manton Marble and some of his northern associates became once more interested in Florida affairs. Some of them misunderstood and thought the court was ordering a recount of the entire election. R. B. Hilton cautioned that the mandamus related to the state election only. The arguments which he and the Florida Democrats were pursuing for a ministerial count were contradictory to the position taken by northern Democratic counsel when Tilden's case was lost before the canvassing board. Hilton explained that he had not insisted on correcting the final action of the board because Judge Westcott advised him that nothing could be done about it. He reminded Marble that the other two judges were Hayes supporters and inferred strongly that the indirect benefit for Tilden was much more than the northern lawyers had been able to achieve. "I remind you," Hilton concluded, "we are before an unfriendly court none of whom are men of the highest character. Our northern friends did not send *us* an ex-United States Attorney General to advise with."<sup>32</sup>

29. Thomas Donaldson to Hayes, December 18, 1876, microfilm of Hayes Papers relating to the election of 1876, Library of Congress.

30. Sherwin to Chandler, January 3, 1877, Chandler Papers.

31. Jacksonville *Daily Florida Union*, January 5, 1877.

32. Hilton to Marble, December 27, 31, 1876, January 4, 7, 1877, Tilden Papers, Box 13.

Wilkinson Call, Edward A. Perry of Pensacola, and Edward M. L'Engle of Jacksonville disagreed with Hilton, Raney, and Pasco. They thought the mandamus decision for Drew should be applied to the case of the Tilden electors. They announced on January 2 that they would take the matter to the supreme court.<sup>33</sup> This suit was quickly abandoned though, because the board members went out of office when Drew was inaugurated. Everyone agreed that a court order carried out by the Democratic officials who replaced McLin and Cowgill would be of little value. After lengthy correspondence with Marble in New York, Call abandoned plans for a writ of *quo warranto* from the supreme court because that body refused to consider it until the regular session beginning January 9, and there seemed little chance that it would accept original jurisdiction even then.<sup>34</sup> Call and other Democrats interested in Tilden's election decided to proceed with the *quo warranto* action in Judge White's court and at the same time have the state legislature, a majority of which was sympathetic toward Tilden, enact legislation providing for a new canvass of the presidential votes.<sup>35</sup> Charles Gibson of Missouri had suggested in late November 1876 that the legislature be induced to memorialize Congress asking that Florida's electoral vote be disregarded as a fraud. Charles P. Thompson, chairman of the House of Representatives' investigating committee in Florida, advised that nothing more could be gained in the courts. He suggested that the state legislature call for a new canvass for presidential electors. R. B. Hilton also suggested that the Democrats rely on Governor Drew and the new legislature.<sup>36</sup>

While the Democrats worked through the legislature on the main floor of the capitol building and in Judge White's court in the basement, the Republicans were still concerned about the

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33. *New York Times*, January 4, 1877, Call to Marble and Marble to Call, January 5, 1877, Call to Marble, January 6, 1877, Marble to Call, January 7, 1877, Tilden Papers, Box 13.

34. Call to Marble, January 7, 1877, Hilton to Marble, January 4, 1877, Tilden Papers

35. Call to Marble, January 8, 1877, Samuel Pasco to Marble, January 8, 1877, Edward A. Perry to Clarkson N. Potter, January 22, 1877, Tilden Papers; *New York Daily Tribune*, January 12, 1877.

36. C. Gibson to Tilden, November 28, 1876, Charles P. Thompson to Tilden, January 4, 1877, Hilton to Marble, December 31, 1876, Tilden Papers.

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supreme court justices and the vacant federal judge's office. Secretary of State McLin was seeking the appointment and had obtained recommendations from numerous Florida Republicans.<sup>37</sup> The Republican party was indebted to McLin whose political future had been destroyed by the Democratic state victory. Democratic officials were already preparing embezzlement charges against him for alleged acts committed as secretary of state.<sup>38</sup>

Judge Westcott proclaimed his satisfaction with the canvassing board's decision for the Democratic state officials and the Republican presidential electors. This position kept Westcott in Senator Conover's favor for the judgeship. Conover, opposed to Governor Stearns and favoring the Republican national administration, was expected to have an influential voice in filling the vacancy. Chief Justice Randall, who also disliked Stearns, said he thought the presidential electors' vote was a matter beyond the court's jurisdiction.<sup>39</sup>

As long as these men had hopes of receiving the appointment, they were not expected to desert the Republican electors. Early in December Governor Stearns, for this reason, had advised United States Attorney General Alphonso Taft that no appointment should be made until the election excitement had passed. In early January Taft was again cautioned against filling the office for a few weeks. Thomas Settle of North Carolina, to whom the party was indebted for recent election activities, was actually appointed in late December, but his name was quickly withdrawn from consideration.<sup>40</sup>

Lew Wallace, back in Florida for the third time to defend the Republican electoral vote, was relieved when the appointment was withdrawn. He warned, "in all earnestness, if that vacancy is filled I am broken down here completely. . . . Keep

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37. McLin to Chandler, December 24, 1876, January 2, 5, 1877, Charles H. Pearce to Chandler, January 11, 1877, W. W. Hicks to Chandler, January 25, 1877, Chandler Papers.

38. Indictment, *State v. Samuel B. McLin*, Fall Term 1877, Circuit Court Records, Leon County, Florida.

39. Wallace to Chandler, January 15, 1877, Chandler Papers.

40. Stearns to Alphonso Taft, December 3, 1876, Horatio Bisbee to Taft, January 4, 1877, Letters Received, Attorney General's Papers, Records of Department of Justice, Record Group 60, National Archives; McLin to Chandler, January 2, 1877, Wallace to Chandler, January 15, 1877, Chandler Papers.

that vacancy open, and the vote of Florida for Hayes is under good protection so far as the courts of the state are concerned.”<sup>41</sup> Meanwhile, Wallace promised McLin his support for the office, but explained that nothing could be said until the electoral vote was beyond recall by the supreme court.<sup>42</sup>

There was never much chance that any Florida Republican could obtain the appointment. Settle was a prominent Republican who was being considered for a possible cabinet position if Hayes was seated as President, but he preferred the certain judgeship to the uncertain Washington post.<sup>43</sup> He was acceptable to Conover, and Democratic Senator Charles W. Jones was opposed to any Florida Republican for the position.<sup>44</sup> Settle's nomination was sent to the Senate on January 26 after it was too late for adverse court action. McLin was promised a judgeship in New Mexico territory, but the Senate ultimately denied confirmation because of Conover's opposition.

In early January a joint congressional committee was still working out details of an electoral commission to count the disputed electoral votes, but the general principles of the bill were decided. It appeared that the electoral commission would consider evidence concerning electoral certificates which were referred to it. For the first time Abram S. Hewitt of New York, Tilden's campaign manager, showed concern for the Florida controversy. He recommended that Marble and other Tilden men draft suitable legislation for passage by the Florida legislature. He also wanted D. W. Sellers and G. W. Biddle sent back to assist the Florida lawyers in their *quo warranto* suit before Judge White.<sup>45</sup> Marble was already preparing two draft bills which were subsequently enacted by the Florida legislature. The first was passed and signed by Governor Drew on January 18, directing a “legal canvass of the electoral vote of Florida as cast at the November 7 election.”<sup>46</sup> The new canvassing board, com-

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41. Wallace to Chandler, January 15, 1877, Chandler Papers.

42. McLin to Chandler, January 16, 1877, Chandler Papers.

43. Thomas Settle letter, January 27, 1877, Settle Papers, Southern Historical Collection, University of North Carolina at Chapel Hill.

44. Jones to Edward M. L'Engle, January 17, 1877, L'Engle Papers, Southern Historical Collection, University of North Carolina at Chapel Hill.

45. Abram S. Hewitt to Tilden, January 8, 1877, Tilden Papers, Box 13.

46. Marble to Call, January 12, 1877, Tilden Papers; Governor Drew Letter Book, January 18, 1877, Florida State Library, Tallahassee; Tallahassee *Weekly Floridian*, January 23, 1877.

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posed of Secretary of State William D. Bloxham, Attorney General Columbus Drew, and Comptroller Walter Gwynn, all Democrats, reported a Tilden majority of about ninety-four for each elector.<sup>47</sup> The legislature then passed the second bill declaring them duly elected and authorizing the governor to issue certificates of election.<sup>48</sup> They met on January 26, cast their votes for Tilden and Hendricks, and forwarded a third certificate of Florida's electoral votes to the United States Senate.<sup>49</sup>

Marble and his New York associates considered the *quo warranto* case important, but they did not send the Philadelphia lawyers as Hewitt had suggested. Neither Samuel Pasco nor R. L. Campbell, who had assisted in Drew's earlier litigation, was present during the case of the electors, but Wilkinson Call assured Marble that Edward Perry and Augustus E. Maxwell of Pensacola were well equipped to handle the Democratic case.<sup>50</sup> The case was argued from January 8 to the twenty-fifth. Lew Wallace argued that the Republican electors had performed their duties and ceased to be electors and that the court could not reach them. Meanwhile, he tried to get the case transferred to the United States Circuit Court and out of Judge White's jurisdiction.<sup>51</sup> White refused to consider the transfer, and the case proceeded in the state circuit court. On January 25 Judge White declared that the Republican electors were mere usurpers of the offices to which the Democratic electors had been duly elected.<sup>52</sup>

Wallace filed an appeal of the decision but the supreme court refused to hear it until the regular session in June. Before that

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47. *Florida Assembly Journal*, 1877, 123; Call to Marble, January 19, 1877, Tilden Papers, Box 13; Jacksonville *Florida Sun*, January 20, 1877.

48. "An Act to Declare and Establish the Appointment by the State of Florida of Electors of President and Vice President," Official Documents Pertaining to Election of 1876 in Florida, Box 1, Manuscript Collection, P. K. Yonge Library of Florida History; New Orleans *Daily Picayune*, January 21, 1877.

49. "Certificate of Florida's Four Electoral Votes for Tilden and Hendricks, January 26, 1877," Official Documents Pertaining to Election of 1876 in Florida.

50. Call to Marble, January 12, 18, 1877, Tilden Papers, Box 13.

51. Call to Marble and Marble to Call, January 10, 1877, Tilden Papers; Wallace to Chandler, January 15, 1877, Chandler Papers.

52. "State of Florida *ex rel* Call, Bullock, Hilton, Yonge v. Pearce, Humphries, Holden, Long," Official Documents Pertaining to Election of 1876 in Florida; Potter to Tilden, January 26, 1877, Tilden Papers, Box 13.

time the case ceased to be important and the national Republican party asked the Florida Republican electors to abandon the case.<sup>53</sup> Governor Stearns accepted the reality of a Republican presidential victory while the state was being turned over to the Democrats, but some of his Republican associates thought he should now apply for his own *quo warranto* action against Drew. When he did not, David Montgomery accused Stearns of selling out for a federal appointment. "If Hayes is President then Stearns is governor," he wrote after Hayes was inaugurated.<sup>54</sup> Others agreed with Montgomery that Stearns should try and oust Drew.

In reference to this sentiment, Stearns wrote Thomas W. Osborn, former United States Senator from Florida, that he was willing to file a *quo warranto* suit and would even furnish the money, but he would first have to have assurance that Judge Randall would uphold him. Since they were not friends, Stearns refused to go before Randall's court without prior guarantees that the judge would act favorably. Stearns prophetically warned Osborn that Hayes might withdraw support from the existing Republican governments in the South rather than try to establish new ones. He concluded, "we may look for the warm loving embrace of southern whites by the next administration."<sup>55</sup>

With the electoral count scheduled to begin on February 1 and with Florida the first disputed state to be reached because of its alphabetical position, Democrats hurriedly assembled their documentary evidence in Washington. There were three certificates before Congress purporting to be the electoral vote of Florida. Only the one signed by the Republican electors and Governor Stearns on December 6 met all the legal requirements. The second one was signed by the Democratic electors on December 6, but bore the attorney general's signature rather than that of the governor. The third certificate was signed on January 25, 1877, after the proper date for the electoral college, by the Democratic electors and Governor Drew, who had not been in office when the electoral college met. To support their certificates,

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53. Call to Marble, January 18, 1877, Tilden Papers, Box 13; Stearns to Chandler, May 4, 1877, Chandler to Bisbee, May 29, 1877, Chandler Papers; *Augusta Chronicle and Sentinel*, January 19, 1877.

54. David Montgomery to Chandler, March 25, 1877, Chandler Papers.

55. Stearns to Thomas W. Osborn, February 21, 1877, Chandler Papers.

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the Democrats had Judge White's decision against the Hayes electors, as well as the administrative and legislative records pertaining to the second canvass which resulted in the third electoral certificate.

Call and Pasco went to Washington with printed copies of court records, legislative acts, and records of the new canvassing board. William D. Bloxham and Attorney General Cocke followed after the Florida case was turned over to the electoral commission, bringing with them the original returns and all related papers.<sup>50</sup> The Democrats were prepared to present overwhelming evidence supporting their claims to Florida's electoral votes if the commission agreed to go behind the certificates and determine which was the correct one.

Congress assembled on February 1, and the electoral count began. There were no objections until Florida's three certificates were reached. All three and accompanying documents were referred to the electoral commission. Both parties had excellent legal counsel, but little new information was introduced. The arguments of both sides had become public knowledge during the weeks following the election. The crucial question was whether the commission itself was a canvassing board with power to review evidence behind the certificates, one signed by Governor Stearns and another by Governor Drew.

The Democrats argued that Tilden had received a majority in Florida which had been changed by a dishonest canvassing board. They emphasized the *quo warranto* decision and pointed out that every branch of Florida's government supported the Tilden electors; they asked the commission to accept evidence which would prove their contention. The Republicans based their argument on the finality of the certificate signed by Stearns and the doctrine of necessity. According to them, the commission had no power to go behind a state's electoral certificate as certified by its chief executive. Furthermore, if the commission did go behind the returns it would be necessary to investigate the whole record. Since there was insufficient time for such an investigation, the commission was compelled to accept the certificate, which met the legal requirements, as final. Ac-

56. *Atlanta Daily Constitution*, February 1, 1877; William D. Bloxham to Marble and Pasco, February 5, 1877, Call to Marble, February 12, 1877, Tilden Papers, Box 14.

ording to the Republicans, the framers of the Constitution had not intended the judiciary to have power over the election process. The court could not even correct mathematical errors or results of bribery if discovered after the electors had been certified by the governor.<sup>57</sup>

Argument of the Florida case ended on February 6, and on February 9 the fifteen-member commission, composed of eight Republicans and seven Democrats, awarded Florida's four electoral votes to Rutherford B. Hayes on the ground that it had no power to go behind the returns of a state as certified by its governor. Since the most important factor seemed to be the Republican majority on the commission, many observers believed that the Florida decision settled the election. The *New York Tribune* commented that "the decision of the Tripartite Commission in the Florida case is a great victory for . . . Governor Hayes, masked however in such a way that the Democrats . . . regard it as not quite a crushing defeat of Mr. Tilden."<sup>58</sup> The Democratic New Orleans *Daily Picayune* agreed.<sup>59</sup> James G. Blaine wrote that the Florida decision virtually settled the contest, and William Chandler advised Hayes to choose his cabinet and prepare his inaugural address.<sup>60</sup> The Louisiana and South Carolina cases were ultimately decided according to the Florida precedent by the same eight to seven vote. On March 2 the count was completed and Hayes was declared elected.

Democrats were incensed because the Republicans had won in Florida by advocating the canvassing board's power to accept evidence proving fraud, then won before the electoral commission by upholding the principle that state returns could not be investigated. The Democrats had built a strong case in the Florida courts if they had been able to get that case before the commission. But the Republicans also had a good case. They had met all the forms of law and were able to prevent the Demo-

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57. Chester L. Barrows, *William M. Evarts* (Chapel Hill, 1941), 303; J. P. Root to W. M. Evarts, January n.d., 1877, Evarts Papers, Library of Congress; Frederick T. Hill, "Decisive Battles of the Law," *Harper's Monthly Magazine*, CXIV (March 1907), 563.

58. *New York Daily Tribune*, February 8, 1877.

59. *New Orleans Daily Picayune*, February 10, 1877.

60. James G. Blaine to Hayes, February 14, 1877, Hayes Papers; Charles C. Tansill, *The Congressional Career of Thomas F. Bayard, 1869-1885* (Washington, 1946), 179.

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crats from showing the circumstances by which that was accomplished. Chandler's shrewd management of Republican activities in Florida had managed to convey the impression to the nation that the Florida canvassing board's original count showed a Hayes victory. Building on that tactical victory, he obtained the properly prepared certificate of the electoral vote and got it into the proper channels in Congress.<sup>61</sup> Although the Democrats won their arguments in the Florida courts, they were unable to present a duly executed electoral certificate. Each side realized that the public would not accept a decision which flagrantly violated the forms of traditional democratic practice, and used every available method to legitimize their arguments. While the Democrats succeeded in the courts, the Republicans were more successful in the administrative and legislative channels.

The returns sent from the Florida counties, questionable though some of them were, probably were not far from an accurate measure of the parties' relative strengths. The presidential election would have hinged on a mere handful of votes in 1876 regardless of the irregularities during the election or the canvassing activities which followed it. On the face of the returns the Democrats won the state election by several hundred votes while the difference between the presidential tickets was less than 100. The disparity was due to split-ticket voting by some East Florida Republicans. Had the state canvassing board excluded the more obviously irregular returns, counted a small Hayes majority, and left the Democrats a state victory, it is unlikely that the Florida Supreme Court would have entertained the case against the canvassing board members. The two Republican justices were Hayes supporters and believed he had been elected. They did not believe the Republicans had won the state election. Neither was friendly with Governor Stearns, a fact which made it easier to order the canvassing board to correct an obviously unfair decision. At the same time, the two Republicans were joined by Democratic Judge Westcott in limiting their court order so that the Hayes electors would retain a majority. Westcott and Randall had personal reasons for this decision, but in

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61. Shofner, "Florida in the Balance: The Electoral Count of 1876," *passim*.

such a close election, the judges were also reluctant to substitute a court order for the canvassing board decision.

Drew and Hull received a clear majority in the election and earned the offices which they assumed in January 1877. The outcome of the presidential election is not as clear as that of the state contest. It is unfortunate that the Republican canvassing board members furnished such overwhelming evidence against the Republican presidential electors by their arbitrary efforts to count in the Republican state ticket. Their action is the basis for the long standing Democratic claim to the Florida electoral votes, but this contention glosses over the question of fraud and intimidation upon which the county returns were based. The election machinery was not accurate enough to resolve beyond a doubt an election as close as that between Hayes and Tilden. After both sides had exhausted all possible remedies and the inaugurations were held in Tallahassee and Washington, it is possible but not conclusive that an equitable resolution of the dispute had been obtained.