INTRODUCTION

The Road to Progressivism

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The Electoral Commission Report referred to by Professor Lurie serves to illustrate something that we sometimes lose sight of about the role of the Court in the National Government. Article III of the Constitution refers to the judicial power of the United States being vested in this one Supreme Court and such other courts as Congress may establish.[1] It does not refer to the judicial power of the Supreme Court; it speaks of the judicial power of the United States.[2] The constitutional crisis that followed the report of the Electoral Commission on the Hayes-Tilden election illustrates that this judicial power of the United States, although "vested" in the Courts via the third article, is not exercised solely by them. Those courts exercise that power in a dependent manner.

When the report came out, the Democrats in the lame duck House of Representatives refused to accept its conclusion; thus, a tie in the Electoral College had to be resolved. A long filibuster took place, and as the March 4th date for the inauguration of the new President approached, it appeared that the day would come and go without a new President being chosen. In a compromise, the Democrats and the Republicans met in the Wormley House Hotel and, according to legend, received a commitment that if Hayes were elected, he would withdraw Federal troops from the states of the South.[3] The House of Representatives took no chances on being dependent solely upon Hayes's word. They thus adjourned without passing an appropriations bill for the National Army, and President Hayes took office without funds in the treasury to pay the Army.[4]

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1 *See* U.S. CONST. art. III, § 1.

2 *See id.* Article III provides that "[t]he *judicial power of the United States*, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* (emphasis added).

3 *See* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 68-165 (1966).

4 *See id.* at 203. *See generally* 5 CONG. REC. 1886, 2088, 2111-20, 2156-63, 2171, 2193, 2230, 2241, 2242, 2246, 2247, 2248-50, 2251-52, 2252 (1877) (debates regarding Army appropriation bill).

Hayes promptly lived up to his side of the bargain by withdrawing the Federal troops from the South.[5] That action had immediate consequences upon the judicial power of the United States. Under section 27 of the Judiciary Act of 1789,[6] the United States marshals were authorized to enforce the Federal judicial process by calling out a *posse comitatus*.[7] The marshals customarily called upon members of the regular Army, who at common law had the same obligation to serve as a member of a *posse comitatus* as did anyone else. The withdrawal of the troops from the South meant, for all practical purposes, that the United States marshals were no longer able to enforce the Federal judicial process. Six months later, President Hayes required the use of Federal troops in order to enforce an injunction against the national railroad strike.[8] Hence, the Army was put back on the payroll.[9] In 1878, however, Congress passed the Posse Comitatus Act,[10] which reinforced the position that Federal physical power would not be used for law enforcement in those states where there was resistance. That Act is still in the statute books.[11] It forbids the United States marshals from calling upon regular Army people for law enforcement purposes. Thus, with the passage of the Posse Comitatus Act, the wherewithal for Federal law enforcement in the face of resistance ceased.

It is interesting that shortly thereafter, the Court began a series of cases that largely dismantled the enforcement statutes.[12] These cases were passed to make the thirteenth, fourteenth, and fifteenth amendments meaningful, and they ushered in the era of Jim Crow. The result of that unfortunate series of cases probably can best be understood as a recognition by the Court that its ju-

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5 *See generally* C. VANN WOODWARD, *supra* note 3, at 186-203 (describing compromise with Hayes).

6 Ch. 20, § 27, 1 Stat. 73, 87 (obsolete).

7 *See id.*; *see also* Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (powers of the marshals) (repealed 1795). A *posse comitatus* is defined as "[t]he entire population of a county . . . which a [law enforcer] may summon to his assistance . . . to aid him in keeping the peace." BLACK'S LAW DICTIONARY 1046 (5th ed. 1979).

8 *See* B. RICH, THE PRESIDENTS AND CIVIL DISORDER 81-82 (1941).

9 *See* Act of Nov. 21, 1877, ch. 1, 20 Stat. 1 (Army appropriations act) (expired).

10 Ch. 263, § 15, 20 Stat. 145, 152 (codified as amended at 18 U.S.C. § 1385 (1982)); *see* 7 CONG. REC. 3579-81, 3584, 3718 (1878) (legislative history of the Act); Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83 (1975).

11 *See supra* note 10.

12 *See, e.g.*, James v. Bowman, 190 U.S. 127 (1903); Baldwin v. Franks, 120 U.S. 678 (1887); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882).

dicial power cannot be exercised if the legislative branch and the executive branch of the Federal Government are unenthusiastic. Indeed, a perfect illustration of that proposition is the Court's decision written by Bradley in the 1890's in *Hans v. Louisiana*.[13] In that case, by rewriting the eleventh amendment, the Court found a way to permit the Southern States to default on their bond obligations when it was quite apparent that Congress was unenthusiastic about having those bonds enforced against the Southern States.[14]

By the end of the century, the Civil War amendments were, for their intended beneficiaries, largely a dead letter. On the other hand, beginning in the late 1880's and accelerating in the 1890's, and even more so in the first two decades of the twentieth century, the Court began to use the fourteenth amendment in a variety of other ways: to limit state economic legislation;[15] to construe the commerce clause narrowly and the tenth amendment broadly as a means for limiting Federal economic legislation;[16] and to read laissez-faire economics into the Constitution. At the same time, however, there was a progressive branch in the dominant Republican party and a strong progressive movement.[17] Things in the Court in the first half of the twentieth century might have been different except for the accidents of the appointive process. As it turned out, William H. Taft, a conservative Republican, rather than Theodore Roosevelt, a progressive Republican, was the President who had six nominees for the Court; this was more than any President since Washington up until that time.[18] One of Taft's nominees was the third New Jerseyan to serve on the Court—Mahlon Pitney, a New Jersey state court judge.

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[13] 134 U.S. 1 (1890).

[14] *See generally* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1998-2002 (1983).

[15] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

[16] *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[17] *See generally* R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955).

[18] President Theodore Roosevelt nominated Justices Oliver W. Holmes, William R. Day, and William H. Moody. President William H. Taft nominated Justices Horace H. Lurton, Charles E. Hughes, Edward D. White, William Van Deventer, Joseph R. Lamar, and Mahlon Pitney. Presidents Abraham Lincoln and Andrew Jackson each made five appointments to the Court.