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Caesarism, Departmentalism, and Professor Paulsen

Steven G. Calabresi†

Let me begin by saying that I come to praise Professor Paulsen not to bury him.¹ Indeed, I am in substantial agreement with much of what Professor Paulsen has just said about both *United States v. Nixon*² and about the nature of American-style judicial review. I agree with Professor Paulsen that the text, structure, and history of our Constitution do not give the power to interpret or enforce that document to any one branch of our national government, including the federal courts. I thus disagree with the judicial supremacist doctrine of *Cooper v. Aaron*³ and agree with Jefferson, Madison, Jackson, Lincoln, Franklin Roosevelt, and Meese that the President is co-equal as a constitutional interpreter to the Supreme Court.⁴ Indeed, I so advised former Attorney General Meese when I accompanied him to New Orleans twelve years ago to deliver his Tulane speech, a document that I helped to develop and edit.⁵

† George C. Dix Professor of Constitutional Law, 1998-2000, Northwestern University. I would like to thank Gary Lawson, Akhil Amar, Thomas Merrill, John Harrison, and my fellow participants in the University of Minnesota Law School Symposium on the 25th anniversary of *United States v. Nixon*, 418 U.S. 683 (1974), for their many helpful suggestions and comments.

1. I have known Professor Paulsen since law school and consider him to be one of the best law professors in the country. Notwithstanding my disagreement with him on this one issue, he is a beacon of sanity and moral principle in these otherwise troubled times.

2. 418 U.S. 683 (1974).

3. 358 U.S. 1 (1958).

4. See generally THE FEDERALIST SOCIETY, WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETIVE AUTHORITY (1992) [hereinafter WHO SPEAKS FOR THE CONSTITUTION?] (collecting statements by all of the individuals listed above and many others who support a role for presidents in constitutional interpretation).

5. See Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 274 & nn.28-29 (1993) (endorsing departmentalism and mentioning my role in assisting with the Tulane Speech).

The essence of the Departmentalist position, as Professor Paulsen has reminded us, is that the text of the U.S. Constitution does not contain a judicial review clause. There is simply no provision in the document that gives either the Courts or any other branch of the federal government the power to enforce or interpret the Constitution.⁶ Our Constitution differs in this respect from the constitutions of most other modern democracies which expressly empower their constitutional courts, and only their constitutional courts, to engage in constitutional "interpretation."⁷ This difference is striking because the Constitution takes great care to spell out and enumerate the powers it grants to each institution of our national government.⁸ Accordingly, the absence of an enumerated power of judicial review means that the doctrine of *Cooper v. Aaron*⁹ is plainly at war with the text of the Constitution. Either there is no judicial review or there is departmental, coordinate three branch enforcement of the Constitution. The text allows for no other conclusion.

Departmentalists and Professor Paulsen agree that the text of the Constitution gives the federal courts the power to decide cases or controversies and that in exercising this power the Courts can, indeed they must, make independent assessments of the constitutionality of any government action that is properly before them. Professor Paulsen, however, disagrees with most other departmentalists in his understanding of what the judicial power to decide a case or controversy entails. Almost alone among departmentalists, he thinks this power only entitles the courts to hear a case and write an opinion but that it does not legally obligate the executive branch to execute the judgment that results.¹⁰

6. See Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1376 (1998) (developing some implications of the absence of a judicial review clause for theories of the judicial role).

7. See, e.g., GRUNDGESETZ [Constitution] [GG] art. 93, §§ 1-2 (F.R.G.); CONST. art. 61, ¶ 1 (R.F.); *id.* art. 62, ¶ 1; Konst. R.F. (1994) ch. 7, art. 120, § 2 (R.F.); *id.* ch. 7, art. 125, §§ 4-6; see also Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 157 n.13 (1995) (comparing the absence of a judicial review clause in the United States Constitution with the texts of some foreign constitutions).

8. See, e.g., U.S. CONST. art. I, § 8 (listing the powers of Congress); *id.* art. II, §§ 1-2 (listing the powers of the President); *id.* art. III, §§ 1-2 (listing the powers and jurisdiction of the federal courts).

9. 358 U.S. 1 (1958).

10. Professor Paulsen's views are set out and defended in Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law*

I strongly disagree with Professor Paulsen's narrow construction of the judicial power to resolve cases or controversies. And, I consider this issue to be absolutely central to any discussion of *United States v. Nixon*¹¹ because in my view the Supreme Court was wrong to find that dispute between President Nixon and his subordinate, Leon Jaworski, to be a justiciable case or controversy. The dispute between Nixon and Jaworski was an internal executive branch disagreement which provided no occasion for the exercise of the power of judicial review.¹² Accordingly, the *Nixon* Court's judgment was in error, the opinion should not have issued, the justices should not have opined on executive privilege, and the tapes should have stayed secret pending impeachment proceedings at which point they would have to have been disclosed. In short, the Supreme Court's performance in *United States v. Nixon* was abysmal, even if understandable given the circumstances.

The key aspect of *United States v. Nixon* that the Supreme Court overlooked was this: Richard Nixon as President of the United States possessed the Executive Power, which in our constitutional tradition includes the power to initiate and control all federal prosecutions.¹³ Leon Jaworski, the Special Prosecutor, was Richard Nixon's subordinate. Jaworski was not merely removable by Nixon but was also subject to his control and direction in all his exercises of the executive power. When Nixon corruptly and crookedly invoked the constitutionally proper doctrine of executive privilege as part of his criminal effort to obstruct justice, Jaworski as his subordinate had no choice but to follow his boss's order. The constitutional remedy for this misconduct was for the House of Representatives to impeach Nixon¹⁴ or at a minimum for the House itself to subpoena Nixon's tapes. That subpoena could validly have

Is, 83 GEO. L.J. 217 (1994), and Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

11. 418 U.S. 683 (1974).

12. Indeed, Nixon's lawyers argued as much in their brief before the Supreme Court only to see their position wrongly rejected.

13. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1531-38 (1997).

14. My knowledge of the relevant history leaves me with no doubt whatsoever that obstruction of justice is a high crime and misdemeanor which can support the impeachment and removal of any executive or judicial official in our federal government, particularly the President.

been enforced in federal court as could have been a subpoena on behalf of one of the named defendants in the underlying Jaworski prosecution.

The bottom line is that just as the President cannot be prosecuted until he has first been impeached and removed,¹⁵ so too he cannot be sued in Court by a subordinate who is constitutionally subject in all ways to his official powers of supervision and control. The "lawsuit" between Jaworski and Nixon was thus feigned or artificial in every way.¹⁶ Moreover, it was a "lawsuit" that Nixon could at any point have ended with a pardon, just as President Clinton could at any time end the Starr investigation (of which he is so fond of complaining) with a pardon. The Supreme Court had no more business arbitrating this dispute than it would have arbitrating a disagreement between the State Department and the Department of Defense or a dispute between the House Ways and Means Committee and the Committee on Appropriations.

My first response, then, to Professor Paulsen's paper is to observe that, since I do not believe *United States v. Nixon* was a properly brought case or controversy, I do not think any opinion should have issued, nor do I think there was any occasion here for the Supreme Court to exercise the power of judicial review—at all. Different litigants—the House of Representatives or one of the named defendants, perhaps—could properly have sought a subpoena of the Nixon Tapes, but not Leon Jaworski.

Well what of Professor Paulsen's broader claim about presidential invocations of executive privilege. Specifically, what should we make of the claim that the President cannot be bound by judicial judgments as to the scope of executive privilege—that he must be able ultimately to judge for himself whether it is appropriate to invoke executive privilege and make the invocation stick even in a case brought by a proper litigant.

15. See Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 18-20 (1997) (discussing the unique nature and position of the Presidency as justification against prosecution).

16. It is well-settled law that such suits are not justiciable. See *United States v. Johnson*, 319 U.S. 302 (1943) (per curiam) (deciding that there was no case or controversy because the suit was not adversary); *Muskrat v. United States*, 219 U.S. 346 (1911) (holding that the Supreme Court can only give a judicial declaration as to the validity of an act of Congress if there is an actual case or controversy).

Here I am much more skeptical of Professor Paulsen's claim, which, as I have already said, is part of a larger thesis he has advanced to the effect that the President is not legally bound by court judgments in properly litigated cases or controversies with which he, the President, disagrees.

As to this larger thesis, I submit that arguments from text, structure, original history, and subsequent practice all suggest that Professor Paulsen is wrong. The President is legally obligated to enforce judicial judgments in cases or controversies that he independently thinks are unconstitutional, subject to a rule of clear mistake.¹⁷ This question is very important and the balance of my comments will therefore be devoted to explaining why Professor Paulsen is wrong on this larger point and therefore wrong also with respect to presidential refusals to abide by court judgments on the scope of executive privilege.

The original text of the Constitution does not specifically mention the executing of judgments or allocate any power to execute judgments. Nonetheless, the text grants the President the executive power and that power clearly includes the power to execute judgments.¹⁸

The original text also grants the federal courts the judicial power, which extends to nine categories of cases or controversies. We know from various historical sources that this power was not merely a power to render advisory opinions but was instead a power finally to resolve actual disputes between adverse litigants in such a way that there was a substantial likelihood that a court decision would have some real world effect.¹⁹

17. My analysis builds on the prior published arguments of my colleagues Gary Lawson and Thomas Merrill. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1314-27 (1996); Thomas W. Merrill, *Judicial Opinions As Binding Law and As Explanations for Judgments*, 15 CARDOZO L. REV. 43, 71 (1993) (arguing that "the judiciary would be reduced to an adjunct of the executive branch" if the President did not have to follow their judgments).

18. See Lawson & Moore, *supra* note 17, at 1314-19.

19. This assertion can be documented as a matter of hornbook law. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 47-53 (2d ed. 1994). Admittedly, as Alexander Bickel and Neal Katyal have pointed out, there are ways in which the federal courts could fairly be said to give advice to the political branches in some sense of that term. See Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709 (1998) (concluding that judicial advicegiving can become an alternative to aggressive judicial review). Nonetheless, it is also true that in some sense court judgments in litigated and adverse cases are supposed to be substantially likely to make a difference in the real world

The ban on advisory opinions in our constitutional tradition is deeply rooted.²⁰ Its underpinnings are confirmed by the records we have of the Philadelphia Convention,²¹ by the exchange of letters known as *The Correspondence of the Justices*,²² by the decisions of the justices riding circuit in Hayburn's Case,²³ and by two centuries of subsequent doctrine interpreting the case or controversy language in Article III.²⁴ While there is much controversy over the modern scope of the Article III justiciability doctrines, those who challenge the doctrine today do so not because they think Court judgments should be advisory. Rather, the modern critics of the Court's doctrine think that too few cases are being allowed into federal court and that too few binding judgments are being judicially issued.²⁵ Unlike the texts of many State constitutions²⁶ and constitutions of foreign countries,²⁷ the text of the U.S. Constitution does not authorize the federal courts to issue advisory opinions. It is an axiomatic feature of our Constitution that there must be a substantial likelihood that judicial opinions will have some real world effect.²⁸ No such likelihood could exist if Professor Paulsen were right that the President has the power independently to make his own de novo decision about whether any judicial judgment was constitutional or not before he executed it. That is why for more than two hundred years almost no one suggested that the courts would exercise a merely advisory power.²⁹

course of events.

20. See RICHARD B. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 93-98 (4th ed. 1996).

21. See *id.* at 10-11.

22. See *id.* at 92-93.

23. See *id.* at 99-107.

24. See *id.* at 99-293.

25. See, e.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985).

26. Advisory opinions are permitted in Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota according to LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 73 n.4 (2d ed. 1988).

27. See FALLON ET AL., *supra* note 20, at 98 (discussing advisory opinions in other legal systems).

28. See CHEMERINSKY, *supra* note 19, at 50-51.

29. Accord Lawson & Moore, *supra* note 17, at 1319; Merrill, *supra* note 17, at 46.

Now it is true, as Professor Paulsen has previously argued, that some of Alexander Hamilton's loose language in the *Federalist Papers*³⁰ and President Abraham Lincoln's actual actions in *Ex Parte Merryman*³¹ at the time of the outbreak of the Civil War support the Paulsen thesis. It is also true that if the federal courts made decisions that were so clearly mistaken that they could be deemed to be irrational the executive would not be legally bound to execute those clearly mistaken judgments given what Paulsen calls the postulate of coordinacy. But it is equally true that ordinarily, i.e., barring irrationality, the President is legally bound to execute federal court judgments³² and for two hundred years all American Presidents not engaged in suppressing a Civil War have viewed themselves as being so bound. Even Presidents who ardently subscribed to departmentalism have acknowledged the legally binding force and obligation to execute a judicial judgment with which they disagreed.³³ Why is it that for two hundred years even presidents who hated the federal judiciary have acknowledged that judicial judgments are binding in a way that the learned discussion taking place in this Symposium issue of the *Minnesota Law Review* is not?

One reason, I believe, is simply that this is what everyone both originally and ever since has understood the judicial power to comprehend. But probably there is even more at work than merely originally mandated legal obligation. At some very fundamental level, I believe our constitutional history has actually been one of departmentalism, as I understand it, which is to say independent three branch enforcement of the Constitution but with judicial judgments at least being legally binding on the executive for their enforcement absent a clear mistake. And, I would go even further and say that our practice in this respect has been what it has been because departmentalism as I understand it works well, it produces good con-

30. Professor Paulsen particularly emphasizes Hamilton's famous essay in THE FEDERALIST NO. 78, at 393-94 (Alexander Hamilton) (Wills ed., 1982) to the effect that the judiciary will have to rely "upon the aid of the executive arm even for the efficacy of its judgments."

31. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

32. I rely here on the powerful analysis of Lawson & Moore, *supra* note 17, at 1313-27.

33. Thus, for example, Abraham Lincoln argued that the *Dred Scott* decision was binding as to the parties in that particular case even though he was vehemently opposed to allowing it to be turned into a general political rule. See WHO SPEAKS FOR THE CONSTITUTION?, *supra* note 4, at 71-73.

sequences in the real world of American politics, or at least it produces better consequences than would be produced by one branch or by no branch enforcement of the Constitution.³⁴

First, with respect to my claim that all three branches actually do and always have enforced the Constitution, I want to express my disagreement with the widespread but mistaken view that the judiciary is today or was historically the supreme enforcer or interpreter of the Constitution.³⁵ This view is simply false, although it is true that the federal courts have always played a role in constitutional interpretation. From the Founding era to the Civil War, the main role played by the federal courts was to legitimate constitutional interpretations already arrived at by the political branches of the federal government. Between the Civil War and the New Deal the Court sometimes second-guessed Congress on constitutional issues but mostly it upheld congressional determinations of constitutional issues. Since 1937, the Court has upheld the overwhelming majority of federal statutes it has reviewed except for a handful struck down on First Amendment grounds³⁶ and very recently a few struck down on structural constitutional grounds.³⁷

Two distinct trends in this three branch enforcement of the Constitution emerge over the last two hundred years. First, the Supreme Court has, as Mr. Dooley said long ago, followed the election returns.³⁸ Forty-two presidents and 105 Senates have used their power over Supreme Court nominations and confirmations to give us Supreme Court justices whose con-

34. See Merrill, *supra* note 17, at 70-75; Calabresi, *supra* note 5, at 274-77 ("This American 'departmentalist' system of multibranch enforcement of the Constitution is an under-appreciated work of genius—particularly compared to the in many ways stronger forms of judicial review recently adopted in many other countries.").

35. See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 1-24 (2d ed. 1996) (introducing and describing the long history of three branch constitutional interpretation and enforcement).

36. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (invalidating provisions of the Federal Communications Decency Act of 1996, 47 U.S.C. § 223 (West Supp. 1996)); *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating the Flag Protection Act of 1989, 18 U.S.C. § 700 (1994)).

37. See, e.g., *Clinton v. City of New York*, 118 S. Ct. 2091 (1998) (invalidating a statutory grant of line item veto power to the President on separation of powers grounds); *United States v. Lopez*, 514 U.S. 549 (1995) (rejecting the application of federal law to a noncommercial situation where the activity being regulated did not have a substantial effect on interstate commerce).

38. See FINLEY PETER DUNNE, *MR. DOOLEY'S OPINIONS* 26 (1901).

structions of the document reflected their own. This phenomenon has been explained and discussed by Professors Robert Dahl and Gerald Rosenberg in far more expert fashion than I could hope to match here, so I will just incorporate their views by reference.³⁹ The first point to remember, though, is that practice suggests that the Supreme Court is not a countermajoritarian body over the long term and thus the problem with recent activist Supreme Courts is not that they are forcing an unwilling people to go down a road they don't want to travel.⁴⁰

Second, practice suggests that federal judicial review will mainly be exercised at the expense of the States. Most holdings of unconstitutionality involve federal invalidations of state laws or executive practices. The federal judiciary is most activist when it is picking on politically weak state officials. This was true in the *Lochner*⁴¹ era and it is true in the era of *Roe v. Wade*.⁴² To the extent there is a countermajoritarian difficulty, the difficulty is this. A five to four majority of the Supreme Court that responds to national majority whims gets to bind the States to national majoritarian policy views without going through the intended procedural hurdles of bicameralism and presentment.⁴³

Our overall practice, then, has been one of three branch enforcement of the Constitution with the judiciary often playing the most visible role but in fact subtly taking its lead from the election returns which it follows. Mainly this national electoral process has resulted in federal judicial invalidation of state laws and practices that Congress and the President might not otherwise have been able to invalidate. In my judgment, the biggest problem raised by our practice is that it is too easy for five to four Supreme Court majorities to invalidate State laws, given that the Constitution prescribes bicameralism and presentment before national lawmaking should occur.

Now, then, what has our practice been with respect to the issue Professor Paulsen is most concerned about—executive

39. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

40. See Calabresi, *supra* note 6, at 1378.

41. *Lochner v. New York*, 198 U.S. 45 (1905).

42. 410 U.S. 113 (1973).

43. See Calabresi, *supra* note 6, at 1378.

enforcement of court judgments. Have presidents by and large followed those judgments or has the execution of judgments, too, followed the election returns. Obviously, the answer is that presidents have overwhelmingly, indeed, they have almost always executed all federal court judgments, including many with which they vehemently disagreed. Even FDR during the height of the New Deal Court-packing crisis did not think to refuse to execute Supreme Court judgments. Except for Lincoln in the very unusual climate of the Spring of 1861, no president has openly defied and refused to execute a judgment.⁴⁴

Why is this so, especially given that we know, and most presidents probably know, that over time the Supreme Court will eventually follow the election returns. What is accomplished by forcing Presidents to execute judgments they vehemently object to until the election returns have their inevitable enlightening effect. It is traditional to say that forcing the President to follow court judgments means that we and he are bound by the Rule of Law, but in what sense is that really so if the Court is ultimately going to follow the election returns

44. As Professor Paulsen acknowledges, the crisis President Lincoln faced in the spring of 1861 was the worst we have ever faced. See Paulsen, *supra* note 10, at 278-84. The country had split into two halves and many Union troops were trapped behind Confederate lines. Washington, D.C., the capital, was in danger of falling into enemy hands. To prevent this from happening, President Lincoln had to be able to transport soldiers through Maryland, a border state, so that they could defend the capital. Riots in Baltimore and in the Maryland countryside were disrupting railroad transports of soldiers. If Washington, D.C., Maryland, and a few border states had gone over to the Confederacy, the Civil War might have been lost before the Union could even begin to fight. Accordingly, it was absolutely imperative that President Lincoln be able to transport troops to the capital in the spring of 1861 even if doing so required suspending the writ of habeas corpus unilaterally. Since Congress was not in session, President Lincoln's only option was to suspend the writ himself pending approval from Congress as soon as it convened. President Lincoln did suspend the writ. Pursuant to this order, John Merryman was arrested and denied habeas relief, Chief Justice Taney's order that Merryman be released was ignored, and Lincoln promptly asked Congress to authorize his actions retroactively claiming that he had inherent emergency power to preserve the Union until Congress could be convened.

Against the backdrop of these facts, I believe Chief Justice Taney's order was so clearly irrational that President Lincoln was justified in believing that he could constitutionally ignore Taney's order because the continuation of the Union and of the Constitution itself depended upon his ignoring Taney's order. President Lincoln's actions were reviewable in Congress and had Congress not concurred in his judgment as to the severity of the emergency and the irrationality of Taney's order, Congress would have been within its rights to consider impeachment as a sanction for disregarding a valid court order in a validly presented case or controversy.

anyway. What is gained by making FDR wait until 1941 for *United States v. Darby*⁴⁵ instead of letting him just have his way from the start.⁴⁶

Obviously, one value that is served is the promotion of gradualism. Constitutional change gets spaced out over time and is dependent on multiple senatorial and presidential election cycles and on the pace of judicial retirements. Under the Paulsen regime, in contrast, every new presidency would immediately mean a new "Constitution" which new "Constitution" would immediately end when said president left office. This it seems to me would be not so much a system of constitutional government as it would be a system of rule by an elected Napoleonic strongman.

Another value that is served by legally obligating presidents to enforce Court judgments with which they disagree is that such an obligation protects individuals from being oppressively singled out and burdened. In this way, the presidential obligation to enforce individual judgments in cases functions in exactly the same fashion as does the Takings Clause of the Constitution or the Bill of Attainder Clause or the Due Process Clauses.⁴⁷ These Clauses all protect individuals from being singled out arbitrarily to bear some heavy burden for the public good.⁴⁸ In a democracy, presidents and politicians will be checked by public opinion when their conduct affects the whole public but they may be able to get away with misconduct that affects only a single individual or a small class of people.⁴⁹ It is

45. 312 U.S. 100 (1941).

46. Some of these issues are discussed in Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW & CONTEMP. PROBS. 61 (1998).

47. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 9-11, 24-32, 39-41 (1993); Lawson & Moore, *supra* note 17, at 1326-27.

48. See Lawson & Moore, *supra* note 17, at 1326-27.

49. See JOHN HART ELY, DEMOCRACY AND DISTRUST 78 (1980); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 75-78, 96-98 (1995). Consider William Howard Taft's description of "the travails" of one Edward Livingston, who objected to President Thomas Jefferson's "unauthorized presidential interference with his property:"

When a public functionary abuses his power by an act which bears on the community, his conduct excites attention, provokes popular resentment, and seldom fails to receive the punishment it merits. Should an individual be chosen for the victim, little sympathy is created for his sufferings, if the interest of all is supposed to be promoted by the ruin of one. The gloss of zeal for the public is there-

for this very reason that the Constitution entrusts the power to make laws—the power to disturb or alter the baseline distribution of private rights—to Congress. And it is also for this very reason that the Steel Seizure Case⁵⁰ has long been thought to be so important. If elected presidents could take private property or deprive an individual of liberty simply on their own say so, then ours would be at best a system of democratic Caesars. The Executive Branch of our government would not be, as Professor Paulsen calls it, the Most Dangerous Branch—it would be a tyranny.⁵¹

Court judgments are very much like the private property that the Takings Clause of our Constitution protects from seizure by executive officials absent full and just compensation from the public fisc.⁵² Often court judgments concern awards of property and even when they concern liberty issues there is frequently a monetary value that might be placed by the victorious litigant on the rights at stake. No one would think it desirable to let the President take an individual's property in violation of the Takings Clause or to let the President arbitrarily imprison people in violation of the Due Process Clause, and yet exactly the same values would be at stake if we were to let the President unilaterally decide which court judgments he wanted to execute or not. Again, a president with that power would be an elected tyrant just as federal courts without the power to execute their judgments would be ciphers.

Lastly, and most ironically, a president with the power to defy court judgments would be dangerous in precisely the same way that the imperial judiciary of recent years has been dan-

fore always spread over acts of oppression, and as a brilliant exertion of energy in their favor, which, when viewed in its true light, would be found a fatal blow to their rights.

In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, there aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause for acts that would make a tyrant tremble on his throne.

Monaghan, *supra* note 47, at 26 n.123 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)). Professor Monaghan observes that Taft thought Livingston's remarks "fully applicable to a proposal entertained by Theodore Roosevelt to seize certain coal mines, even though no statute conferred such authority to invade private rights." *Id.*

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

51. *See, e.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776) (describing the abuses of power that King George III committed).

52. *See Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995).

gerous. The problem with the imperial judiciary is that by five to four votes it can too easily reach and bind the states with its silly national policy ideas that are passed off as being interpretations of the Fourteenth Amendment. The Imperial Supreme Court is our version of the French Revolution's Committee of Public Safety—a five-person indirectly elected directorate that binds a continent and 270 million people to follow its will.

Professor Paulsen's proposal would in my view replace that five-person Committee with one elected President—a Napoleon or a Caesar. Much as I dislike the federal courts—and I dislike them a lot⁵³—I am mortally certain I would like elective Caesarism even less. Policy considerations thus confirm for me what two hundred years of practice and the historical text of the Constitution have already cemented into law. The Framers were right to legally bind the President to execute court judgments absent a clear mistake⁵⁴ just as they were right to in other respects give all three branches of the federal government the co-equal power to enforce and interpret the Constitution. The President is obligated to execute all court judgments

53. See, e.g., Steven G. Calabresi, *Relimiting Federal Judicial Power: Should Congress Play a Role?*, 13 J.L. & POL. 627, 629-38 (1997) (blasting federal judicial activism and laying out a detailed strategy for combating it).

54. In other words, I agree with Lawson & Moore, *supra* note 17, at 1314, 1329, that presidents may only review federal court judgments for constitutionality if they give those judgments Thayerian deference. See, e.g., James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (arguing that judicial review is appropriate only where the political branches have made a clear mistake). Absent a clear mistake, and the only such clear mistake I am aware of is Chief Justice Taney's in *Ex Parte Merryman*, presidents are absolutely constitutionally bound to execute even those court judgments with which they disagree. The penalty for failing to fulfill this constitutional duty is impeachment and removal and possibly prosecution for obstruction of justice.

That being said, there are judicial precedents like *Roe v. Wade*, 410 U.S. 113 (1973), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), that are so blatantly unconstitutional and that are so evil in their consequences that I believe presidents are constitutionally and morally obligated not to acquiesce in them as "political rules." Thus, I think Presidents Lincoln and Reagan were right to resist *Dred Scott* and *Roe* at every turn and to use their appointment power, their litigation power, and their power to recommend legislation to seek the overthrow of these unconstitutional usurpations at every turn. *Dred Scott*, of course, was overturned, but *Roe* still remains, as does the obligation of this and all future Presidents to work day and night for its reversal. As far as I am concerned, *Roe* is on a par with *Dred Scott* both in its unconstitutionality and in the evil it has caused and is causing. Nevertheless, until it is reversed court judgments rendered in reliance upon it must be obeyed.

absent a clear mistake, even those that concern the scope of his constitutionally rooted executive privilege.