Developments

Ernest Collazo Receives Whitney North Seymour Award

By Pete Eikenberry

At the Federal Bar Council's Winter Bench & Bar Conference in Hawaii, my friend of 45 years, Ernest Collazo (whom I first knew as a fine point guard on a lawyer's league basketball team) was awarded the Federal Bar Council's Whitney North Seymour Award. In presenting the award, Counsel President Mary Kay Vyskocil gave tribute to the award's namesake, Whitney North Seymour.

For decades, Seymour was one of two or three most prominent New York City lawyers. Judge Vyskocil stated:

> He was an expert in antitrust laws and a recognized authority in the field of civil liberties, arguing more than 50 cases before the United States Supreme Court. Mr. Seymour fought for justice for all litigants. In 1937, he won an appeal overturning the conviction of Angelo Herndon, a young Black communist, convicted of violating Georgia's anti-insurrection law, largely because he had communist literature in his room.

As the president of the ABA and numerous other bar, civic, and human rights organizations, Seymour took time to mentor individuals, including Judge Vyskocil and Collazo, both of whom became his partners at Simpson Thatcher. Collazo recalled being invited to confer with Seymour "on how he was doing" when Collazo had been an associate at the firm for only four months.

Judge Vyskocil noted that Collazo's career as early president of the Puerto Rican Legal Defense and Education Fund, his long term service on the First Department Grievance Committee, and his numerous civic and bar services as well as his mentoring of young students in the South Bronx emulated Seymour.

As to mentoring, Collazo stated that:

> One of the most satisfying activities I have undertaken over these many decades has been the teaching of leadership skills to young boys and girls in the South Bronx. I did that for the spring semester of 1971 when I graduated early from college. Last year, almost 50 years later, I again taught leadership skills, to 10 very bright 11 and 12 year old boys and girls at a south Bronx elementary school. I met with my class weekly for an hour; and every other week, I would bring with me an African American or Hispanic partner to show them how each of these partners broke the barrier to become a successful big-time lawyer. Each individual I brought with me was peppered with questions and each had a great time regaling them with their individual stories.

In his remarks, Collazo expressed gratitude for his nomination, first to his wife, Denice, then to Judge Dennis Jacobs, former partner George Davidson, and Judge William Kuntz.

Legal History

The Supreme Court Wrestles with the Gold Clause

By C. Evan Stewart

The greatest economic disaster in our country's history was undoubtedly the Great Depression. It also destroyed Herbert Hoover's presidency, and made Franklin Roosevelt's election in 1932 to replace him a certainty. It is interesting that Roosevelt's campaign rhetoric on how to dig out of the crisis was vague and sometimes contradictory (for example, one of his central tenets for economic revival was to balance the federal budget).

Desperately trying to win re-election, Hoover directly attacked Roosevelt, warning the country that, if elected, his oppo-

Franklin D. Roosevelt campaigning in 1932. Photo courtesy of the Franklin D. Roosevelt Library archives.

nent would follow William Jennings Bryan's opiate and "issue greenback currency."

Hoover further warned that that would inevitably lead to the country going off the gold standard, which would create "one of the most tragic disasters to…the independence of man."

Roosevelt, recognizing the danger of this attack, replied that Hoover was conducting a "campaign of fear," that he (Roosevelt) was not a "devolutionist," and that he (Roosevelt) believed in "sound money." This reply was carefully chosen to obfuscate the fact that Roosevelt (and his "Brains Trust") really did not have a set of definitive plans. What was more candid and revealing was what Roosevelt voiced publicly as his overriding, governing principle: "The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something."

Once he became president on March 4, 1933, Roosevelt lived up to his promise of experimentation. One result of that was immensely consequential litigation up to the Supreme Court that is little remembered today.

First We Must Devalue the Currency

One of Roosevelt's first priorities was to get monetary relief for the country's farmers – to raise (somehow) the price of farm commodities. Although there were many ways to perhaps achieve that goal over the mid- to long-term, the way to do that quickly was to (i) give up the gold standard, and (ii) devalue the dollar.

This first step came with Executive Order No. 6102 on April 5, 1933, in which the president decreed that all gold held by private citizens had to be sold to the Federal Reserve. This was followed by Executive Order 6111 on April 20, which prohibited (indefinitely) all exports of gold from the United States. By these two actions, the United States effectively went off the gold standard. (Roosevelt's budget director, Lewis Douglas, said privately that this was "the end of Western civilization.")

At the same time, legislation was moving through Congress to give the president the authority to end deflation by, *inter alia*, doing exactly what Hoover had warned of: issuing greenback currency and monetizing silver (at a 16 to 1 ratio to gold – one of Bryan's campaign slogans in 1896). And while these steps would likely help to jump start farm commodity prices by devaluing the dollar, there was one last leg of the monetary stool that also had to be fixed, and that was the gold clause.

Deep Sixing the Gold Clause

In virtually all private contracts, as well as in government issued securities (and World War I debt incurred by foreign countries), there was a provision known as the gold clause. This meant that the contracting parties agreed to all debts being paid in gold or gold-equivalents. If these clauses remained in place, devaluation of the currency would make matters exponentially worse: the dollar would be worth much less, but all debts would have to be repaid at the official price of gold: $20.67 per ounce (set by the Gold Act of 1900). In other words, farmers (and others) would have even less money (in terms of value) to make good on their fixed contractual obligations; the bankruptcies prior to Roosevelt's election would be a trivial number if this state of play was allowed to exist. Roosevelt's advisors (principally George F. Warren, a professor of agricultural economics at Cornell) were aware of this danger, but believed there was an easy answer: if Congress could devalue the dollar, it could also void the gold clause in contracts.

On May 7, 1933, Roosevelt gave his second "Fireside Chat" to the nation over the radio. Still within the famous, first 100 days of his administration, the president recounted all that had already been done to tackle the Great Depression. He also addressed the country's currency and, in particular, the fact that the government and public had approximately $120 billion in debt that was subject to the gold clause. Roosevelt explained that this was much ado about nothing, since "all the gold in the United States amounted to only between three and four billions and that all of the gold of the world amounted to only eleven billion." Thus, according to the president, very few could really be repaid in gold; instead, virtually all debtors would repay in paper currency, and every creditor, therefore, would have no recourse but to accept that paper.

Like much of his campaign rhetoric, Roosevelt was dissembling in his Fireside Chat. The gold clause did not actually require a physical delivery of gold; rather, it required that the debt be repaid in gold or in currency valued at the price of gold (*see* the "Legal Tender Cases," decided by the Supreme Court after the Civil War; *e.g.*, *Knox v. Lee*, 79 U.S. 457 (1871); *Juilliard v. Greenman*, 110 U.S. 421 (1884)). Thus, the problem still remained – notwithstanding the president's facile dismissal – and it had to be addressed pronto.

On May 26, the administration – contemplating the issuance of new government securities in June *without* the gold clause – asked Congress to void (permanently) the gold clause for all future *and past* contracts. There was immediate (and strong) push back. Carter Douglas, Democratic Senator from Virginia (and someone who had been a key ally in repelling Hoover's economic attacks on Roosevelt during the 1932 campaign) publicly denounced "the proposal to repudiate all outstanding gold contracts [as] unconstitutional and the courts will so hold if there is any integrity left in the courts with respect to the sanctity of contracts." He subsequently attempted to exempt government securities and debts owed to the United States arising out of World War I, but that failed to carry the day in the Senate.

Notwithstanding predictions that foreign governments owing America many billions in World War I obligations would default on their debts if the legislation became law, the House of Representatives overwhelmingly approved the measure on May 29; the Senate quickly followed suit on June 3. Two days later, Roosevelt signed the legislation. Where people stood on this law depended upon, among other things, their political party, not to mention their status as creditor or debtor. Although the executive and legislative branches had spoken and acted, the issue had to be resolved by the courts and, ultimately, by the Supreme Court.

Was the Law Constitutional?

In short order, there were a number of legal challenges to the retroactive voiding of the gold clause; four of them ultimately were consolidated together before the Supreme Court – and they became known as the "Gold Clause Cases": *Norman v. Baltimore and Ohio Railroad* (New York State); *U.S. v. Bankers' Trust Co.* (8th Cir.); *Perry v. United States* (Court of Claims); and *Nortz v. United States* (Court of Claims). The key issues teed up by these cases were:

(1) Was the party relying on the gold clause entitled to receive in legal tender what was owed at the equivalence of the legal price of gold; and

(2) Was the party relying on the gold clause entitled to money damages as a result of Congress' abrogation of the gold clause.

In the government's briefs, the principal argument was that Congress's action was based upon a national "necessity"; as articulated by Assistant Solicitor General Angus MacLean: "[I]f the gold clauses were maintained [at the same time the other steps were taken to devalue the currency]…, this meant bankruptcy on a national scale." (It had been estimated that it would take $1.69 to make good on a gold clause's $1.00 value.) Thus, Congress *had* to act and the Supreme Court was *obligated* to uphold that action "in order to save the country."

The government also argued (in addition to Roosevelt's specious contention that this was all no big deal because there was not enough actual gold to make good on $120 billion in contractual obligations) that the plaintiff had suffered no actual (and actionable) damages – because of widescale deflation, the same amount of paper currency actually had far more purchasing power in 1934-35 than it had prior to October 1929. As precedent for its various positions, the government cited to the Legal Tender Cases, where the Court, *inter alia*, had written: "Whatever power there is over the currency is vested in Congress."

Oral argument on the consolidated "Gold Clause Cases" took place on January 8, 9, and 10, 1935. The general consensus was that the government had not done well before a very skeptical Court, and there were apocalyptic predictions of what would happen if the Court struck down the legislation. Not surprisingly, financial markets reacted negatively, as did commodity prices. Foreign nations, owing huge sums to the United States in World War I obligations, publicly fretted about what to do. According to a report in *The New York Times*, unnamed members of the Senate were studying increasing the number of Supreme Court Justices to get to whatever number of votes were needed to sustain such a law (shades of Roosevelt's Court-Packing Scheme of 1937! See, "Sick Chickens in the Second Circuit Threaten FDR's New Deal," *Federal Bar Council Quarterly*, February 2008). Subsequently, the New York Stock Exchange (fearing the worst) publicly announced that it would (if necessary) suspend trading upon the Supreme Court's decision. Also fearing the worst, Roosevelt's administration began thinking up a "Plan B" – among the contingencies contemplated in the face of an adverse decision were:

(1) The declaration of a national emergency by the president for 90 days (or longer, up to a year), staying payment of any debts greater than the nominal dollar amount of the obligation;

(2) New legislation voiding any counterparty's rights to sue the government based upon the gold clause;

(3) New legislation changing the jurisdiction of the Court of Claims (so no gold clause claims could be brought therein); and

(4) An unprecedented attack by the president on the Supreme Court over the airwaves.

While Roosevelt and his advisors pondered these and other scenarios, they, the nation, and the world waited for the Supreme Court to render a decision.

The Supreme Court Decides

On February 18, 1935, Chief Justice Charles Evans Hughes announced the Court's decisions in open court. In the two cases involving private debt (*Norman* and *Banker's Trust*), by a 5 to 4 vote the Court ruled that Congress's nullification of the gold clauses was constitutional – that Congress had been granted power over such matters by the Constitution. ("We are not concerned here with the wisdom of [Congress's enactment]. We are concerned with power, not with policy.")

But with respect to the two cases involving public debt (that is, government bonds, *Perry* and *Nortz*), by an 8 to 1 vote the Court ruled that Congress' nullification of the gold clauses was unconstitutional – that Congress, having been granted the power to authorize such debt, had "not been vested with authority to alter or destroy those obligations." Notwithstanding, by a 5 to 4 vote the Court went on to rule that the public debt holders (for example, *Perry*) had not suffered "any loss whatsoever" – that to permit "payment to the plaintiff…would appear not a recoupment of loss…, but an unjust enrichment."

In other words, the law was unconstitutional as applied to government bonds (only), but there would be no actionable remedy in money damages.

On behalf of the "Four Horsemen" (Justices Butler, Sutherland, and Van Devanter), Justice James Clark McReynolds issued a vociferous dissenting opinion (although it obviously concurred with the first holding in *Perry* and *Nortz*): "Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution granted power to accomplish both." According to Justice McReynolds, the Founding Fathers never "intended that the expected government should have the authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect." Noting that the "so-called gold clause-promise" had existed for more than 100 years in U.S. contracts, both private and governmental, what Congress had done was contrary both to the sanctity of contracts (private and public) and the country's most solemn obligations: "[I]t destroys directly" and thus violates the Fifth Amendment, there being "no provision for compensation" – i.e., "[o]bligations cannot be legally avoided by prohibiting the creditor from recovering the thing promised."

Then, invoking Alexander Hamilton (regarding the government's moral and constitutional obligations to honor matters of contract), as well as the fact the sanctity of contracts had built America into the greatest nation in the world, Justice McReynolds questioned who would do business in the future with such a government. He ended the opinion as follows: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling." (When he read his opinion in open Court on February 18, Justice McReynolds started off by saying, "The Constitution as many of us understood it, the instrument that has meant so much to us, is gone." He ended with these words: "Shame and humiliation are upon us now. Moral and financial chaos may be confidently expected.")

The subject of little focus at the time was Justice Harlan Stone's separate opinion on the public debt cases (*Perry* and *Nortz*). It was Justice Stone's view that, once Justice Hughes had opined that the debt holders had no damages, the Court should *not* have then gone on and ruled (unnecessarily, in his opinion) that the law – as it applied to public obligations – was unconstitutional (having determined the opposite for private obligations). By that extra step, the Court had "imposed restrictions upon the future exercise of the [Congress'] power to regulate the currency." Even so, in Justice Stone's mind the formality of said "restrictions" perhaps did *not* in fact kick in because the Hughes opinion on the constitutionality of cancelling the gold clause vis-à-vis public debt had gotten only four votes (he dissented on that ruling, and Justice McReynolds' opinion had a different rationale vis-à-vis Congress' statute); Stone privately wrote that the "Court has not declared, decided, or adjudged that the Government is bound by the Gold Clause."

The media's immediate reaction to what the Court decided was, to say the least, "confused." The Associated Press announced that the government had "lost." The *Atlanta Constitution's* headline read: "'New Deal' Upheld in High Court." Closer to what actually happened was headlined by *The Wall Street Journal*: "Moral Defeat, Practical Victory, for Government." Similarly, the *Times of London* opined that "[y]esterday's judgement…leaves the Administration free to act as if what is declared unconstitutional were in fact constitutional." And as Walter Lippmann wrote a week later, the decision constituted "a victory but not…a vindication of the government…. The abrogation destroys a vested right. It repudiates a contract…. And unless one is prepared to agree that legitimate rights can never be extinguished, the gold clauses cannot be dealt with on the theory that contracts are absolute."

Irrespective of the media's confusion, Roosevelt and his advisors were relieved and "very jolly." While they could not foresee the New Deal's setbacks in the Court that would lead to the Court-Packing Scheme in 1937, for now they had radically devalued the currency and gotten the Court to uphold Congress's retroactive invalidation of the nation's contracts. As for the financial markets – which had been braced for bad news – they reacted positively; not so much for the Court's validation of the nation acting like a banana republic (i.e., repudiating its legal obligations), but rather for the certainty that seemed the clear result of the Court's decisions.

Although Milton Friedman and Anna Schwartz would later write that the Supreme Court's rulings retarded the country's emergence from the Great Depression (*A Monetary History of the United States, 1867-1960* (1963)), the U.S. government in fact had no difficulty going back to the financial markets and issuing new debt in short order. Thus, unlike when Third World countries have defaulted on their debts and investors punished them severely, our nation radically changed the rules of the game at half time and seemingly paid no price for it (indeed, benefitted from it). Could this work a second time?

Postscripts

- Like, I presume, most lawyers, I was never taught about the Gold Clause Cases when I was in law school. Rather, I just learned about them at a recent, fascinating symposium at the Council on Foreign Relations, which featured a presentation by Professor Sebastian Edwards, an economics professor at UCLA. His book – *American Default* (Princeton 2018) – is a must read for anyone seeking more information on this little remembered but fascinating part of our nation's legal and economic history.

- The devaluation of our currency and abrogation of the gold clause did not seem to have a beneficial impact upon foreign countries' willingness to repay their World War I obligations to America. Of the 17 countries that borrowed over $10 billion from the United States (a huge sum in 1914-18 dollars), only Finland paid its debts in full.
- Dean Acheson was undersecretary of the Treasury Department in early 1933, and because of the illness of the secretary he was pretty much running the department on a day-to-day basis. He (like so many establishment figures) considered Roosevelt's plan to go off the gold standard and to devalue the currency, etc., to be improper and illegal. As such (and depending on which version of history you believe), he was either asked to resign or resigned of his own volition. In any event, in doing so Acheson wrote a short letter to Roosevelt, thanking the president for allowing him to serve in such "stirring times." Thereafter, Acheson – despite his views – never expressed them publicly. Roosevelt never forgot Acheson's "appropriate" behavior and, when another subordinate tendered a very different type of resignation, the president told his press secretary, "Return it to him and tell him to ask Acheson how a gentleman resigns." Acheson's actions also had the effect of allowing him back into the government during World War II to a high level post in the State Department (and, later, under President Truman, he became the Secretary of State).
- The last word on the Gold Clause Cases is given to the legendary Harvard Law Professor Henry M. Hart, Jr., who wrote a seminal piece in the May 1935 issue of the *Harvard Law Review* ("The Gold Clause in United States Bonds"). In Professor Hart's view, "Few more baffling pronouncements, it is fair to say, have ever issued from the United States Supreme Court…. Seldom has a legal controversy been touched with ramifications so various and extensive. So much the more astonishing, therefore, is the Delphic character of the Court's utterance in the most difficult of the cases before it.… [With respect to the public debt plaintiffs,] [a]lmost the only thing which is possible to say with assurance is that the plaintiff[s]…did not recover."

What's on Your Wall?

A Rockwell Print

By Lisa Denig

The very first Norman Rockwell print I bought was "The Runaway." I am sure you know it. It depicts a small boy, sitting at a lunch counter, all of his earthly possessions tied up in a bandana at the end of a stick lying on the floor. A kindly looking police officer is sitting next to him, leaning over, presumably attempting to persuade the young man that life on his own will be much harder than life at home with his parents.

I bought this print for my first husband. He was a police officer with the New York Police Department, in the Highway Unit, and the uniform in the painting was remarkably similar to the one he wore every day. However, there was so much more to that