

## JURISDICTION AND CONSTITUTIONAL CRISIS

*William Baude*\*

Courts don't always do what the President wants, and sometimes the President wants to fight back. As Gerard Magliocca's interesting article points out, Presidents have a range of options for political resistance.<sup>1</sup> But what about their options for *legal* resistance? It turns out that the Constitution provides a narrow outlet for lawfully resisting the courts, and that Roosevelt's contingency plan for the *Gold Clause Cases* might even have fit within it.

The Constitution vests the federal courts with "[t]he judicial Power."<sup>2</sup> That means that courts have the power to conclusively decide cases on important constitutional issues. But this power has inherent limits. A court's judgment is conclusive only when the court has jurisdiction over the case—a technical issue that is usually separate from the merits. And because of that, a court's judgment is also conclusive only with respect to the immediate controversy before it. The judgment may have *practical* consequences for many other people whose claims will raise the same issues, but as a legal matter, those claims aren't yet resolved.<sup>3</sup>

Thus, when judicial decisions threatened to frustrate President Jefferson's implementation of the Embargo of 1807, he devised a jurisdictional theory to avoid compliance. At the same time, he worried about subsequent suits for damages against his officers, where jurisdiction could not be contested under the laws in force at the time.<sup>4</sup> So too, when Lincoln advocated resisting the Supreme Court's decision in *Dred Scott*, he adhered to the judgment principle. While conceding that the decision bound the parties who had been before the court, he argued that it should not be followed for other people not under the Court's jurisdiction.<sup>5</sup> And when Lincoln ignored the writ of habeas corpus in *Ex Parte Merryman*, most of his administration's arguments (the "all the laws but one" flourish aside) were jurisdictional ones.<sup>6</sup>

What is noteworthy, and what Magliocca touches on only briefly, is

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1. Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1259 (2012).

2. U.S. CONST. art. III, § 1, cl. 1.

3. For extended support for the argument in this paragraph, see William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1814–18, 1826–34 (2008).

4. *Id.* at 1822–23.

5. Abraham Lincoln, Speech on the Dred Scott Decision at Springfield, Illinois (June 26, 1857) in LINCOLN: SELECTED SPEECHES AND WRITINGS 117, 117–18 (Don E. Fehrenbacher ed., 1992); see also President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) in LINCOLN, *supra*, at 284, 289–90.

6. Baude, *supra* note 3, at 1853–61.

that even Roosevelt's proposed resistance of the Gold Clause decision appears roughly consistent with the Court's judgment power. Suppose that *Perry*—which was the closest case for the Government<sup>7</sup>—had gone the other way. The immediate decision would have affected only the \$10,000 before the court. President Roosevelt might or might not have paid that judgment (and the court might have given him some time to do it) but judgment would not have automatically resolved the claims of other bondholders, who would have to bring subsequent suits. As to those, the government planned to invoke sovereign immunity.<sup>8</sup> Sovereign immunity is a jurisdictional defense, depriving the court of any power to lawfully issue judgments against the government.<sup>9</sup> This is precisely the sort of resistance that the Constitution countenances. So Roosevelt's invocation of constitutional necessity actually fit within the Constitution's own rules for judicial power. Perhaps it is not a coincidence that Roosevelt's undelivered Gold Clause speech quoted Lincoln's discussion of *Dred Scott*.<sup>10</sup>

To be sure, Roosevelt's planned response in *Perry* may not have turned perfectly square corners: Until sovereign immunity was formally invoked, the President apparently planned to impose a 90-day moratorium on the payment of the bonds, with no obvious jurisdictional basis.<sup>11</sup> At the same time, it is unclear how rapidly federal courts would have ordered payment in any of the new bond cases, so the moratorium may not have created any judicial conflict. And it is not clear Roosevelt had a plan for lawful defiance in the other cases besides *Perry* (the other cases dealt with private agreements) but if he did, he would have had to be more aggressive, such as by convincing Congress to pack the Court or perhaps to strip it of appellate jurisdiction over subsequent suits.<sup>12</sup> In any case, the fundamental point is that the core of Roosevelt's planned response to the most important adverse ruling his administration might face was a perfectly lawful one.

If I am right that even Roosevelt planned to channel his disagreement with the Court into the technical legalisms of the Constitution, the remaining question is why. Justice Breyer has noted that this question is well-presaged by Shakespeare's *Henry IV*, where "Hotspur listens to Owen Glendower boast, 'I can call spirits from the vasty deep.' Hotspur then replies, 'Why, so can I, or so can any man,

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7. See Magliocca, *supra* note 1, at 1268–69.

8. See ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 65–66 (John Q. Barrett ed. 2003); Magliocca, *supra* note 1, at 1261.

9. See *United States v. U. S. Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); see also Caleb Nelson, *Sovereign Immunity As A Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1654 (2002).

10. Magliocca, *supra* note 1, at 1277.

11. *Id.* at 1261.

12. *Id.* at 1261–62 (noting the problem in other cases).

but will they come when you do call for them?”<sup>13</sup> The Constitution may tell judges when they can issue binding judgments, but it gives them few tools to actually *force* compliance, so the puzzle is why Presidents would limit their resistance to that allowed by law.

One possibility is that there is something functional and intuitive about using jurisdiction to resolve interbranch disputes. First-order disagreements on questions of law might be intractable, tending to destabilize the system and make legal resolution impossible. Perhaps second-order questions of jurisdiction are more tractable; even if the constitutional merits of a dispute are unclear, it might be clear whether a court has the power to decide the dispute. Or even if the second-order questions are no clearer, fragmenting the dispute into smaller pieces gives both branches a chance to measure the strength of the other’s resolve.

Another possibility is that at bottom the public really does care about compliance with the law. A President who intends to defy another branch of the federal government raises questions of political legitimacy. By showing that his actions are in keeping with a formal legal tradition that long predates the disputes of the day, the President can resist the impression of an illegitimate power grab. One could even imagine—or perhaps just hope<sup>14</sup>—that a desire to obey the law comes from within. Either way, as Magliocca concludes, “Mistakes come only when those making a necessity claim abandon that kind of careful examination.”<sup>15</sup>

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13. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 11 (2010) (quoting WILLIAM SHAKESPEARE, *HENRY IV*).

14. H. Jefferson Powell, *Law as a Tool*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 250, 263 (2009) (H. Jefferson Powell & James Boyd White, eds.) (“Perhaps one part of a hopeful response . . . is to remind ourselves, our students, and our political culture that the cynical view of the law as invariably a tool is not the only view that men and women of intelligence can hold. This might be seen as hero worship, but I am undeterred. Maybe some heroes and heroines are just what we need now.”).

15. Magliocca, *supra* note 1, at 1275.