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## Counting the Electoral Votes

Benjamin T. Eames

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COUNTING THE ELECTORAL VOTES.

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SPEECH

OF

HON. BENJ. T. EAMES,

OF RHODE ISLAND,

IN THE

HOUSE OF REPRESENTATIVES,

JANUARY 25, 1877.



WASHINGTON.

1877.

SPEECH  
OF  
HON. BENJAMIN T. EAMES.

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On the bill (S. No. 1153) to provide for and regulate the counting of votes for President and Vice-President, and the decisions of questions arising thereon, for the term commencing March 4, A. D. 1877.

Mr. EAMES. Mr. Speaker, the questions involved in the report of the committee of the House to determine its powers and privileges, and in that of the Senate and House upon counting and declaring the votes in the recent election for President and Vice-President of the United States are of vital importance. The correct decision of these questions may determine, if not the existence, the continuance and stability of the Government under which we live, which is a government of law and not of men.

Any departure from this fundamental principle of a free government as a government of law and not of men, upon which we all depend for protection of reputation, liberty, life, and property, involves the very life of the Government. Liberty and law, and liberty regulated by law, are essential requisites of a free government. If we would preserve such a government it is an indispensable condition to stand by and preserve intact the law of the land until changed in the mode prescribed by law. And it is fortunate that the consideration of the vital questions involved in these reports occurs at a time when there is no occasion to determine them otherwise than upon principle and in accordance with the fundamental principle of law upon which a free government rests and upon the adherence to which its continuance depends.

The great political parties of the country in this Congress are so divided, and in the next Congress will be so evenly divided that it will be impossible, whether Mr. Hayes or Mr. Tilden shall be President, at least for a period of two years, to change the existing law so as to disturb the business interests of the country. With a republican Senate and a democratic House, whether the President is republican or democratic, no change in the law can be made unless agreed to by both political parties, and hence no fears need be entertained by any one engaged in any business pursuit that any change in the law will be made which will disturb the business of the country, as no change can be made unless assented to by both the great political parties.

It is true, however, that the uncertainty as to the result of the recent presidential election has created in the public mind an uneasiness which interferes with the business of the country, through a vague apprehension that it may result in disturbing the peace which now exists, and the continuance of which is essential to the prosperity of the industrial and commercial interests of the country. This vague and, as I think, unfounded apprehension of another civil war is the only thing in the way of a dispassionate and calm consideration and determination of the great questions involved in these reports, in accordance with the law of the land.

But whether this apprehension is well founded or not, the question is here and before us, and as members of this House, upon our con-

sciences and our oaths, we must express an opinion upon it; and it is a question of vital importance not only as determining the result of the recent election, but as establishing a precedent in all presidential elections which may hereafter occur. In this view it is the solemn duty of every member of this House, so far as he may, to divest himself of political or partisan bias, and to decide the question upon a careful and thorough consideration of the provisions of the Constitution and the law of the land; constantly keeping in mind that the Government under which we live is a government of law and not of men, and that if the law is in any respect wrong there is a mode prescribed by which it may be changed peaceably and without resort to arms.

Where, then, under the Constitution and the laws of the United States is the power vested to determine the election of the President and Vice-President? Is it in the President of the Senate, in the House of Representatives, in the Senate, or in Congress? Let us, so far as we can, examine these questions upon principle and aside from appeals to party, and without regard to the apprehension that our material interests seem to require and demand a settlement in the present, without regard to either principle or the future, but simply and solely upon the principles of law upon which all our rights under a free government depend and without which a free government fails and falls. This is the question to which our attention is invited and which we are called upon to decide, and upon its correct solution, as I have said, may depend the permanence and stability of our free institutions.

The provisions of the Constitution upon the election of a President and Vice-President are expressed in language so simple and plain that there ought not to be any dispute about their intent and meaning.

Article 2, section 1, declares that—

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

It also prescribes that "Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States," and declares also the qualifications which are necessary for a President and a Vice-President.

Congress has by law prescribed the time when the electors shall be chosen, and the time when they shall give their votes, and the Constitution prescribes the manner in which they shall give their votes and how they shall be certified, and the officer to whom they shall be delivered; and provides that the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and that the votes shall then be counted, and declares that the persons having the greatest number of votes for President and Vice-President shall be the President and Vice-President if such number be a majority of the whole number of electors appointed.

Now under these provisions of the Constitution each State has the right to appoint, in such manner as the Legislature thereof may direct, the electors to which it is entitled, subject only to the limitation as to eligibility and the time of election and when the electors shall vote. And under these provisions of the Constitution and the laws of the United States and the laws of the State the only question which can arise, wherever the power rests to determine it, is whether the electors have been chosen in the mode prescribed by the State law and

were eligible to the office of elector under the Constitution, were elected on the day prescribed by law, and on the day fixed by law cast their votes for persons eligible to the offices of President and Vice-President of the United States.

It is the right of the State under the Constitution to appoint the electors in such manner as the Legislature may direct. If these electors, having the requisite qualifications, have been appointed in accordance with the laws of the State where appointed, the vote must be counted, for neither the House nor the Senate nor Congress can either deny or abridge the constitutional right conferred in this respect upon the States.

The only question then is whether the law of the State has been complied with and whether this law is in accord with the limitations prescribed as to time and place and qualifications by the Constitution and laws of the United States.

This leads to the question by whom, under the law, is the vote certified by the State to be counted?

The power of the President of the Senate to count the vote is found in the provision of the Constitution which directs the votes to be delivered to him, and directs him in the presence of the Senate and House to open all the certificates, and declares that the votes shall then be counted.

What power does this provision of the Constitution confer upon the Vice-President of the United States or President *pro tempore* of the Senate? It certainly, by its terms, confers no powers in this respect either upon the House or the Senate or Congress. Neither the House nor the Senate nor Congress is named in this connection, except as witnesses to an act which is to be done by some other person who is named.

The act to be done, which is not only to open the certificates but also to ascertain who has been elected President and Vice-President, is by the express language of the Constitution to be done in the presence of the Senate and the House, and of necessity to be done by some one besides the Senate and the House, and, by necessary implication, as no other person is named, by the person to whom the vote was directed, who had the custody of the votes, and who by express language was directed to open the certificates in which the votes were inclosed. Otherwise the whole ceremony is idle. The President of the Senate has the legal custody of the votes. He is directed to open them on a certain day in the presence of the Senate and the House. The two Houses meet. The President of the Senate opens the certificates in their presence. What is to be done with them? Who is to count them? Surely not the House, nor the Senate, nor both Houses, for what is to be done is to be in their presence, and by necessary implication not to be done by them. It surely was intended that the votes should then and in that presence be counted to ascertain who if any one had been elected as President and Vice-President.

And although the Constitution does not in so many words say that the votes shall be counted by the Vice-President, inasmuch as the votes were to be counted then and there, the inference is almost absolutely certain that the act was to be done by the person who was specifically named as the custodian of the votes and who was directed by name to have them on a certain day at a fixed place, and then and there to open the certificates. And such has been the construction placed upon this clause of the Constitution from the organization of the Government.

But if the power to count these votes and to declare the result is not in the Vice-President, or the President *pro tempore* of the Senate, in whom is this power vested by the Constitution? Is it in the two

Houses, in the presence of which the Constitution directs the President of the Senate to open the certificates? No one makes this claim, because each House has its separate organization, and when they meet, they meet as the Senate and the House and not as a joint convention to determine any question which may arise. And under the uniform practice, when any question has arisen on such an occasion, the two Houses have separated and acted separately upon it. Is it in the House? If so, upon what provision of the Constitution or the law? Where in either case can any authority be found for the exercise of any control by the House in such case? Indeed no pretense of this kind has been made. The only claim is that the House may by its action prevent the count of a vote of a State. If this is the true construction of the Constitution, then it follows that the House may at any time defeat the election of a President and Vice-President, although it may be demonstrated that the election has been made in every respect in accordance with the Constitution and laws of the United States and the laws of the States. Is it vested in the Senate? If so, the same thing follows. It cannot therefore be claimed that this power exists in the House or the Senate separately, and, if not, is it vested in Congress? And it is just here that the doubt arises.

The Constitution prescribes that after the certificates of the votes have been opened by the Vice-President the votes shall then be counted. It does not in terms say that they shall be counted by the Vice-President, and it surely does not in language say that the votes shall be counted by Congress. The necessary implication, as I have said, is that, inasmuch as the votes are then to be counted in the presence of the Senate and House, it excludes the idea of the count by the Senate and the House, because the body in the presence of which the act is to be done, by the very language of the Constitution, is not the body to do the act required. And yet I freely admit that the language of the Constitution in this respect is open to doubt. It does not say that the count is to be made by the Vice-President, nor does it say that the vote is to be counted by Congress.

It is upon these few words that the claim is made that the power is vested in Congress, and that it has power to count the vote under the general provision of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." But in putting a construction upon this general provision of the Constitution, it should be borne in mind that it does not apply to the special question under consideration any more than to any other subject to which it may apply. And besides this it should also be remembered that as to the choice of President and Vice-President the Constitution does make special provisions, and among these precludes either a Senator or Representative from acting as an elector for these offices, and especially provides that such electors shall be chosen in such manner as the Legislatures of the States may direct; and also specifically prescribes that, if there is a failure to elect a President or Vice-President, the House shall elect the President and the Senate the Vice-President, and that, in vesting these specific powers in the Senate and in the House, it precludes the exercise upon this subject of any other powers, and therefore excludes any power supposed to be derived from the general clause of the Constitution, on which solely rests any reasonable claim in this regard by Congress. Moreover no fair mind can read the law of the land, as expressed in the Constitution, without coming to the conviction that it never was intended by the framers of that instrument that Congress should, under any circumstances, have the power, either directly or indirectly,

to interfere with the constitutional right of the States in the mode prescribed by the Legislatures thereof to choose the President and Vice-President of the United States.

It surely was never intended that the Legislature should elect the Executive, any more than that the Legislature should elect the judges of the Supreme Court.

The true intent of the Constitution was to keep so far as possible each of the great departments, the legislative, judicial, and executive, separate from each other, the one to adopt, the other to interpret, and the other to execute the laws.

In this view certainly it is more than doubtful if Congress has any power over the question now pending before the House. If it has any power, that power is subordinate to the express authority given to the States to choose electors for President and Vice-President in such manner as they may prescribe. This is the constitutional right conferred upon the States. It cannot be denied or abridged by any act of Congress, and if the States under their respective laws in the exercise of this right have acted within the limits of the Constitution and the votes of their electoral colleges have been duly authenticated and sent to the President of the Senate, as required by law, they must be counted, whoever has the power to count. And whenever so certified, they must stand, *prima facie* at least, as the vote of the State, and every such vote should be counted, if Congress has the power, unless it is rejected by the concurrent vote of both Houses.

The only power that Congress has, if any, is to determine whether the vote of any State has been cast for persons eligible under the Constitution in the mode prescribed by the Legislature thereof, because the Constitution confers upon the States the right within certain limitations to choose electors of President and Vice-President in such manner as the Legislatures may prescribe, and no act of Congress can deprive the States of this constitutional right. And any attempt to do it is an usurpation of power, and in its very essence revolutionary. If, therefore, any law is to be adopted by Congress for the purpose of ascertaining who in the recent election has received a majority of the votes of the electoral college of the State, it ought to carefully recognize and guard these unquestioned rights of the States under the Constitution. And whatever power is granted by any such act should be limited to Congress. If the power to count the vote is not by the fair construction of the Constitution vested in the Vice-President, and if it is so vested, Congress has no power to divest it, it is vested in Congress, and if vested in Congress it is a personal trust, which can be delegated to no person or body except Congress. It might as well be claimed that the power to make laws under the Constitution could be delegated as to claim that this power if in Congress can be delegated.

Applying these views to the reports of the committee of the house as also to the report of the committees of the two Houses, it will be seen that, in my judgment, the power to open and count the electoral vote is vested in the President of the Senate. If, however, there is doubt upon this proposition, the power is in Congress, to be defined by law; and if in Congress it must be exercised so as not to infringe on the constitutional rights of the States, and that in the exercise of this power the only question which can be inquired into in any case where the vote has been duly authenticated is whether the vote is by persons eligible and upon the face of the returns duly elected to the office and whether such election was at the time and the vote of the electors was cast at the time required by law, and that any authority which Congress has over these questions, if it has any, cannot be delegated.

I dissent, therefore, to the report of the House committee, which claims that it is in the power of the House by objecting to a vote to defeat the provisions of the Constitution which confers on the States the right to choose electors of President and Vice-President in such manner as the Legislature may prescribe. And if Congress has any power over this subject, I claim that Congress should exercise that power, and not attempt to avoid its duty by delegating that power to others upon whom no power in this regard or for this purpose has been conferred by the Constitution.

Aside from this legal view of the question before the House upon these reports, it seems to me as a question of expediency the bill of the committees of the two Houses ought not to be approved. If there are questions upon which doubts exist, these questions relate to a political office; and the judges of the Supreme Court before whom these questions may come for adjudication ought to be kept free from any bias in their decision.

But aside from this view, it appears to me that questions of this kind may as well be determined by the President of the Senate as by a fifth judge, who is to be selected by the four judges of the Supreme Court, who have, as acknowledged by the report, been named because two of them are democrats and two republicans. In either case, practically, we have a commission of five republicans from the Senate, five democrats from the House, four judges, two of whom are republican and two democrats, and the fifth will decide who is to be President and Vice-President of the United States. It is submitting the whole question practically to one man, and the question is whether it would not be wiser to submit it to the man who is named in the Constitution to receive and open the certificates, rather than to any other person, however eminent, who is not recognized by the Constitution as having any power over the subject.

Convinced, as I am, that under the Constitution the Vice-President has the power to open and count the votes, it seems to me that the best course to pursue is to allow him to exercise this power as such officer always has, rather than to submit the question to any one not known to the Constitution for any such purpose. And if the Vice-President in the exercise of this power shall commit any error, to leave the final determination of the question, not to five persons who are judges of the Supreme Court of the United States, but to the Supreme Court, before which the questions in dispute may be judicially determined.

I think, therefore, that the bill reported should be amended so as to provide that the President of the Senate shall open and count the votes and declare the result, and that his decision upon all constitutional questions should, if desired, be left, under the last section of the bill, to be determined by any court which has jurisdiction to hear and determine such a case.

In adopting such a course we will have complied with the provisions of the Constitution as it has been understood and acted upon in the early years of the Republic; will have protected the rights of the States under the Constitution; will have secured a remedy for any wrong which may have been done; and shall have recognized and acted upon the great principle upon which we depend for the protection of life, liberty, and property, that we live under a Government of law and not of men.