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Samuel Tilden's Plea

A growing number of bar associations, law schools, and legal groups are working vigorously to ensure that the rule of law is sustained.

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As we approach the midterm elections, one thing is clear: The state of our union is fraught. The country is still reeling from the former president and many of his supporters' refusal to accept his re-election defeat, and a growing number of "election deniers" are running for public offices that determine, or at least evaluate, election results.

Many in the legal profession are rightly concerned with the fragility of the rule of law and the norms that sustain it, creating a foreboding of an inconclusive, perhaps actually stolen, election in 2024. Indeed, this worry is laden with the additional fear of the violent insurrectionism we experienced last year. Former president Donald Trump is not solely responsible for the current state of affairs, but his reaction to defeat certainly exacerbated an underlying contentiousness in the country. The question we face, therefore, is stark: Will our constitutional democracy survive?

Let's look at history. In 59 presidential elections, no fewer than 11 incumbents lost—only Trump attempted to subvert our constitution to stay in power. Although he ultimately left the White House, it wasn't until after he attempted to bully state election officials to upend results, concoct spurious legal theories that were rejected in over 60 court decisions, threaten the Vice President if he did not keep him in office, incite an armed mob to close down the Electoral College certification process, and influence 147 members of Congress to reject rightfully-cast electoral votes. And the grave threat the former president posed is not behind us. He and some supporters continue to infect the body politic in ways that Representative Jamie Raskin characterizes as a "clear and present danger"—with vitriolic lies and defamatory speeches.

But Trump is an anomaly. Every other defeated president, starting with John Adams in 1800, honored the peaceful succession of power by accepting the results and leaving the White House. Unsuccessful non-incumbents followed suit. Three examples stand out. In 2000, when Al Gore's chance of victory was snatched away by a questionable decision of the U.S. Supreme Court, he accepted it as a lawful determination and conceded. When Richard Nixon concluded in 1960 that he could not prove that Illinois and Texas vote totals were fraudulent, he acknowledged John Kennedy as the president-elect. As it turned out, both Gore and Nixon, serving as Vice President presiding over Congress when the electoral votes were ratified on the following January 6th, each fulfilled their constitutional duty by announcing the victory of their opponents. And the one presidential election that came closest to having been actually stolen, in 1876, also revealed the patriotism of the purported loser as stronger than his disappointment or anger. In that race, Samuel J. Tilden "lost" the presidency (most scholars and commentators say he won) as a result of corrupt election administrators, an extra-constitutional commission, and a political deal that eliminated post-Civil War efforts to expand the franchise of African Americans. Yet, several months after Congress ratified the election of Rutherford B. Hayes, Tilden spoke optimistically about our nation's prospects. In a speech to a civic group in Manhattan, Tilden said: "If my voice could reach throughout our country and be heard in its remotest hamlet, I would say: Be of good cheer. The Republic will live. The institutions of our fathers are not to expire in shame. The sovereignty of the people shall be rescued from this peril and re-established."

Although they had good reason to reject the results of a flawed presidential election, Tilden, Nixon and Gore each chose to accept the outcome of the legal and political process at the time. In doing so, although denied the power of the presidency, they played a pivotal role in preserving the republic by embracing one of its central features, the peaceful succession of power.

The issue confronting Americans today is both simple and profound. Does the current political and legal climate inevitably foreordain a serious backsliding of our constitutional democracy, or if we adopt the attitude of Tilden that the republic will survive and embrace a course of conduct to ensure that it happens, is success possible? Political disengagement may be tempting; and determined efforts to support the rule of law are challenging, especially in the face of legal obstacles such as restrictive voting laws, hyper-partisan gerrymanders, and a judiciary

populated by some who see little value in an expansive and fair electoral process. Tilden thought the choice was clear. So do I.

A growing number of bar associations, law schools, and legal groups are working vigorously to ensure that the rule of law is sustained. And the United States Congress is poised to revise the Electoral Count Act to buttress the legal guardrails of fair and accurate presidential elections. Whatever the results of the midterms, I choose to believe, with Tilden, that our republic will survive. In large part, this depends upon the legal community. Those who wish to contribute their time and effort can find many opportunities—a sampling can be found on the websites of the New York City Bar Association, the New York State Bar Association, or the ABA. It is not hyperbole or partisan to say that the future of our constitutional democracy is on the line.

Jerry H. Goldfeder is director of the Fordham Law School Voting Rights and Democracy Project and special counsel at Stroock & Stroock & Lavan. He serves on the NYC Bar Association’s Task Force on the Rule of Law, as advisor to the ABA Election Law committee, and as Chair of the Voting Rights Task Force of the NY State Bar Association. This article is adapted from ‘I Hope Tilden Was Right’, to be published in the forthcoming inaugural issue of the ‘Fordham Law School Voting Rights and Democracy Forum’.