to fact, that the *status quo* which he sought to preserve did not include any likelihood of a strike. (R. 74, 75). In fact, not only was a strike imminent on April 8, but one began on April 30, 1952, fifteen minutes after Judge Pine's order. Whether that strike was justified or not is aside from the point; any realistic appraisal of the situation should have recognized its likelihood.

In essence, moreover, the judge rested his idea of balancing equities on a prejudging of the merits. He felt that the enormous damage from a cessation of production "would be less injurious to the public than the injury that would flow from a timorous judicial recognition that there is some basis" for the defendant's contentions in this case as he misconceived them (R. 75). We submit the proper procedure is the other way; the balancing of equities must be before determination of the merits, and where public action is sought to be enjoined, the normal presumption of constitutionality of the act of a coordinate branch of the Government should lead the courts, on preliminary injunction, to assume at least a substantial likelihood that the public officer will prevail on the merits, and to consider seriously the damage to the public interest that would re-

sult on the assumption that he acted constitutionally.[66]

On these grounds we urge that no preliminary injunction should have been granted. We go further, however, and urge also that it is clear that no final relief can be granted. The principles of balancing the equities and of endeavoring to avoid injury to the public interest apply to final as well as preliminary injunctions, *Harrisonville* v. *Dickey Clay Co., supra; Hurley* v. *Kincaid,* 285 U. S. 95; *New York City* v. *Pine,* 185 U. S. 93, 97; *Virginian Ry.* v. *Federation, supra; Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *United States ex rel. Greathouse* v. *Dern,* 289 U. S. 352, 360; *Morton Salt Co.* v. *Suppiger Co.* 314 U. S. 488, 492, 494; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 670. "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction." *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, 500. At the very least, those principles require that any doubts as to the showing of irreparable injury, or as to the availability and adequacy of a remedy at law, be resolved against the plaintiffs in order to avoid

[66] For the foregoing reasons, the usual rule that granting or denial of a preliminary injunction rests in the trial judge's discretion, *Rice & Adams* v. *Lathrop,* 278 U. S. 509, 514, is inapplicable here, even assuming that it may ever be applied in cases where a wrong exercise of that discretion has led the trial judge erroneously to reach and decide great constitutional issues and to interfere with action of the President.

both the certain and enormous public injury which would flow from a granting of an injunction and also the necessity for passing on constitutional issues of grave moment. In our view, plaintiffs' remedy at law is certain and entirely adequate. But, in any event, the principle that "a court of equity acts with caution and only upon a clear showing that its intervention is necessary in order to prevent an irreparable injury," *Hurley* v. *Kincaid, supra,* 104n., which has been applied in cases involving far less threat to the public and presenting no important constitutional issues, clearly requires that plaintiffs be left to that remedy for whatever injury, if any, they may suffer.

It should be strongly emphasized that the basic issue is not whether the plaintiffs will suffer damage. Rather, the point is whether any damages which they may incur from continuance of the seizure will outweigh the injury to the public from the grant of an injunction. At this stage it is entirely conjectural whether in fact any damage to plaintiffs will have resulted from the President's acts. But it is certain that grave and incalculable harm will follow the continuance of a restraint on defendant. At the same time, it appears highly probable, if not absolutely certain, that the plaintiffs have a sufficient judicial remedy under the Tucker Act. But whether they have or not, equity cannot permit a catastrophic injury to the entire public in order to avoid a private injury that may be relatively insignificant.

II

THE TAKING OF PLAINTIFFS' PROPERTIES WAS A VALID EXERCISE OF AUTHORITY CONFERRED ON THE PRESIDENT BY THE CONSTITUTION AND LAWS OF THE UNITED STATES

A. GENERAL NATURE OF THE AREA OF CONSTITUTIONAL POWER INVOLVED

For the reasons and under the principles set forth in the preceding point, this Court need not here reach constitutional issues. If, however, constitutional issues are to be reached, they must be considered and resolved in the light of the well settled rule, another aspect of judicial restraint in the delicate process of constitutional adjudication, that courts will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 347 (concurring opinion); *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 569; *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461. Moreover, neither here, nor in any constitutional case, is the Court faced with the need to solve an abstract problem. On the contrary, "* * * the constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular condi-

tions * * *." *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 426; and see Opinion of Attorney General Murphy, 39 Op. A. G. 343, 347–348.

Given these two principles, precise analysis of the nature of the problem presented will serve to eliminate much of the rhetoric which has characterized plaintiffs' approach in these cases. It will also serve to sustain, beyond doubt, the validity of the action taken by the President on the night of April 8. On that night, the President took action, purely temporary in nature and subject to various limitations, to meet a critical emergency. And he so acted in the discharge of his constitutional function as Chief Executive and as Commander-in-Chief, of his unique constitutional responsibility for the conduct of foreign affairs, and of his constitutional power and duty to execute the laws. In short, he brought to solution of the emergency the sum of his powers.

1. Separating these elements, first, it cannot be denied that the Presidential action with which this Court is concerned is intended to be temporary in nature. Less than a day after the issuance of the Executive Order, the President, in a message to Congress, stated that he had undertaken to provide for "temporary operation of the steel mills by the Government" and that he wanted to see Government operation "ended as soon

as possible." House Document No. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962. See also the President's letter of April 21, 1952, 98 Cong. Rec. 4192. In both of these messages to Congress, moreover, President Truman has expressed a readiness to abide by any program or directive which Congress may enact with regard to the emergency situation presented by the threatened shut-down of the steel mills.

2. That the President's action on the night of April 8 was taken in response to a pressing emergency cannot seriously be questioned. Plaintiffs have not controverted, nor can they, the recitals of the executive order or the supporting affidavits which were introduced on behalf of Secretary Sawyer in the district court. *Supra,* pp. 9–15. From these, and from the detailed statement set forth above, pp. 28–49, it is clear beyond question that the President acted in a situation of national emergency in which a shut-off of steel supplies would have been catastrophic. Thus, putting to one side the fact that no issue has been raised as to the findings upon which the President's action was based and assuming that such findings are subject to judicial review, the President's action was clearly based upon and directed to an emergency. This Court has stated that it will inquire into the correctness of such recitals only to determine "whether in the light of all the facts and

circumstances there was any substantial basis" for the challenged action. *Hirabayashi* v. *United States,* 320 U. S. 81, 95; and compare *United States* v. *Russell,* 13 Wall. 623, in which this Court concluded that a constitutional emergency existed in a case in which the sole evidence was the bare statement of the assistant quartermaster commandeering the ships that "imperative military necessity requires the services of your steamers for a brief period."[1] There is no need, however, for us to labor any such restraints upon judicial inquiry in these cases. It is inconceivable that, as a matter of fact, this Court could do other than to conclude that the President was faced by the gravest sort of national crisis on April 8.

[1] This principle is particularly applicable where, as here, the President's decision rested in large part on information available to him as to military and international considerations. *Cf., C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences.

3. The sources of the President's power to act must similarly be considered in the light of the actual situation in which the President acted. Whatever view might be taken, broad or narrow, as to the scope of the President's function under any particular clause of Article II of the Constitution, we think it clear that the complex and completely integrated nature of the situation in which the emergency arose brought into play all of his powers.

Each part of the Constitution, as well as the charter as a whole, must be given living and flexible meaning so that it can be ever adapted to vastly differing occasions in the course and development of our national life. "It is no answer * * * to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a constitution* we are expounding' (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407)—'a constitution

intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' *Id.*, p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland,* 252 U. S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters * * *. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'" *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. at 442–443.

Thus, even if the validity of the President's action in these cases had to be resolved exclusively in terms of any one of the granting clauses of Article II, as plaintiffs appear to insist, we submit that each clause is sufficiently broadly drawn and wide in purpose to support emergency executive action.

Section 1 of Article II provides that "the executive Power shall be vested in a President of the United States of America." In our view, this clause constitutes a grant of all the executive powers of which the Government is capable. Cf. *Myers* v. *United States,* 272 U. S. 52; *Works of Alexander Hamilton* (Lodge Ed.), Vol. 4, p. 438; Theodore Roosevelt, *Autobiography,* pp. 388–389. Remembering that we do not have a parliamentary form of Government but rather a tripartite system which contemplates a vigorous executive

(*The Federalist,* Nos. 70 and 71; see also Thach, *The Creation of the Presidency, 1775–1789* (Johns Hopkins University Studies, 1922), Chapters IV, V), it seems plain that Clause 1 of Article II cannot be read as a mere restricted definition which would leave the Chief Executive without ready power to deal with emergencies. Here, as in connection with each aspect of the President's constitutional powers, a specific and compelling frame of record is provided by the nature of the grave crisis with which the country was faced in the event of a production stoppage in the steel industry.

Again, Section 2 of Article II provides that "the President shall be Commander-in-Chief of the Army and Navy of the United States * * *." Powers stemming from the President's position as Commander-in-Chief, specifically invoked in Executive Order 10340 (R. 6), are also clearly available as the basis for the challenged action in these cases. Cf. *The Prize Cases,* 2 Bl. 635. The place of steel at the very heart of our defense and combat activities, and those of our allies, is forcefully demonstrated by the material described above, pp. 39–49. Included in any consideration of the relationship between steel production and the President's position as Commander-in-Chief must be a genuine recognition of his affirmative power in connection with the safety and effectiveness of American troops in Korea. *Hirota* v.

MacArthur, 338 U. S. 197, 207–208 (Mr. Justice Douglas, concurring). From this basis alone, we submit, would stem ample power to "supply an army in a distant field * * *," *United States* v. *Russell,* 13 Wall. 623, 627, to take whatever steps were necessary to insure that no condition of danger be created by reason of a failure of supply of steel. Perhaps the most forceful illustration of the scope of Presidential power in this connection is the fact that American troops in Korea, whose safety and effectiveness are so directly involved here, were sent to the field by an exercise of the President's constitutional powers.

In addition to the general grant of executive power in Section 1 and the powers thus clearly stemming from the Commander-in-Chief clause, the President is under the duty imposed on him by Section 3 of Article II to "take Care that the Laws be faithfully executed." The broad scope of Section 3 has been delineated by this Court (*In re Neagle,* 135 U. S. 1, and, again, in *In re Debs,* 158 U. S. 564; see also Statement by Attorney General Jackson, June 10, 1941, 89 Cong. Rec. 3992) and is also available to justify the action taken by the President in these cases as a necessarily implied part of his express obligation to carry out our national policy to deter and repel aggression. See *supra,* pp. 28–39; *infra,* pp. 144–150.

But the validity of the President's action on April 8 is not to be determined, either as a matter of common sense construction or as a matter of historic judicial method, by reference to one specific clause. On the contrary, from the beginning of the Republic, it has been recognized that Presidential power to act on a particular occasion may derive from more than one of the grants contained in Article II. For example, the legislative decision of 1789 as to the removal power of the President was bottomed upon both the vesting of the executive power in the President and upon his power and duty to take care that the laws shall be faithfully executed. See Substitute Brief for the United States on Reargument in *Myers* v. *United States,* No. 2, October Term, 1926, pp. 49–91. And this Court's decision on this question in *Myers* v. *United States,* 272 U. S. 52, was likewise based not upon a single provision of Article II but upon the combined force of the several provisions. Similarly, the doctrine, announced as early as 1800 by Chief Justice Marshall as a Member of the House of Representatives, that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations" (Annals of Cong., 6th Cong., col. 613) does not rest upon any single provision of Article II but upon a combination of provisions. Cf. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304; *United States* v. *Pink,* 315 U. S. 203. Again, the

authority and ability of the President to execute the laws depends not only on the provision that "he shall take Care that the Laws be faithfully executed," but also upon his authority as Chief Executive, as Commander-in-Chief, and as the organ of foreign relations. Cf. *In re Neagle,* 135 U. S. 1; *In re Debs,* 158 U. S. 564.

It is thus plain that, in the light of the circumstances which confronted the President on April 8, there could be no justification for a requirement that his action be seen as confined to any one of the provisions set forth in Article II. On the contrary, this power to act must be taken as having sprung from all the available clauses.[2] Cf.

[2] History records numerous well-known incidents in which executive powers taken as a whole have been broadly exercised, and we think it unnecessary to rehearse them here extensively. A few notable examples, which readily come to mind, may be mentioned. Perhaps the earliest instance of broad executive action is President Washington's Neutrality Proclamation of 1793, which was at first criticized as an usurpation of authority but "has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration." *Myers* v. *United States*, 272 U. S. at 137. Authority for its issuance has been laid in the provision vesting the executive power in the President and in the provision empowering him to execute the laws. Cf. 7 Hamilton, *Works of Alexander Hamilton* (1851) pp. 80–81; 2 Story, *Commentaries on the Constitution* (1891) Sec. 1570. Similarly, such incidents as the suppression of the Pennsylvania Whiskey Rebellion by President Washington, President Jackson's Proclamation of 1832 that he would employ force to prevent the execution of the South Carolina Ordinance of Nullification, and President Cleveland's dispatch of troops to Illinois in 1894 in connection with the Pullman

Woods v. *Miller Co.*, 333 U. S. 138, 144. Rigid concepts, comparable to notions of common law pleading, which would require either the President or the Congress to specify particular powers as the basis for necessary and valid action, at their peril, should be taken as of no more value in resolving the living problems present in these cases than is the discredited technique of constitutional interpretation, based on "immutable" principles, which was employed by the court below.

4. We have sought to show affirmatively the precise nature of the area of constitutional powers involved in these cases. We think it plain that the action to be tested must be seen as temporary in nature and taken in an emergency situation and must be measured against a variety of

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Company strike were constitutionally authorized by virtue of the President's power to execute the laws, his power as Commander-in-Chief, and the vesting in him of executive power. Cf. *In re Debs*, 158 U. S. 564. Again, based on these sources of authority and upon the President's power in the field of foreign relations, President Tyler, without statutory authority, sent naval vessels and soldiers to Texas in 1844 to protect Texas against Mexican aggression pending Senate ratification of the Treaty of Annexation which he had negotiated. Indeed, in reliance upon this aggregate of Presidential powers, there have been more than 100 occasions in which the Presidents, without Congressional authorization and in the absence of a declaration of war, have ordered our armed forces to take action or maintain positions abroad to protect the lives and property of the United States citizens, to protect the honor of the United States, to open areas to the foreign commerce of the United States and to defend the United States. See H. Rept. 127, 82d Cong., 1st Sess., pp. 55–62.

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constitutional powers granted to the President by Article II. The narrow constitutional question actually presented, then, is one of means, whether seizure is a method available to the President, in the exercise of his constitutional powers, to avert a crisis of this type.

B. THE PRESIDENT, WITHOUT SPECIFIC STATUTORY AUTHORITY, MAY SEIZE PROPERTY TO AVERT CRISES DURING TIME OF WAR OR NATIONAL EMERGENCY, SUBJECT TO THE PAYMENT OF JUST COMPENSATION

Turning then to the precise question presented here, it should first be noted that, where the President possesses constitutional powers to meet emergencies, he necessarily has "wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it." *Hirabayashi* v. *United States,* 320 U. S. 81, 93. Second, it cannot be overemphasized that, considered as federal governmental action, there can be no doubt of the validity of what was done. That is to say, if precisely such a seizure made in precisely this manner and followed by precisely the same actions or proposed actions in respect of the management of the seized plants had been taken under explicit Congressional authorization, there could, we submit, be no conceivable question of its validity. Cf. *United States* v. *United Mine Workers,* 330 U. S. 258; *Du Pont de Nemours & Co.* v. *Davis,* 264 U. S.

456, 462; *United States* v. *Montgomery Ward & Co.,* 150 F. 2d 369 (C. A. 7), vacated as moot, 326 U. S. 690; *Ken-Rad Tube & Lamp Corp.* v. *Badeau,* 55 F. Supp. 193 (W. D. Ky.); *Alpirn* v. *Huffman,* 49 F. Supp. 337 (D. Neb.).[3]

The real question here, therefore, is whether seizure was a means available to the President, in the exercise of his constitutional powers, to meet the pressing emergency which faced the nation. On this issue, ample support is to be found in executive and legislative precedent for the President's action. Moreover, there is direct judicial recognition of executive seizure as a means of meeting emergency situations.

1. *Executive construction.*—During the Revolution and the War of 1812 there were numerous

[3] It should perhaps be emphasized that the President's action in no way violates any of the prohibitions on governmental action contained in the first ten Amendments. There is no question here, for example, of any infringement by the President of the rights of freedom of speech, religion, or press guaranteed by the First Amendment, or of the right to be secure from search and seizure guaranteed by the Fourth Amendment or of the rights of jury trial, privilege against self-incrimination, assistance of counsel, etc., guaranteed by the Fifth and Sixth Amendments. The President's action is entirely consistent with the rights of property guaranteed by the Fifth Amendment. That amendment expressly recognizes that private property may be taken for public use upon payment of just compensation, and we concede that just compensation will here be payable in respect of any injury which the plaintiffs may prove to have resulted from the taking. See Point I A, *supra.* The invasion of property rights is only to the extent and for the period of time necessary to meet the emergency.

instances of taking of property for the benefit of the armed services by military officers. While the exact nature of these takings is seldom clear from the available records, most of them appear to have been based entirely on executive authority. The records show that during the Revolution, the buildings of Rhode Island College, as well as other buildings throughout the country, were taken over for use as hospitals and barracks. Other instances were the taking of wagons, horses, and slaves required for public service. During the War of 1812 the property of traders at Chicago was taken to prevent its falling to the enemy, rope walks at Baltimore were destroyed for the same purpose, a house was taken to hold military stores and was later blown up to prevent those stores falling to the enemy, and, in Louisiana, General Jackson freely took plantations, fencing, and supplies as the emergency dictated.[4] By the

[4] American State Papers, Class IX, Claims No. 86, p. 197; No. 584, p. 833; No. 590, p. 838; No. 243, p. 424; No. 258, p. 441; No. 266, p. 446; No. 345, p. 521; No. 356, p. 525; No. 461, p. 649.

In case No. 461, p. 649, General Swartwout, under order of General Wilkinson, took certain vessels to be used in operations on the St. Lawrence in 1813. The general was sued in a New York state court and judgment was given against him for $2500.00. The Committee on Military Affairs recommended that this sum be repaid to General Swartwout, saying "In the circumstances of war, such exigencies will frequently occur in which the commanding officer will stand justified in taking, by force, such necessaries, either for support or conveyance, as are absolutely indispensable and which cannot be obtained by any other means."

close of the War of 1812, it was firmly established that property could be taken in wartime emergencies as an exercise of independent executive power.

More pertinent parallels in history are found during the administrations of Presidents Lincoln, Wilson, and Franklin D. Roosevelt.

The first discovered instance of a taking by order of the President himself, as distinguished from a taking by a subordinate military official, occurred in the first year of the Civil War.[5] On April 27, 1861, Secretary of War Cameron, at the direction of the President, issued a declaration taking over the railroads and telegraph lines between Washington and Annapolis.[6]

Confronted with secession, President Lincoln exercised greater executive power than had been exercised by any previous President. His most dramatic act of executive taking was his Emancipation Proclamation of January 1, 1863, an action resting exclusively on his constitutional powers as

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[5] The power of seizure of private property had apparently also been exercised during the War with Mexico by military officers. One such seizure resulted in the celebrated case of *Mitchell* v. *Harmony*, 13 How. 115, which is discussed in detail *infra*, pp. 126–131.

[6] War of the Rebellion, Official Records of the Union and Confederate Armies, Series I, v. II, p. 603. Secretary Cameron's correspondence shows that he acted with full Presidential authority. *Ibid.*, 604. For details of the control, see *ibid.*, pp. 605, 609, 610, 611, 623.

Commander-in-Chief.[7] Although the Proclamation was operative only in the Confederate areas, it is indicative of Lincoln's basic conception of the power of the Chief Executive in time of war. He said in a comment on the constitutionality of the Proclamation:

> I think the Constitution invests its Commander-in-Chief with the law of war in time of war. The most that can be said—if so much—is that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it will help us, or hurt the enemy?[8]

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[7] Less pertinent here, but equally broad and vigorous, were the actions taken by Lincoln when, without statutory authority, he increased the size of the Army and the Navy, ordered the payment from the Treasury of monies to those not authorized to receive it, and suspended the writ of *habeas corpus*. Corwin, *The President, Office and Powers* (1948 ed.), pp. 277–278. In addition, he proclaimed a blockade of the Southern ports and ordered the taking of blockade-runners, an order which, although without congressional authorization, was upheld in the *Prize Cases*, 2 Bl. 635.

[8] Letter to James C. Conkling, Aug. 26, 1863, IX Nicolay and Hay, Works of Abraham Lincoln, 95 at 98. The effect of the Emancipation Proclamation was considered in a number of cases, but none has been discovered which relate to the immediate problem *The Emancipation Cases*, 31 Tex. 504 (1868); *Slaback* v. *Cushman*, 12 Fla. 472 (1869); *Dorris* v. *Grace*, 24 Ark. 326 (1866); *Morgan* v. *Nelson*, 43 Ala. 586 (1869).

Following the precedent set by President Lincoln, Wilson, too, exercised his constitutional powers to seize the property of the Smith & Wesson Company on August 31, 1918. See Testimony of Attorney General Biddle, Hearings, House Select Committee To Investigate Montgomery Ward Seizure, 78th Cong., 2d Sess., pursuant to H. Res. 521, June 8, 1944, pp. 167–168. In describing that action in a letter to striking workmen of the Remington Arms Company in Bridgeport, Connecticut, Wilson stated (Baker, *Woodrow Wilson, Life & Letters, Armistice* (1939), Vol. 8, pp. 401–402):

> The Smith & Wesson Company, of Springfield, Mass., engaged in government work, has refused to accept the mediation of the National War Labor Board and has flaunted its rules of decision approved by Presidential Proclamation. With my consent the War Department has taken over the plant and business of the Company to secure continuity in production and to prevent industrial disturbance.
>
> It is of the highest importance to secure compliance with reasonable rules and procedure for the settlement of industrial disputes. Having exercised a drastic remedy with recalcitrant employers, it is my duty to use means equally well adapted to the end with lawless and faithless employees.

In addition to his actual seizure of Smith & Wesson and his threat of a similar measure as a

sanction against the employees of the Remington Arms Company (Corwin, *op. cit. supra* (1948), p. 298), Wilson also seriously contemplated the seizure of the Colorado coal mines in 1914 because of a strike there. No seizure was effected, however. *Woodrow Wilson Papers,* File 6, Box 393, Nos. 901, 902, Division of Manuscripts, Library of Congress; Corwin, *op. cit. supra* (1948), p. 453, n. 107.[9]

[9] Prior to his accession to the Presidency, Wilson had expressed views comparable to Theodore Roosevelt's "stewardship" theory of executive power. Wilson, *Constitutional Government in the United States*, pp. 88–89. During World War I, he adhered to those views, and, acting without statutory authority, created a War Industries Board, a War Labor Board, and a Committee on Public Information. Berdahl, *War Powers of the Executive*, p. 172. On April 28, 1917, he ordered that all telegraph and telephone lines and cables be operated only pursuant to regulations of the Secretary of War or the Secretary of the Navy, although there was no statutory authority for this action. On July 13, 1917, again without statutory authority, Wilson issued a proclamation preventing German marine and war-risk insurance companies from operating in the United States on the ground that the German Government apparently was obtaining information concerning ship movements through these companies. Again in 1917, President Wilson asked Congress to arm merchant vessels and when such authority was not forthcoming he, as an exercise of his constitutional powers, gave notice of determination to arm all American merchant vessels and placed naval personnel and guns thereon. From 1917 to 1922, troops were sent into the States more than 30 times, a majority of these instances being in connection with labor disputes. Corwin, *op. cit. supra* (1948), pp. 287, 166; Berdahl, *op. cit. supra*, pp. 68–70, 200.

The most recent and extensive exercise of the executive power to seize property without statutory authority occurred during the administration of President Franklin D. Roosevelt. On twelve occasions prior to the enactment of the War Labor Disputes Act on June 25, 1943 (57 Stat. 163, 50 U. S. C. App. 150–1511), which authorized the seizure of plants, President Roosevelt issued Executive Orders taking possession of various companies when it appeared that a work stoppage would seriously impede operations.[10] The first seizure occurred as much as six months prior to Pearl Harbor,[11] and a total of

[10] List of plants and facilities taken by President Roosevelt prior to the passage of the War Labor Disputes Act.

Executive Orders	Date	Concerns Involved
Executive Order No 8773	June 9, 1941	The North American Aviation Pl
Executive Order No 8868	August 23, 1941	Federal Shipbuilding & Drydk Co
Executive Order No 8928	October 30, 1941	Air Associates, Inc
Executive Order No 8944	November 19, 1941	Grand River Dam Project
Executive Order No 9108	March 21, 1942	Toledo, Peoria & Western R R Co
Executive Order No 9141	April 18, 1942	Brewster Aeronautical Corp
Executive Order No 9220	August 13, 1942	General Cable Company
Executive Order No 9225	August 19, 1942	S A Woods Machine Co
Executive Order No 9254	October 12, 1942	Triumph Explosives, Inc
Executive Order No 9340	May 1, 1943	Coal Mines
Executive Order No 9341	May 13, 1943	American R R Co of Puerto Rico.
Executive Order No 9351	June 14, 1943	Howarth Pivoted Bearings Co

[11] This first seizure, of the North American Aviation Plant, was justified by the then Attorney General Jackson as an act within the "duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the defense efforts of the United States a going concern." 89 Cong. Rec. 3992.

three plants were seized before our entry into the War.[12]

Although other Presidents apparently did not have the occasion to meet crises of the magnitude and complexity here presented, brief mention should be made of the following incidents of a similar nature which illustrate the views of others who have occupied the office. President Hayes, in connection with the railway strike of 1877 and on other occasions, did not hesitate to make drastic use of his constitutional powers, including the use of troops. Corwin, *op. cit. supra,* (1948), p. 164. Again, in 1894 President Cleveland, over the objection of the Governor of Illinois, sent troops to Chicago in connection with the Pullman strike

[12] Less pertinent here but equally significant were other actions taken by President Roosevelt without statutory authority, both during the depression emergency and the war emergency. A notable illustration during the depression was the National Bank Holiday. The emergency caused by the war in Europe required a frequent exercise of his constitutional powers both before and after the attack on the United States. A familiar exercise of these powers, for which Wilson in World War I had set a notable precedent in the War Industries Board and other agencies, was in the creation of executive agencies. Thus, the Office of Price Administration and Civilian Supply and the Office of Emergency Management were created by the President long before our entry into the War. Among the others created before or after the beginning of World War II by executive order were BEW, NWLB, OCD, ODT, OWI, OPM, WMC and NHA. Other types of executive action taken included the occupation of Iceland by our troops, and action taken in connection with labor disputes. Corwin, *op. cit. supra,* (1948), pp. 293, 294, 299, 300, 493, 494.

in order to remove obstructions to interstate commerce and the passage of mails. President Cleveland proclaimed that this action was taken for the purpose of enforcing the faithful execution of the laws of the United States and the protection of its property and removing obstructions to the United States mail. An injunction in connection with the strike was sustained in the *Debs* case, 158 U. S. 564, and the use of troops in that instance was approved by the Court as an exercise of the President's constitutional powers to enforce the Federal laws. 158 U. S. 564, 582. Similarly, President McKinley dispatched troops to Idaho in 1899 to suppress the disturbances resulting from a strike of lead and silver miners. Berman, *Labor Disputes and the President* (1942), Ch. II. In 1902, Theodore Roosevelt seriously considered taking possession of the Pennsylvania coal mines during a strike in the mines to prevent a coal shortage. The taking never became necessary because the dispute was settled. 20 *Works of Theodore Roosevelt,* p. 466; Corwin, *op. cit. supra,* (1948), p. 190.[13] Later in his administra-

[13] An unpublished opinion of Attorney General Knox, dated October 10, 1902, stating that the President had no power to make such a seizure and resting the argument largely on the view that a coal strike in Pennsylvania presented matters of local and not federal concern, may be found in the Manuscript Division of the Library of Congress, among the Theodore Roosevelt papers. For a contrary view as to the power of the President in 1902, see *Dakota Coal Co.* v. *Fraser*, 283 Fed. 415, 417 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8).

tion, he withdrew from private entry "pending legislation" many parcels of land for forest and coal reserves although the pertinent statutes authorized withdrawal only of lands in which mineral deposits had been found. Corwin, *op. cit. supra,* (1948), p. 147. President Taft, despite his expression of views as an academic matter, did not hesitate to take similar action, in the teeth of existing statute, as a matter of executive power, based on usage. *United States* v. *Midwest Oil Co.,* 236 U. S. 459. And President Harding, like his predecessors, employed troops to quell the West Virginia Mine disorders of 1921. Berman, *op. cit. supra,* pp. 210–213.

2. *Legislative construction.*—As noted above, the first discovered instance of a Presidential taking was Lincoln's seizure, through his Secretary of War, of the railroad and telegraph lines between Washington and Annapolis in 1861. In January 1862, legislation was enacted which confirmed the Presidential power to take over any railroad or telegraph line in the United States and provided penalties for interference with their operation by the Government (12 Stat. 334).[14] Throughout the debates on the proposed legislation, virtually every Senator and Representative

[14] On February 11, 1862, President Lincoln, pursuant to that statute, took possession of all railroads in the United States. 6 Richardson, *Messages and Papers of the Presidents,* 101.

who addressed himself to the subject either assumed or declared that the President had the inherent constitutional power to take the railroads and telegraph lines if he thought it necessary in the exercise of his war powers. The supporters of the bill advocated its passage as a declaration of existing law and as a means of providing a rigorous system of penalties.

Thus, the sponsor of the bill in the Senate, Senator Wade, stated, "Mr. President, this bill confers no additional power upon the Government, as I understand it, beyond what they possess now. It attempts to regulate the power which they undoubtedly have; for they may seize upon private property anywhere, and subject it to the public use by virtue of the Constitution." Cong. Globe, 37th Cong., 2d Sess., p. 509. And the sponsor of the bill in the House, Representative Blair, similarly stated that the bill "does not confer on the Secretary of War any new or any dangerous powers. The Government has now all the powers conferred by this bill; and the simple object of the bill is to regulate, limit, and restrain the exercise of those powers." *Ibid.,* p. 548.

Equally enlightening was the opposition of Senators Cowan, Browning, Grimes and Fessenden, who voted against the bill on the ground that it was unnecessary and might be construed as a limitation on existing powers. Viewing the question in that light, Senator Cowan, for example,

observed that "When Congress declares war provides an army and navy for the Preside achieve a particular thing, it confers upon h the same time all the powers necessary to a the desired end; and among other things it co on him power, as has been well said, to im horses, railroads, telegraph lines, men, t everything of that kind into his service, and pel them to work according to his plan pattern." *Ibid.* p. 516. For similar state see *ibid.*, p. 512 (Fessenden), *ibid.*, pp. 51 (Browning), and *ibid.*, p. 520 (Grimes).[15]

The legislative history of the War Labo putes Act of June 25, 1943 (57 Stat. 1 U. S. C. App. 1501–1511) is strikingly si The Act was passed in the 78th Congre finds its antecedent in the 77th Congress

[15] The nature of the President's powers was also d in the Congress in connection with the Act of July 1 40 Stat. 904, which authorized the taking of the te and telegraph lines during World War I. Relative power, President Harding, then Senator Harding, a opposed to the bill, stated:

> Mr. President, I listened with a good deal of a yesterday to the able remarks of the senior Senat Illinois [Mr. Lewis], and I recall that he said, were a real war emergency, if there were a prese sity for the seizure of the lines of communicatio country, the Chief Executive would take them o he would be unfaithful to his duties as such Chie tive. I agree with that statement; and if the P believes that there is such an emergency, he seize them. (56 Cong. Rec. 9064.)

June 5, 1941, Senator Connally introduced S. 1600 (87 Cong. Rec. 4736). This bill was roughly similar to Section 3 of the War Labor Disputes Act as finally enacted, the most notable difference being that the bill covered plants "equipped for the manufacture of any articles or materials" without reference to mining or production. On June 9, 1941, as noted above, p. 109, the President took possession of the North American Aviation plant at Inglewood, California, to end an interruption of production caused by a strike. On June 10, 1941, Senator Connally offered a virtually identical proposal as an amendment to S. 1524, a bill amending the Selective Service Act in certain respects wholly unrelated to the present litigation (87 Cong. Rec. 4932).[16]

As with the Civil War Congress, discussed above, it was again generally recognized in consideration of the bill that the President already

[16] The Connally amendment passed the Senate, but was revised into wholly different form and finally rejected altogether by the House. In conference the Connally proposal was adopted but the House rejected the conference report. S. 1524 eventually passed without any amendment on plant seizures. The House Report on the bill is H. Rept. 785, 78th Congress. The House Conference report is reprinted at 87 Cong. Rec. 6331 and the report was rejected by the House at 87 Cong. Rec. 6424. In November 1941, Senator Connally introduced a new bill, S. 2054. The bill was reported favorably. Meanwhile, war was declared, and Senator Connally abandoned the bill for the remainder of the 77th Congress, in view of the President's creation of the War Labor Board.

had full constitutional power to take the actions contemplated by the Act. Again, some Congressmen voted against the bill on the ground that it was unnecessary but others thought legislative action desirable to remove any possible doubt. Representative May, Chairman of the House Military Affairs Committee, to which the bill was referred, said (87 Cong. Rec. 5895):

> Mr. Chairman, if any Member thinks that is wrong, that it is wrong that the President should have this power to take over an industry for the purpose of policing it just because one or two men may object, that Member will have the opportunity to express himself by his vote; but let me tell you a few things. We hear it said the President already has power to do this. I think he has, and I think he exercised it wisely when he took over the plant in Inglewood, Calif. * * *

Representative Whittington, supporting the bill, said (87 Cong. Rec. 5972):

> We approve the course of the President of the United States in the North American air plant in California. It was never argued; it was never stated by the Attorney General that the President had such authority under section 9 of the Selective Service and Training Act. It is only maintained that he had that authority under the Constitution as Commander in Chief. I say that the bill should be enacted and that

> the President of the United States should be given the power by statute to do that which he did in the case of the aviation company in California.

On the other hand, Representative Dirksen contended that the bill was unnecessary (87 Cong. Rec. 5974):

> Secondly, let me submit to you that the Commander in Chief who can occupy Iceland with the troops of the United States and advise Congress of this action 6 days later does not need any legislation to occupy a plant in the United States of America. He has done it once and he can do it again. Surely no proponent of the pending bill will arise to confess that what the President did before in California was or is illegal.[17]

The Connally proposal, which had first been debated after the President's seizure of the North America plant, was again introduced by the Senator in the 78th Congress after the seizure of the coal mines. As introduced the bill was substantially the same as S. 2054, considered in the previous Congress, and it was speedily reported favorably without Committee hearings.[18] The congressional debate reveals no purpose to impugn the President's constitutional power but,

[17] Similar views as to the President's power were expressed by Rep. Dworshak, 87 Cong. Rec. 5901, Rep. Faddis, *ibid.*, 5901, Rep. Harter, *ibid.*, 5910, and Rep. Hook, *ibid.*, 5975.

[18] S. Rep. 147, 78th Cong., 1st sess.

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rather, indicates to the contrary. In the course of discussion, Senator Connally described on several occasions the object and scope of the bill (89 Cong. Rec. 3807):

> There is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. The authority heretofore exercised has been the general power of the President as Commander in Chief of the Army and Navy, and such subsidiary powers as were derived from the War Powers Act. The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property, but even that does not carry the specific authority. It was my thought that, regardless of the legal technicalities involved, it would be a wholesome thing for the Congress of the United States specifically, and in direct language, to authorize the President to do these things, and to confirm and ratify, if necessary, what the President has done and let the country know that the Congress is squarely behind the President.

Similarly, Senator Austin said (89 Cong. Rec. 3896):

> The pending proposal is but a part of the whole picture * * * It merely says that we will supplement the powers enumerated, which are powers given by the Constitution to government, powers which

> are inherent with government without being given, anyway, * * *.

General acceptance of the President's constitutional powers was also expressed by Senator Lucas, 89 Cong. Rec. 3885, Senator McClellan, *ibid.,* 3887, and Senator Wheeler, *ibid.,* 3887. Senator Tydings offered an amendment which would have specifically ratified the taking of the coal mines. This amendment was defeated on the pleas of Senators Connally and Barkley that such formal language of ratification might cast doubt on the validity of the President's constitutional power to take, *ibid.,* 3989, 3992, 3993.[19]

[19] After the enactment of the War Labor Disputes Act, identical views were expressed by Attorney General Biddle in advising President Roosevelt as to the legality of the proposed Executive Order [Executive Order No. 9438, 9 F. R. 4459, April 25, 1944] directing the Secretary of Commerce to take possession of, and to operate, certain plants and facilities of Montgomery Ward. Attorney General Biddle concluded that the Act did authorize the action contemplated by the President but pointed out that (40 Op. A. G. 312, 319–320):

> It is not necessary, however, to rely solely upon the provisions of section 3 of the War Labor Disputes Act. As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war. The Constitution lays upon the President the duty "to take care that the laws be faithfully executed." The Constitution also places on the President the responsibility and invests in him the powers of Commander-in-Chief of the Army and Navy. In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor

3. *Judicial precedent.*—Even were there no direct judicial authorities, we believe that these historical precedents would be sufficient support for the President's action here. As Mr. Justice Holmes has cogently observed, "a page of history

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disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort. In modern war the maintenance of a healthy, orderly, and stable civilian economy is essential to successful military effort. The Congress has recognized this fact by enacting such statutes as the Emergency Price Control Act of 1942; the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes"; the Small Business Mobilization Law of June 11, 1942; and the War Labor Disputes Act. Even in the absence of section 3 of the War Labor Disputes Act, therefore, I believe that by the exercise of the aggregate of your powers as Chief Executive and Commander-in-Chief, you could lawfully take possession of and operate the plants and facilities of Montgomery Ward and Company if you found it necessary to do so to prevent injury to the country's war effort.

Earlier, on October 4, 1939, Attorney General Murphy had stated as follows in reply to a request of the Senate for his opinion on the war emergency powers of the President:

> You are aware, of course, that the Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically de-

is worth a volume of logic." *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349. Contrary to plaintiffs' assertions that these precedents prove a usage but do not establish its validity, "even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 525. "Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 472–473; *United States* v. *Macdaniel,* 7 Pet. 1, 13–14.

In any event, direct judicial recognition of the executive power to seize property to avert a crisis in time of war or national emergency is not lack-

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fined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action. [39 Op. A. G., pp. 343, 347–348.]

ing. As this Court said in *United States* v. *Russell,* 13 Wall. 623, 627:

> * * * in cases of extreme necessity in time of war or of immediate and impending public danger, * * * private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent

> of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. * * *.

Indeed, judicial controversy in this area has not been over the question whether the power to take exists but whether just compensation was required in view of the circumstances of the taking. In the analysis which follows we shall show (1) that the pertinent cases all hold that the executive may, without statutory authorization, employ seizure as a means of averting impending crisis; (2) that the power to seize is of two types, one based on the police power and the other in the nature of eminent domain; (3) that the police power seizure, which is not involved in this case, does not require compensation; (4) that the eminent domain taking, which is here involved, requires necessity and the payment of just compensation but can be exercised without regard to its physical relation to the field of battle; and (5) that since the owner suffers no greater injury from a taking under the eminent domain power than any other person whose property is taken by the usual legislative-

judicial eminent domain process, a lesser degree of necessity justifies eminent domain takings as contrasted with police power seizures.

(a). The first reported American case discovered, *Respublica* v. *Sparhawk*, 1 Dall. 357, involved a claim for compensation for property removed from Philadelphia during the Revolution by order of Congress to prevent it from falling into the hands of the enemy. The property later was captured by the enemy in its new location. Compensation for its loss was denied by the Pennsylvania Supreme Court. The taking was compared to those involved in the destruction of buildings to prevent the spread of fire. Although the case did not involve a purely executive taking, the decision played a principal part in the development of the police-power branch of the law.

Two significant developments occurred in the period from the War of 1812 to the Civil War. The first was the emergence in the state courts of a clearer concept of the police power aspect of the executive power, and the second was the earliest Supreme Court decision dealing squarely with the power of the Executive to take property in wartime.

The executive power of taking was dealt with in the state courts in this period in connection with the problem of liability of municipal officers for destruction of buildings to prevent the spread of

fires. The courts reasoned from the war-power precedents like the *Sparhawk* case. Thus, in the leading case of *Mayor of New York* v. *Lord,* 18 Wend. 126 (1837), involving liability of destruction of buildings in face of fire, the court discussed the problems in terms of the recognized privilege to destroy property without liability in case of such necessity as the advance of a hostile army. While the cases are not unanimous as to compensation, they hold generally, reasoning from the maxim *salus populi est suprema lex* and from the analogy of wartime emergency, that property may be destroyed under such circumstances without compensation.[20] In the cases falling in later periods this authority is rested explicitly on the police power.[21] The leading case of the period is *Parham* v. *The Justices,* 9 Ga. 341, 348, 349 (1851), a case involving an eminent domain problem not directly relevant to this discussion, but in which the court enunciated a principle often referred to in later decisions that "in cases of urgent public necessity, which no law has anticipated, which cannot await the action of the

[20] *Meeker* v. *Van Rensselaer,* 15 Wend. 397 (1836); *Russell* v. *Mayor of New York,* 2 Den. 461 (1845); *American Print Works* v. *Lawrence,* 23 N. J. L. 590 (1851); *Surocco* v. *Geary,* 3 Cal. 69 (1853); *McDonald* v. *City of Red Wing,* 13 Minn. 38 (1868).

[21] *Aitken* v. *Village of Wells River,* 70 Vt. 308 (1898); *Bowditch* v. *Boston,* 101 U. S. 16; 2 Cooley, *Constitutional Limitations* (8th ed.) 1313; David, *Municipal Liability in Tort in California,* 6 S. Cal. L. R. 269.

Legislature," property may be taken without compensation on the theory of *salus populi.* The examples given are those arising from the incidence of war.[22]

The case of *Mitchell* v. *Harmony,* 13 How. 115 (1852) was the first to come to this Court involving the executive power of emergency taking. The facts were as follows:

Harmony was a naturalized Spanish-American who took a large wagon train for trading purposes from Independence, Missouri, to El Paso

[22] The full quotation is as follows:

"It is not to be doubted but that there are cases in which private property may be taken for a public use, without the consent of the owner, and without compensation, and without any provision of law for making compensation. These are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the Legislature. In such cases, the injured individual has no redress at law—those who seize the property are not trespassers, and there is no relief for him but by petition to the Legislature. For example: the pulling down houses, and raising bulwarks for the defense of the State against an enemy; seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton bags, as Gen. Jackson did at Orleans, to build ramparts against an invading foe.

"These cases illustrate the maxim, *salus populi suprema lex.* Per *Buller, J. Plate Glass Co.* v. *Meredith,* 4 T. R. 797. Noy's Maxims, 9th ed., p. 36. Dyer, 60 b. Broom's Maxims, 1. 2 Bulst. 61. 12 Coke, 13. [*The Saltpetre Case*, ed. note] Ib. 63. 2 Kent's Com. 338. 1 Bl. Com. 101, note 18, by Chitty. Extreme necessity alone can justify these cases and all others occupying the same ground."

during the Mexican War. Colonel Doniphan's unit, under the distant command of General Kearney, was in El Paso with about 1,000 men at the same time. Doniphan determined to attack Chihuahua, about 300 miles away in Mexico, and by order of his subordinate, Lt. Col. Mitchell, Harmony was compelled to accompany the troops in his wagon train. Other traders in El Paso were given similar orders. The purposes of the orders were threefold: Doniphan felt it necessary to enlarge his tiny military force by adding to it the 300 teamsters in the trading party; he desired the wagons for the formation of corrals on the march in case he should be attacked by the enemy if left behind or, more important in Harmony's case, that Harmony himself might trade with the enemy if left to his own devices.[23] The wagon train was therefore taken to Chihuahua, and subsequently fell into the hands of the enemy there.

Upon his return to the United States, Harmony petitioned Congress for compensation for his losses. Bills for this purpose were considered in both Houses in the 30th and 31st Congresses in 1848, 1849, and 1850, and bills on the subject passed each House. However, no agreement between the two Houses was ever reached, and Har-

[23] Depositions of Doniphan and Major Clark in Record of *Mitchell* v. *Harmony*, Sup. Ct., No. 178, Dec. term, 1851.

mony thereupon sued Mitchell personally for damages.[24]

The case was tried before a jury in the Circuit Court in New York with Mr. Justice Nelson, on circuit, presiding. On the basis of Justice Nelson's charge, 1 Blatch. 549, the jury, without leaving its seats, gave a verdict to Harmony for $90,000.[25]

Before the case came to this Court, Congress acted. On March 11, 1852, it passed an act, 10 Stat. 727, providing that Mitchell should be represented in the Supreme Court by the Attorney General, and that any judgment resulting should be paid by the United States.

The case thus came to the Court in this posture: Harmony's property had been taken by military action. Despite prevailing sentiment in both Houses of Congress that Harmony should be compensated, no compensation bill had been enacted. Harmony had no way of suing the United States, for the Court of Claims had not yet been created, and such cases as *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, and *United States*

[24] For record of Harmony's claim in Congress, see Sen. Misc. Docs. No. 11, 30th Cong., 1st sess.; H. Rept. No. 458, 30th Cong., 1st sess.; Cong. Globe, 30th Cong., 2d sess., 580–581. Senator Mason, in reporting the bill to the Senate, said: "Now, I apprehend it is clear that where private property is seized in time of war by a military officer for public purposes, the owner has a right to claim its value from the Government" (Cong. Globe, *supra*, 580).

[25] 13 How. at 141.

v. *Lynah,* 188 U. S. 445, holding the United States liable for takings on a theory of implied contract, were still many years in the future. Indeed, the first decision that the United States possessed a power of eminent domain was still more than twenty years distant, *Kohl* v. *United States,* 91 U. S. 367 (1876).[26] The United States, as the Court knew,[27] had assumed Mitchell's liability, and the only possible way of compensating Harmony under the circumstances was by affirming the jury's verdict.

The Court affirmed. It held that the trial judge had correctly instructed the jury that a military officer had the power to take private property for a public use but that the power could be exercised only in the event of an emergency.[28] The core of

[26] It is significant that the executive power to take property had been often exercised and had been expressly recognized by this Court before the Congressional power of eminent domain became established. The *Russell* case, cited *supra,* p. 122, antedated *Kohl* v. *United States* by five years.

[27] In accordance with the Compensation Act, Mitchell was represented in the Supreme Court by the Attorney General. The case was fully discussed by a Member of Congress with Justice Nelson when the compensation bill was before the House, and the Justice's informal views were before Congress. Cong. Globe, 32d Cong., 1st sess., 663.

[28] This emergency power was conceded by counsel for Harmony, who cited as precedent for its existence the New York fire case, *Mayor* v. *Lord, supra. Mitchell* v. *Harmony, supra,* 124.

the Court's opinion on this point is contained in the following passage, pp. 133, 134:

> There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.
>
> But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

The Court did not consider whether on the facts in the case an emergency existed that justified the taking. The Court said specifically that that question was not before it; that it was a question of fact upon which the jury had passed and that the Court would confine its considera-

tion to "whether the law was correctly stated in the instruction of the court." 13 How. 134. Thus, although the actual holding of the *Mitchell* case is that the taking was invalid, the Court reached that result solely because of a jury finding that no emergency existed which justified the exercise of power which the Court ruled was possessed by the executive.

(b). As a result of the widespread executive takings during the Civil War, innumerable claims arose before state courts,[29] Congress,[30] the President, and the Federal courts in the reconstruction years. Congress, after elaborate debate, brought the problem to a sharp issue by passing,

[29] In Tennessee and Virginia it was held that action by municipal executives in collaboration with townspeople to destroy liquor which might otherwise have fallen to advancing Federal troops was a justifiable, noncompensable taking on the theory of *salus populi*. *Harrison* v. *Wisdom*, 54 Tenn. (7 Heisk.) 99 (1872); *Wallace* v. *City of Richmond*, 94 Va. 204 (1897). Both decisions rely on the conflagration cases discussed above. In Tennessee the impressment of wood for use on a government railroad in a friendly territory was also upheld, *Taylor* v. *Nashville & Chattanooga Railroad Co.*, 6 Cold (Tenn.) 646 (1869); and the impressment of horses by executive action was upheld in Missouri, *Wellman* v. *Wickerman*, 44 Mo. 484 (1868).

[30] In 1874 a Committee on War Claims of the House of Representatives submitted an elaborate report, usually referred to as the Lawrence Report. H. Rep. No. 262, 43rd Cong., 1st Sess. This report carefully distinguished between seizures on the theory of *salus populi* and takings by eminent domain. Report, p. 45. The report emphasizes that "there is a law overruling necessity, entirely distinct from the right of eminent domain. *Ibid.*, 50.

in 1872, a bill authorizing payment of a claim of J. Milton Best for compensation for destruction of his house by military order in the course of the defense of a fort at Paducah, Kentucky.[31]

President Grant vetoed the Best bill and in so doing enunciated the distinction subsequently adopted by the Supreme Court between two types of wartime takings. He said, in a passage later quoted with approval in *United States* v. *Pacific Railroad,* 120 U. S. 227, 238:

> It is a general principle of both international and municipal law that all property is held subject not only to be taken by the Government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to com-

[31] The prolonged debate on the Best bill called forth learned and elaborate argument from many members of Congress. The speakers explored thoroughly all writers and precedents, ancient and modern. Cong. Globe, 41st Cong., 3d sess., 97, 165, 295, 311. A similar discussion in the preceding Congress concerned the claim of Sue Murphey, whose house in Decatur, Alabama, was destroyed by the military authorities for the purpose of construction of fortifications many months after the entire area had been pacified by Union forces. For discussion, see Cong. Globe, 40th Cong., 3d sess., 274, 293, 381.

> pensate the owner. The temporary occupation of, injuries to, and destruction of property caused by actual and necessary military operations are generally considered to fall within the last-mentioned principle. If a government makes compensation under such circumstances it is a matter of bounty rather than a strict legal right.[32]

Meanwhile, the courts were creating a formal distinction between the two types of executive taking. In *Grant* v. *United States,* 1 Ct. Cls. 41 (1863), the issue was whether plaintiff should recover for destruction of his property at Tucson, Arizona, by a military order which had as its purpose the keeping of goods out of enemy hands. The court ruled that there were two types of taking of property, one done by eminent domain, and the other under the law of "extreme necessity" (p. 45), and held that, under the eminent domain power, private property might be rightfully taken by military officers without legislative authority (p. 47). Acknowledging that this power might be exercised only in circumstances of necessity, the court laid down this general rule as the measure of necessity (pp. 47, 48):

> The necessity must be urgent, but it need not be overwhelming; the danger must ap-

[32] 7 Richardson, *supra*, 172, 173. President Grant followed these principles in vetoing a subsequent bill for compensation for destruction of a salt works in Kentucky. *Ibid.* 216.

> parently be near and impending, but it need not be actually present, threatening instant injury to the public interests.[33]

In two reconstruction cases, *United States* v. *Russell,* 13 Wall. 623, and *United States* v. *Pacific Railroad,* 120 U. S. 227, this Court further clarified the distinction between eminent domain and police power takings. In both cases, the Court held the executive takings to be lawful. However, because the necessity for, and circumstances of the occasions of taking differed in degree in each case, compensation was held to be due in the *Russell* case and not in the *Pacific Railroad* case.

In *United States* v. *Russell* the owner of three steamers that had been seized by Army Assistant Quartermasters at various points on the Mississippi during the Civil War brought a suit in the Court of Claims to recover compensation for their use. After temporary use by the Government the vessels had been returned to the owner. A statute had been passed on July 4, 1864, which provided that the jurisdiction of the Court of Claims should not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy while it was engaged in the suppression of the rebellion. The United States contended that the

[33] A dissenting opinion on grounds unrelated to the subject under discussion here in the *Grant* case is reported at 2 Ct. Cls. 551. The *Grant* case is followed in *Wiggins* v. *United States*, 3 Ct. Cls. 412 (1867) and see also *Heflebower* v. *United States*, 21 Ct. Cls. 228, 238 (1886).

taking of the three steamers was an "appropriation" of property within this statute and that therefore the Court of Claims had no jurisdiction to entertain a suit. The Court of Claims rejected the contention and its decision was affirmed by this Court. There was no special showing of emergency other than the bare statements of the Assistant Quartermasters that the ships were needed because of "imperative military necessity" and the Court of Claims made no finding of special necessity (5 Ct. Cls. 121). This Court stated that in extreme emergencies the executive branch of the Government possesses the taking power. It declared that in this case an emergency did exist, that the taking was lawful, that the United States was liable on a theory of implied contract for the use of the vessels, that the taking was not an appropriation within the meaning of the statute of 1864 and that the Court of Claims had properly assumed jurisdiction. See *supra,* p. 122.

The second of this pair of Supreme Court cases was *United States* v. *Pacific Railroad.* A number of railroad bridges had been destroyed in Missouri by order of the Federal Commander to prevent the advance of the enemy in the Civil War. Other bridges were destroyed by Confederates. Four of those bridges, two of which had been destroyed by the Northern and two by the Southern Armies, were rebuilt by the United States. The issue was whether the cost of the

rebuilding by the United States could be set off against claims of the railroad.

The Court held that the destruction of the bridges was an act of military necessity for which the Government was not liable, and that their reconstruction was also a military necessity for which the Government could not charge the railroads. In reaching its result, the Court considered exhaustively the nature of government liability for the taking of property "during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency" (120 U S. at p. 239), for which the Government is immune from liability. "The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex.*" (120 U. S. at p. 234)[34] The other type of taking is described by reference to *Mitchell* v. *Harmony* and *United States* v. *Russell,* and in such cases "it has been the practice of the Government to make compensation for the property taken." [35]

[34] In describing this category, the court relied on *Respublica* v. *Sparhawk*, *Parham* v. *The Justices*, *Taylor* v. *Nashville and Chattanooga Ry.*, *Mayor* v. *Lord*, *Vattel*, and President Grant's veto message in the *Best case*, 120 U. S. 234, 238.

[35] "Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause." 120 U. S. at 239.

Once the distinction between compensable and non-compensable, or *salus populi* and eminent domain, executive takings in war-time had been clearly articulated, it followed almost as a matter of course that no rigid requirements of catastrophic emergency would be established for the latter type.

In *Alexander* v. *United States,* 39 Ct. Cls. 383 (1904), the government, through the Secretary of War, after termination of hostilities in the Spanish-American war but before the treaty of peace had been signed, took possession of a farm in Pennsylvania for training camp purposes, apparently without statutory authorization. The plaintiff had a fee simple reversionary interest in the land which was being temporarily occupied by a tenant. On claim of the tenant, the War Department paid rental for the use of the land but refused to pay the plaintiff for the permanent injuries done the land during the period of government occupancy. The plaintiff sued for compensation for injuries done his reversionary interests, on an eminent domain theory. The government defended on the ground that if the plaintiff had an injury, the injury was tortious, or, failing this defense, that the taking was one which required no compensation, on the theory of the law of war. The court gave judgment for the plaintiff. Rejecting the Government's second defense, the court noted that the property taken was "more than 1,000 miles from the nearest

approach of a public enemy." But in holding the taking to have been proper and compensable, the court dealt with the element of necessity as follows:

> There was a military necessity that some land in that vicinity should be taken. There is always a necessity when property is taken, and it implies no wrong on the part of the Government that it does take property without the consent of the owner. Underlying the exercise of the right is grant of power upon the expressed condition that compensation be made. [*Id.* at 396.]

See also, to the same effect, *Philippine Sugar Estates Development Co.* v. *United States,* 39 Ct. Cls. 225, 40 Ct. Cls. 33.

In short, at the turn of the century, the existence of executive power to seize private property during time of war or national emergency was firmly established, not only as a matter of executive construction and usage and legislative approval, but also by judicial decision. Viewing this history negatively, the executive power was frequently used and never stricken down. We know of no case which denied the existence of this power nor any instance in which a responsible majority of either House of Congress questioned its existence. Rather, as we have shown, it was always recognized that the executive does have the power and controversy arose only over the question whether a right to just compensation

flowed from the circumstances surrounding the taking.

The *Russell* case, if it stood alone, would, we submit, sustain the President's action here. This Court squarely held there that in time of "immediate and impending public danger * * * private property may be impressed into the public service * * * no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency" (13 Wall. at 627–628). And, on the bare statements of the Assistant Quartermasters who commandeered the ships that they were taken because of "imperative military necessity," the Court held the takings to be lawful. Certainly, as we have shown above, pp. 9–15, 28–49, the present public danger is at least as "immediate and impending."

(c). But the *Russell* case, and the others discussed above, do not stand alone. Since the turn of the century, there has been continued judicial recognition of the President's constitutional powers in this area. Although there appears to be no reported litigation as a result of purely executive takings during World War I,[36] the existence of the power was pointed out in an occasional strong dictum. See *Roxford Knitting Co.*

[36] This circumstance may possibly be accounted for by the great number of requisition statutes in force during that war. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155, for a collection of such statutes.

v. *Moore & Tierney,* 265 Fed. 177, 179 (C. A. 2); *United States* v. *MacFarland,* 15 F. 2d 823, 826 (C. A. 4). Similar statements appeared in lower court opinions in World War II. See, *e. g., Ken-Rad Tube & Lamp Corp.* v. *Badeau,* 55 F. Supp. 193, 197 (W. D. Ky.); *Employers Group, etc.* v. *National War Labor Board,* 143 F. 2d 145, 151 (C. A. D. C.), certiorari denied, 323 U. S. 735; *Alpirn* v. *Huffman,* 49 F. Supp. 337, 340 (D. Neb.) And a recent decision of this Court indirectly confirms the existence of a constitutional power in the President, in the nature of eminent domain, to seize property during time of war or national emergency. *United States* v. *Pewee Coal Co., Inc.,* 341 U. S. 114.

As in the instant suit, the *Pewee* case involved a non-statutory seizure by executive order of the coal mines on May 1, 1943, to avoid a nation-wide strike of miners [Executive Order 9340, 8 F. R. 5695]. Although no question was raised by the parties as to the validity of the seizure (see 115 C. Cls. 626, 676), the issue whether the seizure was an eminent domain taking within the meaning of the Fifth Amendment was squarely joined. It was the Government's position that the seizure did not constitute a taking within the meaning of the Fifth Amendment but that the seized property was merely in the custody of the Government, as would be property under conservatorship or temporary receivership, and

Pewee was not, therefore, entitled to just compensation. The Court rejected the Government's argument. The Court was divided on the question of the measure of just compensation, but it was unanimously of the opinion that there had been a taking of Pewee's property which would require the payment of just compensation under the Fifth Amendment whenever loss is suffered. Although the Court did not expressly so state, it is implicit in the decision in that case that there had been a valid exercise of executive power in the nature of eminent domain or requisition. See *supra,* pp. 67–68.

Finally, the court's attention is particularly directed to District Judge Amidon's disposition of a situation substantially identical to that presented in these cases. *Dakota Coal Co.* v. *Fraser,* 283 Fed. 415 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8). The facts were these:—A coal mine strike in North Dakota had been called for November 1, 1919. Lignite coal was the fuel for the western half of the State. Because lignite coal, if exposed to the weather, disintegrates and becomes unfit for fuel, the public needs could be met only by continuous operation of the mines. A few days after November 1, winter set in with an unprecedented snow storm and the temperature fell to 8 to 10 degrees below zero over the whole area supplied by lignite. To meet this crisis, the Governor issued a proclama-

tion calling on the lignite coal mine owners to operate their mines, and, upon their failure to resume production, he called out the militia and seized the mines. Plaintiff mine owners then brought suit for injunctive relief against Fraser, the Adjutant General of the State.

Judge Amidon pointed out that (p. 416):

> The owners of the coal mines had already charged their right of private property therein with a public use. The continuance of the public service which such use involves cannot be separated from the right of private ownership. As to compensation, that can best be fixed by negotiation between the parties. But, if this fails, the state has expressly waived its exemption from suit, and the plaintiff may recover the reasonable value of the use of its property.

Continuing, the Judge observed that he knew (pp. 416–417):

> * * * the difference between verbal anarchy and real anarchy. I do not think the quiet and orderly operation of the coal mines, which has taken place under the management of the defendants in this case, can properly be characterized as anarchy. On the contrary, if the situation which was presented to the Governor at the time he called out the militia had been permitted to actually arise, and the people had been freezing to death and dying of disease

> because of the failure of fuel supplies, and men under the excitement of such a situation as that had been driven to acts of violence to relieve themselves against it, that perhaps might have been spoken of as anarchy.

And, finally, stating that "rhetoric is a poor substitute for coal" (p. 418), Judge Amidon concluded (p. 418):

> I am asked to issue a writ of injunction which will necessarily say that the acts of the Governor have been illegal and unconstitutional. If I do that, I am not simply dealing with his acts; I am defining the powers of the Chief Executive of an American commonwealth to meet a crisis which threatens loss of life. I am not willing to strip the Governor of his power to protect society. I do not believe it comports with good order, with wise government, with a sane and ordered life, to thus limit the agencies of the state to protect the rights of the public as against the exaggerated assertions of private rights.

In the light of these authorities, there is no basis for Judge Pine's reference to "the utter and complete lack of authoritative support for defendant's position" (R. 73). Contrast the opinion of the Court of Appeals below (per Circuit Judges Edgerton, Prettyman, Bazelon, Washington, and Fahy) (R. 447–448).

C. THE EXTENSIVE SYSTEM OF LAWS PROVIDING FOR NATIONAL SECURITY, WHICH THE PRESIDENT IS OBLIGATED TO ENFORCE, JUSTIFIED THE TAKING

We have reviewed (pp. 28–49) the admitted, and admittedly compelling, facts of the international situation which threatens intolerable risks and losses if American production of steel, most basic of military and industrial materials, should be interrupted. We have noted the comprehensive scheme of statutes and treaties in which the United States has by law pledged enormous portions of its human and material resources to cope with the continuing international crisis which, if it is not quite "war" on a full modern scale, is surely not peace. Viewed in terms of their total purpose, these laws make it clear that Congress has committed this Nation to a full-scale and increasing national defense program in which the critical production of steel must not be permitted to cease. This necessity for steel in order to carry out the will of Congress calls into play, not only the President's constitutional duty to "take Care that the Laws [treaties as well as statutes, *In re Neagle,* 135 U. S. 1, 64] be faithfully executed," but the whole array of the President's constitutional powers and responsibilities. See pp. 95–101, *supra.* In short, far from being inconsistent, the measures Congress has taken to deal with the national emergency authorize and serve to demonstrate the propriety of the President's action to keep the steel mills functioning.

Cf. *Madsen* v. *Kinsella,* No. 411, this Term, slip op., pp. 6–7.

We believe, therefore, that, if it were necessary, the President's action could be sustained merely as an exercise of his power and duty to execute the laws faithfully. Recognizing that steel "is the backbone of our economy" and that the steel industry "is of paramount importance both in peace and in war" (H. Rep. No. 2759, 81st Cong., 2d Sess., p. 5), Congress has enacted a series of measures designed to chart the Nation's course "in a struggle for survival" (S. Rep. No. 117, 82d Cong., 1st Sess., p. 3). The fact that the efficacy of these measures would be seriously threatened by a stoppage in steel production sustains the President's action.

For Congress has made it clear that its overriding concern at this juncture in our history is the preservation of our national security, and the statutes and treaties designed for this purpose leave no doubt as to the President's duty. Cf. *Exparte Quirin,* 317 U. S. 1, 26. Paramount among the tasks Congress has committed to the President for execution is a mammoth effort to supply the material means to enable the United States and the whole "free world to stand secure against the present danger."[37] "Our partners

[37] H. Rep. No. 872, 82d Cong., 1st Sess., p. 5. This entire document, reporting the bill which became the Mutual Security Act of 1951 (Pub. L. 165, 82d Cong., 1st Sess., October 10, 1951), gives a graphic picture of the world-wide nature of American commitments.

need an uninterrupted supply of equipment to convert their manpower into effective military units." [38] "We have to supply most of the heavy weapons and equipment; we have to supply money, materials, machinery, and know-how to speed up European production of military equipment." [39] And in the supplying of these needs, as well as the needs of our own defense establishment, steel is probably the most vital single material.

The crisis in world affairs needs no further elaboration here. But we wish to emphasize a fact everybody knows—that Congress has acted on a broad scale to cope with the crisis and that this action places imposing responsibilities upon the President to see that our defense efforts succeed. Typifying the urgency which Congress recognizes almost daily in this area is the declaration of the Senate Committee on Armed Services reporting the 1951 Amendments to the Universal Military Training and Service Act (Title I of Pub. L. 51, 82d Cong., 1st Sess.): [40]

> The grim fact is that the United States is now engaged in a struggle for survival. The dimensions of that struggle cannot be measured. We do not know how long it will continue; we do not know how or

[38] *Id.* at 62.
[39] *Id.* at 19.
[40] S. Rep. No. 117, 82d Cong., 1st Sess., p. 3.

> where a decision will be ultimately reached; we do not know what will be required of us.
>
> * * * * *
>
> To avoid increasing our national jeopardy, it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour.

Coping with a problem which it, as well as the President, sees as one of national survival, Congress has included among its sweeping measures provisions to insure that the kinds and quantities of materials required shall be continuously available. It has stated its intention to "prevent inflation [through a system of economic controls] * * *; to prevent economic disturbances, labor disputes, interferences with the effective mobilization of national resources, and impairment of national unity and morale * * *."[41] Determined to resist aggression with every necessary resource, Congress has legislated to give the President powers "to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives * * *."[42] And Congress, far from expressing aversion to drastic interferences with private property in the interest of national defense, has prescribed procedures for requisitioning and condemnation of

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[41] Defense Production Act of 1950, Pub. L. 774, 81st Cong., 2d Sess., Sec. 401.

[42] *Id.*, Sec. 2.

materials, equipment, and facilities which are vital and would otherwise be unavailable.[43]

We think the President's mandate from Congress is clear. An interruption or diminution in steel production means irremediable injury to the national defense, which the President has been solemnly charged to insure. It is true, as the steel companies have argued, that no statute specifically prescribes the action the President found necessary in this case to maintain steel production. Cf. pp. 57 ff., *supra*. But it has never been supposed that the limits of the President's duties are marked by the literal terms of statutes. See *In re Neagle,* 135 U. S. 1, 64–66. Judge Pine, in the district court, conceded that the President could dispatch troops and use all the force at the Nation's disposal to protect the mails (R. 83–84). See *In re Debs,* 158 U. S. 564, 582. In the present case, we submit, there was no less clear an implication of power to seize the steel companies from an array of statutes and treaties which commit the Nation by law to a program of self-preservation which could not fail to suffer from a loss of steel production. As Attorney General Jackson said of a situation substantially

[43] *Id.*, Title II, as amended by Pub. L. 96, 82d Cong., 1st Sess., Sec. 102; Selective Service Act of 1948, c. 625, Sec. 18, 62 Stat. 604, 625.

identical with the one presented here (89 Cong. Rec. 3992): [44]

> The Constitution lays upon the President the duty "to take care that the laws be faithfully executed." Among the laws which he is required to find means to execute are those which direct him to equip an enlarged army, to provide for a strengthened navy, to protect Government property, to protect those who are engaged in carrying out the business of the Government, and to carry out the provisions of the Lend-Lease Act. For the faithful execution of such laws the President has back of him not only each general law-enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.
>
> The Constitution also places on the President the responsibility and vests in him the powers of Commander in Chief of the Army and of the Navy. These weapons for the protection of the continued existence of the Nation are placed in his sole command and the implication is clear that he should not allow them to become paralyzed by failure to obtain supplies for which Congress has appropriated the

[44] This statement was made at the time of the seizure of North American Aviation Company in 1941, because of a strike impeding defense production.

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money and which it has directed the President to obtain.

It bears emphasis that, in the period of over a month since the Presidential action the steel companies attack, Congress has done nothing to repudiate or countermand that action. The President has made clear his readiness to accept and execute any Congressional revision of his judgment as to the necessary and appropriate means of dealing with the emergency in the steel industry. In the absence of such revision, we believe that the authority the President has invoked under the Constitution and laws is clearly valid. Intimately conversant with the necessities of the Nation's security, charged by the Constitution and Congressional enactment with the duty to meet those necessities, the President has seized the steel mills because he concluded that this was the only effective way to keep them operating. In the circumstances, with the great need for continuous steel production undisputed, his action was sustained by the extensive system of laws, both statutes and treaties, protecting and providing for the national security at this critical time.

III

THE LABOR MANAGEMENT RELATIONS ACT DID NOT PRECLUDE THE PRESIDENT'S EMERGENCY ACTION IN THIS CASE

Plaintiffs argue that, when they rejected the settlement terms determined by the Wage Stabili-

zation Board to be fair and consistent with the stabilization program (and accepted by the union), the President should have convened a board of inquiry under Section 206 of the Labor Management Relations Act (61 Stat. 136, 155, 29 U. S. C., Supp. IV, 176) with a view toward ultimately seeking an injunction under Section 208 of that Act to bar a strike for another 80 days. Because this procedure was not followed, the companies contend, the President's temporary taking of the steel mills was unconstitutional.

This argument ignores the facts that (1) the substance, if not the precise forms, of the Labor Management Relations Act was more than achieved by the President and the parties to the labor dispute during the 99-day strike postponement; (2) the situation, when the President found it necessary to take the action here questioned, was such that the procedures of the Labor Management Relations Act would have been inadequate to prevent the cessation of steel production which it was necessary to prevent without the slightest delay; and (3) the patent unfairness of seeking to enjoin the union for another 80 days after it had voluntarily refrained from striking for 99 days would have written finis to the effectiveness of the Government's measures for enlisting the willing cooperation of labor and management in the settlement of labor disputes affecting defense production. And these measures, evolved under a Congressional mandate to provide "effec-

tive procedures for the settlement of labor disputes affecting national defense" (Defense Production Act of 1950, Sec. 501, Pub. L. 774, 81st Cong., 2d Sess.), are neither less important than, nor inconsistent with, the provisions of the Labor Management Relations Act.

At the most, plaintiffs' argument goes only to the wisdom of the President's "selection of the means for resisting" the threatened danger. On such an issue "it is not for any court to sit in review of the wisdom" of his action. *Hirabayashi* v. *United States,* 320 U. S. 81, 93. "The Constitution * * * does not demand * * * the impracticable" (*Yakus* v. *United States,* 321 U. S. 414, 424). The availability of an alternative which would have been far less effective cannot, without more, be taken to preclude the President from exercising his constitutional powers.

In any event, even if the wisdom of the President's choice were open here, there would be no ground for the companies' reliance upon the Labor Management Relations Act. For it is clear, and decisive of the argument under consideration, that the Labor Management Relations Act nowhere precluded the President's taking of the steel mills and that, far from insisting on that Act as the exclusive means for dealing with labor-management controversies, Congress in later legislation expressly stated its intention that other measures be devised for coping with the special problem of

threatened work stoppages affecting defense production.

A. THE PRESIDENT WAS NOT REQUIRED TO USE THE PROCEDURES OF THE LABOR MANAGEMENT RELATIONS ACT

1. Even considered by itself, the Labor Management Relations Act was plainly not intended to be either an exclusive or a mandatory means of dealing with labor disputes threatening a national emergency. Thus, Section 206 of that Act (29 U. S. C., Supp. IV, 176) provides that when in the President's opinion "a threatened or actual strike or lockout * * * will, if permitted to occur or continue, imperil the national health or safety, he *may* appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe" (emphasis added). Similarly, Section 208 (29 U. S. C., Supp. IV, 178) provides that upon "receiving a report from a board of inquiry the President *may* direct the Attorney General" to seek an injunction (emphasis added). The legislative history of these provisions, revealing an express rejection of proposals which would have made the board-of-inquiry and injunction procedures mandatory, makes it clear beyond doubt that the decision as to when or whether

such measures were to be invoked was committed to the President's discretion.[45]

Of even greater present significance is the fact that, in the years since enactment of the Labor Management Relations Act, Congress, in facing the special and acute problems posed by national defense needs, has explicitly directed the President to devise additional means of coping with labor disputes affecting defense production. Title V, Section 501 of the Defense Production Act of 1950 (64 Stat. 812, 50 U. S. C. App. (Supp. IV) Sec. 2121) provides:[46]

> It is the intent of Congress, in order to provide for effective price and wage stabilization pursuant to title IV of this Act and *to maintain uninterrupted production,* that there be *effective procedures* for the settlement of labor disputes affecting national defense. [Emphasis added.]

[45] The House version of the bill which became the Labor Management Relations Act was phrased in mandatory terms ("the President shall direct the Attorney General to" seek an injunction—H. R. 3020, 80th Cong., 1st Sess., Sec. 203 (a), as reported in H. Rep. No. 245). The Senate version, which gave the powers to the Attorney General rather than to the President, used the word "may" (S. 1126, 80th Cong., 1st Sess., Secs. 206, 208, as reported in S. Rep. No. 105), the permissive significance of which was noted in the Senate debates. 93 Cong. Rec. 4594, 5012, 5115. In conference, the House provision for action by the President rather than the Attorney General and the Senate's permissive language were adopted, and the bill was thus enacted. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 63–65.

[46] Section 501 was continued unchanged when the Act of July 31, 1951 (Pub. L. 96, 82d Cong., 1st Sess.) amended the Defense Production Act in various respects.

Section 503 of the same Act[47] goes on to declare that—

> * * * No action inconsistent with the provisions of * * * the Labor Management Relations Act, 1947, * * * or with other applicable laws shall be taken under this title.

As we show below (pp. 160–165), the procedure the President followed in this case was in no meaningful sense "inconsistent" with the provisions of the Labor Management Relations Act. What we would emphasize here is the unmistakable fact that, in calling for "effective procedures for the settlement of labor disputes", and in providing for action not "inconsistent" with the Labor Management Relations Act, Congress anticipated and intended the use of methods "other than" those created by that Act.

The need for such additional and supplemental methods was clear. Geared to a peacetime economy, framed at a time when relaxation of recent wartime controls was the order of the day, the Labor Management Relations Act was not designed to deal fully with the problems of labor relations posed by the special circumstances of a huge new defense effort and of an integrated stabilization program designed to prevent infla-

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[47] As amended in a presently immaterial respect by Section 105 (c) of Pub. L. 96, 82d Cong., 1st Sess.

tion. And so Title V of the Defense Production Act was enacted

> to strengthen the national defense effort by giving the President the necessary authority to prevent interruption of production by labor disputes which affect the national defense. In an emergency period we can ill afford to permit labor disputes to follow their normal course to eventual settlement. The institution of price and wage stabilization provided for under title IV of this bill would add to the strain upon normal collective bargaining. We therefore need a peaceful means of settling labor disputes which may threaten national defense or economic stabilization. [S. Rep. No. 2250, 81st Cong., 2d Sess., pp. 40–41.]

The Senate Committee reporting the provisions which became Title V contemplated

> that the President, in taking action in a labor dispute affecting national defense will have available to him the procedures provided by existing statutes, *as well as those authorized by this title.* For instance, if a dispute came within the terms of the national emergency provisions of the Labor-Management Relations Act, action *might* be taken under that act. [*Id.* at 41-42, emphasis added.]

But, once again, there was no thought that the President *must* use the Labor Management Relations Act provisions and no others.

2. Title V of the Defense Production Act was broad enough to authorize the President, after consultation with labor and management, to create a body like the War Labor Board of World War II—with power to decide disputes and nonjudicial sanctions for enforcement of its decisions. S. Rep. 2250, 81st Cong., 2d Sess., p. 41; S. Rep. 1037, 82d Cong., 1st Sess., pp. 4, 5–6.

Under Executive Order 10233 (16 F. R. 3503), the President has taken the moderate course of assigning to the Wage Stabilization Board authority to hear labor disputes affecting national defense where (a) the parties voluntarily submit them or (b) the President, regarding a dispute as a substantial threat to the progress of national defense, refers it to the Board. After investigation and inquiry, the Board is to make "recommendations to the parties as to fair and equitable terms of settlement" which are binding only where the parties have agreed that they should be. Where, as in the present case, the dispute is one referred to it by the President, the Board reports to him the results of its inquiry and its recommendations.

Within a month after this disputes procedure was placed in operation, a subcommittee of the House Committee on Education and Labor considered, in hearings preparatory to possible amendments of the Defense Pro-

duction Act.[49] Similar hearings by a subcommittee of the Senate Committee on Labor and Public Welfare led to a report approving the machinery the President had established. S. Rep. No. 1037, 82nd Cong., 1st Sess. When it came to act on the extension of the Defense Production Act, Congress was thus fully apprised of the fact that the Wage Stabilization Board had been armed "with power to make recommendations for the settlement of labor disputes under specified conditions * * *". H. Rep. No. 639, 82nd Cong., 1st Sess., p. 17. With this fact clearly before it, Congress acted on the recommendations of both committees considering the extension bills,[50] and extended the Defense Production Act of 1950 with no change affecting the disputes functions of the Wage Stabilization Board.[51] Bills designed specifically to eliminate these functions were defeated.[52]

These briefly summarized developments leave no doubt that the re-enactment without change of Title V of the Defense Production Act must be viewed as specifically approving the disputes procedures the President invoked in this case. Cf. *United States* v. *South Buffalo R. Co.,* 333 U. S.

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[49] Hearings before a Subcommittee of H. R. Committee on Education and Labor on Disputes Functions of the Wage Stabilization Board, 82nd Cong., 1st Sess.

[50] S. Rep. No. 470, 82nd Cong., 1st Sess., p. 15; H. Rep. No. 639, 82nd Cong., 1st Sess., pp. 29, 41.

[51] Pub. L. 96, 82nd Cong., 1st Sess.

[52] 97 Cong. Rec. 8390–8415.

771, 775–783. Congress was clearly persuaded by the view of its spokesmen who concluded that "Executive Order No. 10233 does not in any way run counter to the Defense Production Act or the Taft-Hartley Act." S. Rep. No. 1037, 82nd Cong., 1st sess., p. 10. Fully aware that the Defense Production Act "was designed to be broad and flexible enough to give the President the powers necessary to adapt the complex and intricate economy of the country to the demands of the heavy defense program" (H. Rep. No. 639, 82nd Cong., 1st sess., p. 15), Congress deliberately rejected proposals designed to prevent the President from choosing among complementary alternatives in dealing with the particular facts of particular labor disputes.

The President thus had the full consent of Congress when he referred to the Wage Stabilization Board disputes to which the emergency provisions of the Labor Management Relations Act were literally applicable. As the matter was put by a subcommittee of the Senate Committee on Labor and Public Welfare, reporting on its study of the disputes functions assigned by Executive Order 10233 to the Wage Stabilization Board (S. Rep. No. 1037, 82nd Cong., 1st Sess., p. 4):

> It is conceivable that the same dispute will meet the requirements of the emergency disputes provisions of both the Taft-Hartley law and of the Executive Order.

> [Should such a situation] arise, the President is the initiating factor in both procedures, *and he will have the responsibility for deciding which route will dispose of the dispute most effectively*—or he *may* use both routes depending upon the circumstances. [Emphasis added.]

Against this background, we think it clear that in the 99 days between December 31, 1951, and the seizure on April 8, 1952, the President acted properly in exhausting a wholly sufficient alternative to the procedures under the Labor Management Relations Act.

3. By referring the dispute to the Wage Stabilization Board on December 22, 1951, the President achieved everything that he could have achieved under the Labor Management Relations Act. In addition, he invoked a procedure designed to ensure that any resolution of the wage dispute was geared to the over-all requirements of the stabilization program.

It is undisputed that the union, having failed to reach an agreement with the companies, was prepared to strike on December 31, 1951 (R. 59). On this date, or in advance thereof, the President might have convened a board of inquiry under Section 206 of the Labor Management Relations Act. Upon receipt of the board's report, the President might have directed the Attorney General to seek a court order enjoining the strike. Section 208. This order would have been effec-

tive for a maximum of 80 days. Sections 209 (b) and 210.

This compulsory 80-day postponement of a strike or lockout is the heart of the benefit sought by the Act. During this period, the Act (Section 209 (a)) directs the parties, with the assistance of the Federal Mediation and Conciliation Service, "to make every effort to adjust and settle their differences * * *." Addressing himself to these provisions, Senator Taft said (93 Cong. Rec. 4262):

> The second part of that title provides that if mediation is not successful and a strike occurs in a Nation-wide industry, an injunction may be obtained for 60 days—for what purpose? In order to permit the Mediation Service to make further efforts to obtain a collective bargaining agreement between the employers and the employees.

It was contemplated that the period of delay would in most instances be sufficient to bring about a settlement through continued bargaining under the pressure of public opinion. See S. Rept. No. 105, 80th Cong., 1st Sess., p. 15. The 80 days would also provide time, in the event conciliation and bargaining failed, for consideration and formulation of special emergency action by Congress. See 93 Cong. Rec. 3836 (Senator Taft). As far as the Act itself was concerned, however, the parties would be free after 80 days to engage

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in a strike or lockout. The conclusion of this postponement, important and efficacious as it might be in some cases, would mark the exhaustion of the Act's utility.

The significant fact here is that a delay longer than 80 days, coupled with the employment of settlement efforts which the President reasonably deemed more appropriate and more promising than those contemplated by the Labor-Management Relations Act, was achieved in this case. Called upon by the President to remain at work and strive for a settlement without an interruption of production, the union postponed its strike scheduled for December 31, 1951, four times—ultimately through April 8, 1952—a total of 99 days (R. 59–60). And these postponements, just like the 80-day delay provided by the Labor Management Relations Act, constituted an essential feature of the procedure the President employed. The simple reality, known to both the companies and the union, was that the inquiry, report, and recommendations of the Wage Stabilization Board were being used as an alternative to the inquiry and report, without recommendations, of a board under the Labor Management Relations Act—an alternative rendered appropriate by the fact that a "unified labor policy for the emergency makes it desirable that the disputes function be administered by the Wage Stabilization Board and not by a separate agency." S. Rep. No. 1037, 82nd Cong., 1st Sess., p. 10. The parties knew that an

injunction against a strike was available under the Labor Management Relations Act, that the Wage Stabilization Board would probably not consider their dispute if a strike were called, and that the President's demand for continued production, backed by his powers of compulsion under the Labor Management Relations Act, was not lightly to be unheeded or ignored.

These thoroughly understood realities had been illustrated by events shortly preceding those involved here.[53] On August 27, 1951, widespread strikes of workers in the nonferrous metals industry were called. The President referred the disputes to the Wage Stabilization Board for settlement efforts similar to those employed in the instant case. Despite the declaration by the Wage Stabilization Board that it would not consider the disputes unless work was resumed, the strikes continued. On August 29, 1951, the Board referred the disputes back to the President with no report or recommendations, pointing out in its letter that, as it understood its responsibilities under Executive Order 10233, "it would not be appropriate for it to consider the merits of the dispute prior to the resumption of work." Accordingly, on the following day, the President created a board of inquiry under the Labor

[53] The account which follows of the nonferrous metals industry dispute is taken from the President's report to Congress contained in H. Doc. No. 354, 82nd Cong., 2d Sess., February 14, 1952.

Management Relations Act, and on September 5, 1951, following receipt of the Board's report by the President, the Attorney General obtained an order enjoining the strikes pursuant to Section 208 of that Act.

In the present case, the occasion for such an injunction was obviated by the union's voluntary postponement of its strike for more than the 80-day injunction period of the Labor Management Relations Act. The substance of that Act's objectives has been more than achieved. Collective bargaining, mediation, and the recommendations of a board responsible for adapting particular labor arrangements to the broad needs of an economy controlled for a huge defense effort and stabilized to prevent inflation have all been tried at length in an effort to reach a settlement. Subject of newspaper headlines for weeks, the steel dispute has been discussed repeatedly in Congress, both before and since the seizure, [54] and that body has had ample time to consider whatever action it might choose to take. The President, driven finally to a temporary taking of the steel mills in order to prevent the unquestioned crisis which a cessation of steel production would entail, has made it clear that he is fully prepared to execute any action Congress may direct. See communications to the President of the Senate, cited *supra,*

[54] See, *e. g.*, 98 Cong. Rec. (unbound) 3225–26, 3418–19, 3461, and pp. 18–22, *supra.*

pp. 19–20 (dated April 9 and April 21, 1952). To date, Congress has not acted.

In determining whether to use the Labor Management Relations Act procedure, instead of the Wage Stabilization Board, the President was compelled to take into consideration the fact that, since January 1, 1952 (when the old contract was no longer in effect), the probabilities were that, until a board under the Labor Management Relations Act could report, a crippling strike would have been in existence, and, after the expiration of the 80-day period of the injunction, the President, the public and the parties to the dispute would have been back where they started. Based on what actually happened, if the President had used the Labor Management Relations Act at the outset, the seizure would have taken place 19 days earlier than it did.

4. Now, having rejected the Wage Stabilization Board recommendations which the union was prepared to accept, and having failed to achieve a settlement through collective bargaining both before and after Government seizure, the last meeting being held in the White House on request by the President, the companies contend that the President was and is required to create a new board to find the facts again; and that an attempt should have been or should be made to compel the union by injunction to remain at work with unchanged terms for another 80 days. In substance, this contention, so patently devoid of

equity, amounts to a claim that the companies are entitled to have their employees compelled to work for a total of six months with unsatisfied demands for changes in their terms of employment. But such compulsion was not contemplated by the Labor Management Relations Act and was plainly inappropriate to the circumstances of this case.

Not only would invocation of the Labor Management Relations Act have been inequitable, but there is no reason to suppose that it would have prevented an interruption of steel production. Under the Labor Management Relations Act, an injunction may be sought only after a board of inquiry has investigated and reported to the President. With the complex facts of the present dispute, which occupied the Wage Stabilization Board for three months, there was no assurance that a report reflecting in any way the impartial study contemplated by the Act could have been prepared within any reasonably short space of time. Unless the report was to be an empty formality, there was danger that a strike during its preparation would cost precious and irreplaceable steel tonnage. And if it be suggested that the facts had already been found and needed no further study, this is merely another way of saying that the ends of the Labor Management Relations Act had already been fulfilled. Summarizing these considerations, the President

declared (Letter to the President of the Senate, 98 Cong. Rec. (unbound) 4192, April 21, 1952):

> It appears to me that another fact-finding board and more delays would be futile. There is nothing in the situation to suggest that further fact finding and further delay would bring about a settlement. And it is by no means certain that the Taft-Hartley procedures would actually prevent a shutdown.

In the circumstances of this case, it is at least highly questionable whether a court of equity would be prepared to enjoin the union from striking after the voluntary 99-day postponement. In *Hecht Co.* v. *Bowles,* 321 U. S. 321, where the statute provided that upon an administrative official's showing of certain facts "a permanent or temporary injunction, restraining order, or other order shall be granted without bond", this Court rejected the contention that injunctive relief was mandatory despite Congress' use of the word "shall." Section 208 of the Labor Management Relations Act, merely providing that the district courts "shall have jurisdiction" to issue injunctions or other orders, falls far shorter of the "unequivocal statement" of Congressional purpose which would be required to establish that the courts were placed under an "absolute duty" to issue injunctions "under any and all circumstances." *Hecht Co.* v. *Bowles, supra,* at 329.

But apart from the legal situation which might exist if the President had deemed the Labor Management Relations Act procedure appropriate and permissible, we submit the President's judgment that this procedure was futile, unfair, and improper was clearly a reasonable one.

In addition to the considerations of fairness which might move a court of equity, and which the President was certainly not required to disregard, is the practical fact that an effort to secure an injunction in this case would probably have ended the effectiveness of the disputes functions the President had assigned to the Wage Stabilization Board in cases involving national emergencies. These functions are exercised, and can be effective, only where the parties voluntarily continue production. Such voluntary restraint is promoted by the likelihood that an injunction will be used as an alternative. It is extremely unlikely that the "voluntary" method would ever be acceptable again if the alternatives turned out to be cumulative.

Charged with responsibility to weigh the considerations we have summarized, the President, after the union had voluntarily accepted restraints greater than those of the Labor Management Relations Act, could reasonably adopt the view that the invocation of that Act would have been an unjustified repudiation of the assumption on which the union had voluntarily refrained from striking,

and would not have been effective to insure the uninterrupted steel production which was and is so critically important. These wholly reasonable conclusions dispose of the contention that there was really no emergency because a Labor Management Relations Act injunction was not sought. The emergency in hard fact was the threatened stoppage of steel production. The President could properly conclude that the emergency should no more be cured by attempting to utilize the Labor Management Relations Act than by sacrificing the stabilization program to the price demands of the companies. Cf. pp. 47–49, *supra*. Because his rejection of these alternatives was proper, their existence is no basis for attack on the legality of the taking of the steel mills.

B. THE LABOR MANAGEMENT RELATIONS ACT DID NOT PRECLUDE EXECUTIVE SEIZURE

In the district court the companies argued that because Congress omitted any seizure provision when it wrote the Labor Management Relations Act, the action of the President in this case was precluded. But this argument, resting on the fallacious premise that Congress passed a law by not passing a law, misreads both the language and history of the Labor Management Relations Act, misconceives the nature of the President's constitutional powers, and ignores the critical history

and legislation that have followed the Labor Management Relations Act.

Apart from the problem of the provision for an injunction delaying a strike or lockout, discussed above (pp. 160–162), there is nothing in the LMRA itself to show that Congress intended to deny the President a power of seizure. Congress recognized that where a dispute was not settled during the period of delay, further action, not specified by the Act, might be required. It is true, as the companies have argued, that Congress foresaw and considered with favor the possibility that it might itself take action to handle a specific emergency. But there was, nevertheless, no suggestion that, in the absence of a settlement during postponement of a strike or lockout and in the absence of action by Congress, seizure by the President was intended to be precluded.

Congress did consider and omit a specific seizure provision. But the announced reasons for this negative action make it clear that it was not intended as an affirmative proscription of seizure. Explaining, Senator Taft said (93 Cong. Rec. 3835–3836):

> We did not feel that we should put into the law, *as a part of the collective-bargaining machinery,* an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. *If such a remedy is available as a routine remedy,* there will always be pressure to resort to it by whichever

> party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided. [Emphasis added.]

This explanation makes it clear that what was avoided was a provision for seizure as a routine, expectable device.[55] Unwilling to hold out hopes of reward to recalcitrant parties who might anticipate benefits from seizure, Congress left for specific consideration in specific cases the course to be followed when delay and conciliation proved insufficient to settle a dispute. And Congress, which knows the delays and difficulties of legislation, certainly did not intend that a prolonged crisis should continue without remedy while a legislative solution was being hammered out.

In any event, what is important at this point is the obvious proposition that the failure of the LMRA to grant specific authority for seizure cannot be read as a prohibition against seizure.

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[55] Under the War Labor Disputes Act of June 25, 1943, 57 Stat. 163, 50 U. S. C. App. 309, seizure was the normal ultimate sanction for enforcement of War Labor Board orders. See I Termination Report of the National War Labor Board, chap. 39, p. 415.

Cf. Helvering v. *Clifford,* 309 U. S. 331, 337.[56] We have shown above (pp. 112–120) that Congress has repeatedly recognized the President's power of seizure in an emergency, with or without specific statutory authority. Nothing in the language or history of the LMRA purports to restrict Presidential power stemming from sources outside that Act. We do not argue that the LMRA is itself authority for the President's action; for this authority we have invoked the Constitution and a large body of other laws as they apply to the urgent circumstances of this case. *Supra,* Point II. Here we urge simply that, if the authority upon which we rely is otherwise ample, as we think it clearly is, it is in no way diminished by the failure of the Labor Management Relations Act to supply additional authority.

CONCLUSION

One of the great problems of the age is whether the democracies can find sufficient vigor and energy to respond promptly and decisively to the crises of our time. The century and a half since the drafting of the Constitution has witnessed an extraordinary growth in the magnitude, com-

[56] "There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will." Mr. Justice Rutledge, concurring in *Cleveland* v. *United States,* 329 U. S. 14, 22.

plexity, and interrelationship of the nation's problems. There has been an enormous increase in the tempo at which events occur, and decisions must be made. And above all there is the necessity with which the democracies are faced, if they are to maintain their very existence, to meet and overcome the challenge of dictatorship whether on the field of battle or in the market places of the world, where goods and ideas are traded.

We believe that these problems, like other problems which have arisen in the past, can be met within the framework of our Constitution. But they can be met only by regarding the Constitution as a "continuously operative charter of government" (*Yakus* v. *United States,* 321 U. S. 414, 424), which is capable now as in the past of adapting itself to the needs of new circumstances without sacrificing the basic principles of democracy and liberty This Court has recently emphasized that "it is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect" and that "in time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety." *Lichter* v. *United States,* 334 U. S. 742, 779–780. As was said by Chief Justice Hughes, "We have a fighting Constitution" which "marches" with events.

"There are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contained, in their general words and true significance, needed and adequate authority." Charles E. Hughes, *War Powers under the Constitution,* 42 A. B. A. Rep. 232, 247–8. "Equally in war and in peace" the particular provisions of the Constitution "must be read with the realistic purposes of the entire instrument fully in mind." *Lichter* v. *United States, supra,* 782.

The present case does not require this Court to "fix the outermost line" (*Steward Machine Co.* v. *Davis,* 301 U. S. 548, 591). As we have sought to show, the issue before this Court is whether, in dealing with an immediate crisis gravely threatening the continuance of the production of perhaps the most essential commodity of our present civilization, the President could take temporary action, of a type not prohibited by either the Constitution or the statutes, to avert the imminent threat, while recognizing fully the power of Congress by appropriate legislation to undo what he has done or to prescribe further or different steps. We believe that the solution does not require the pressing of juristic principles to "abstract extremes" (*New York* v. *United States,* 326 U. S. 572, 577), but only a realistic consideration of the "necessities of the situation" (*Moyer* v. *Peabody,* 212 U. S. 78, 84).

For the reasons set forth above, we submit that the orders of the district court must be set aside. We have demonstrated the non-constitutional grounds which, we believe, compel reversal. When the constitutional question is reached, there is ample authority to sustain the President's action.

Final disposition of this case on either of these grounds will open the way for continued steel production and eliminate the occasion for further interruptions.

Respectfully submitted.

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