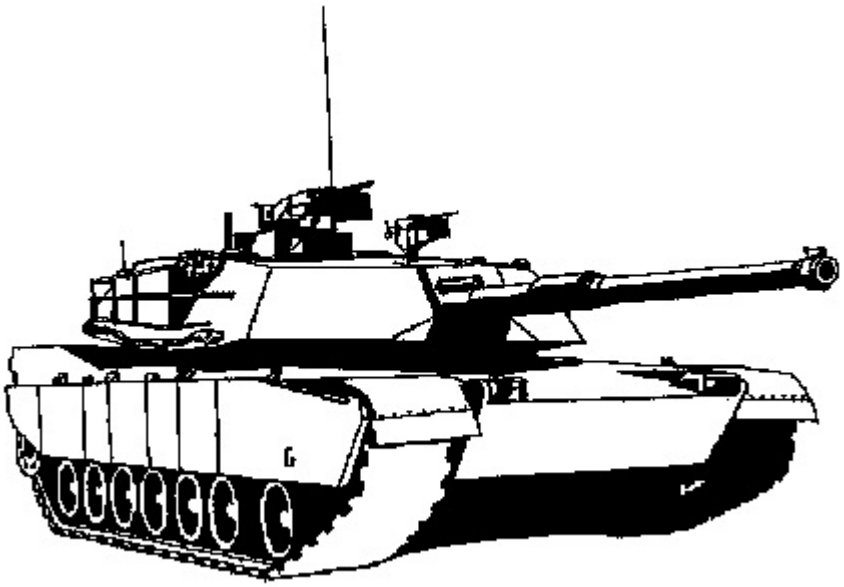

In this next case, President Truman used what he thought was his "war power" to take over the private steel mills in the Nation in order to keep them running to produce steel for use in the Korean War. The Court told him he went too far.

YOUNGSTOWN SHEET & TUBE CO. v. SAWYER

SUPREME COURT OF THE UNITED STATES
343 U.S. 579
June 2, 1952
[6 - 3]

We get a great history lesson. There have been numerous "seizures" by Congress and/or Presidents. Why? When? Legal or otherwise? Read on.

OPINION: Justice Black...We are asked to decide **whether [President Truman] was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.** The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was **necessary to avert a national catastrophe**

which would inevitably result from a stoppage of steel production, and that...the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the **Commander in Chief** of the Armed Forces of the United States...

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. On December 18, 1951, the employees' representative, United Steelworkers of America, gave notice of an intention to strike when the existing bargaining agreements expired on December 31. The Federal Mediation and Conciliation Service then intervened in an effort to get labor and management to agree. This failing, the President on December 22, 1951, referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. This Board's report resulted in no settlement. On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 a.m. April 9. **The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.** Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340...[which] directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The Secretary immediately issued his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. **The next morning the President sent a message to Congress reporting his action. <u>Twelve days</u> later he sent a second message. <u>Congress has taken no action</u>.**

Obeying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions. The District Court was asked to declare the orders of the President and the Secretary invalid and to issue preliminary and permanent injunctions restraining their enforcement...The United States asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had **"inherent power"** to do what he had done -- power "supported by the Constitution, by historical precedent, and by court decisions."

...The District Court on April 30 issued a preliminary injunction restraining the Secretary from "continuing the seizure and possession of the plants"...The Court of Appeals stayed the District Court's injunction...We granted certiorari...and set the cause for argument on May 12...

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no...act of Congress to which our attention has been directed from which such a power can fairly be implied [and]...moreover,...when the Taft-Hartley Act was under consideration in 1947, **<u>Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency</u>**. Apparently it was thought that the technique

of seizure...would interfere with the process of collective bargaining. Consequently, the...Act did not provide for seizure under any circumstances...

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . ."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, **we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's law-makers, not for its military authorities.**

Where is the "theater" of the War on Terror?

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker... The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control...The judgment of the District Court is *Affirmed*.

CONCURRENCE: Justice Frankfurter/Douglas/Jackson/Burton/Clark...The issue before us can be met...without attempting to define the President's powers comprehensively...It is as unprofitable to lump together in an undiscriminating hotch-potch past presidential actions claimed to be derived from occupancy of the office, as it is to conjure up hypothetical future cases. The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. **But in doing so we should be wary and humble...**

We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.

...Congress has frequently -- at least 16 times since 1916 -- specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has

qualified this grant of power with limitations and safeguards. This body of enactments...demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority. The power to seize has uniformly been given only for a limited period or for a defined emergency, or has been repealed after a short period. Its exercise has been restricted to particular circumstances such as "**time of war or when war is imminent**," the needs of "**public safety**" or of "**national security or defense**," or "**urgent and impending need**."

...Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns...**A proposal that the President be given powers to seize plants to avert a shutdown where the "health or safety" of the Nation was endangered, was thoroughly canvassed by Congress and rejected. No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress...**An amendment presented in the House providing that, where necessary "to preserve and protect the public health and security," the President might seize any industry in which there is an impending curtailment of production, **was voted down after debate**, by a vote of more than three to one... **Congress chose not to lodge this power in the President**...

Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency...The President could not ignore the specific limitations of prior seizure statutes. No more could he act in disregard of the limitation put upon seizure by the 1947 Act.

...**By the Labor Management Relations Act of 1947, Congress said to the President, "You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation."...But it is now claimed that the President has seizure power by virtue of the Defense Production Act of 1950 and its Amendments.** And the claim is based on the occurrence of new events -- **Korea** and the need for stabilization, etc. -- although it was well known that seizure power was withheld by the Act of 1947, and although the President, whose specific requests for other authority were in the main granted by Congress, never suggested that in view of the new events he needed the power of seizure which Congress in its judgment had decided to withhold from him. The utmost that the Korean conflict may imply is that it may have been desirable to have given the President further authority, a freer hand in these matters. **Absence of authority in the President to deal with a crisis does not imply want of power in the Government**. Conversely the fact that power exists in the Government does not vest it in the President...**The Defense Production Act affords no ground for the suggestion that the 1947 denial to the President of seizure powers has been impliedly repealed**, and its legislative history contradicts such a suggestion. Although the proponents of that Act recognized that the President would have a choice of alternative methods of seeking a mediated settlement, they also recognized that Congress alone retained the ultimate coercive power to meet the threat of "any serious work stoppage."

...It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress **consciously withheld**. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

The legislative history here canvassed is relevant to yet another of the issues before us, namely, the Government's argument that <u>overriding public interest</u> prevents the issuance of the injunction despite the illegality of the seizure. I cannot accept that contention...

Apart from his vast share of responsibility for the conduct of our foreign relations, the embracing function of the President is that "he shall take Care that the Laws be faithfully executed..." Art. II, §3. The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. **"The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.**" The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers...

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority... The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice Brandeis:

> **"The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."** *Myers v. United States.*

It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences...

In 1952 Supreme Court Justices managed to inform the President he had exceeded his powers, yet maintained the high road of statesmanship in the process. They didn't doubt President Truman's integrity in seizing the Nation's steel mills for what he considered a proper and constitutionally permitted purpose or, at least, that is what they said.

When President Bush deems it necessary to do something seemingly far short of the same, he is automatically labeled as a power hungry tyrant. Why do you think that is? Will we ever again get to the point when we can "get along" well enough to respect opposing views? I forget the name of the Congressman who recently said this War in Iraq was and continues to be fought for President Bush's amusement. Whatever one may think of the man, I simply have no stomach for that kind of rhetoric from either side.

CONCURRENCE: Justice Douglas...There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But **the emergency did not create power**; **it merely marked an occasion when power should be exercised**. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act...Legislative power...is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and **while the Congress slowly moves into action, the emergency may take its toll** in wages, consumer goods, war production, the standard of living of the people, and **perhaps even lives**...

Justice Douglas acknowledges that Congressional delay in responding to an emergency (compared to a quicker Executive response) might result in lives lost. For him, it would appear that loss of life would not justify any elasticity in the Constitution on this issue. Do you think it should? Under any circumstances?

The method by which industrial peace is achieved is of vital importance not only to the parties but to society as well. A determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power. In some nations that power is entrusted to the executive branch as a matter of course or in case of emergencies...We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places **not *some*** legislative power in the Congress; Article I, Section 1 says "**All legislative Powers herein granted shall be vested in...Congress...**"

The legislative nature of the action taken by the President seems to me to be clear. When the United States takes over an industrial plant to settle a labor controversy, it is condemning property. The seizure of the plant is a taking in the constitutional sense. A permanent taking would amount to the nationalization of the industry. A temporary taking falls short of that goal. But though the

seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession.

The power of the Federal Government to condemn property is well established. *Kohl v. United States.* It can condemn for any public purpose; and **I have no doubt but that condemnation of a plant, factory, or industry in order to promote industrial peace would be constitutional.** But there is a duty to pay for all property taken by the Government. The command of the **Fifth Amendment** is that no "private property be taken for public use, without just compensation." That constitutional requirement has an important bearing on the present case.

The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. **The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected.** That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment. It squares with the theory of **checks and balances** expounded by...the opinion of the Court in which I join.

What a President may do as a matter of expediency or extremity may never reach a definitive constitutional decision. For example, President Lincoln suspended the writ of habeas corpus, claiming the constitutional right to do so. *Ex parte Merryman*.[1] Congress ratified his action by the Act of March 3, 1863...Wartime seizures by the military in connection with military operations are...in a different category...

Article II...vests the "executive Power" in the President...[and] makes the Chief Executive the Commander in Chief of the Army and Navy. But **our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs.** Article II, Section 3 provides that the President shall "...recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient." The **power to recommend legislation...**serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, Section 3 also provides that the President "**shall take Care that the Laws be faithfully executed.**" But, as [Justices Black and Frankfurter] point out, the power to execute the laws starts and ends with the laws Congress has enacted...

We pay a price for our system of checks and balances, for the distribution of power among the three branches of government...

CONCURRENCE: Justice Jackson...**That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety.** While an interval

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[1]Case 2-6 on this website.

of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.

President Franklin Roosevelt appointed Robert H. Jackson as Attorney General in 1940 and, when Harlan Fiske Stone replaced retiring Chief Justice Charles Evans Hughes in 1941, Roosevelt appointed Jackson to the Supreme Court. But, in 1945 he took a brief leave of absence from the High Court when he was appointed by President Truman to serve as chief prosecutor at the Nuremberg Trials. He died in 1954, the first Supreme Court Justice to die while in office.

...A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Here we have a Supreme Court Justice who had been an advisor to a President and who candidly says, quite accurately, that unambiguous answers cannot be found when searching for the limits of Presidential power. For anyone, especially a former President, to state emphatically that President Bush has trampled on our constitutional foundation in exceeding his power simply does not have the integrity of a Justice Jackson. How could President Carter not know that the definition of power and its balance is and will forever be a fluid concept?

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. **When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum**, for it includes all that he possesses in his own right plus all that Congress can delegate...If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the

strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

How much power did Congress authorize to President Bush? We will find out when we come to the Congressional resolutions in response to 911 and that authorized the Iraq War. Remember the foregoing when we get there.

2. **When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.** Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. **When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter**. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure...

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. In cases where the purpose is to supply needs of the Government itself, two courses are provided: one, seizure of a plant which fails to comply with obligatory orders placed by the Government; another, condemnation of facilities, including temporary use under the power of eminent domain. The third is applicable where it is the general economy of the country that is to be protected rather than exclusive governmental interests. None of these were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, **we can sustain the President only by holding that**

seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

...The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a [stingy] construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, "The **executive Power shall be vested in a President** of the United States of America." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: "In our view, this clause constitutes a grant of all the executive powers of which the Government is capable."...**I cannot accept the view that this clause is a grant in bulk of all conceivable executive power** but regard it as an allocation to the presidential office of the generic powers thereafter stated.

The clause on which the Government next relies is that "The President shall be **Commander in Chief** of the Army and Navy of the United States..." These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But **just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.** It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

We must return to these statements when we get to the Congressional resolutions empowering President Bush. I will try to remember to do so.

That seems to be the logic of an argument tendered at our bar -- that the President having, on his own responsibility, sent American troops abroad derives from that act "affirmative power" to seize the means of producing a supply of steel for them. To quote, "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." Thus, it is said, he has invested himself with "war powers."

I cannot foresee all that it might entail if the Court should indorse this argument. **Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course,**

a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture. I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to discountenance argument based on it. How widely this doctrine espoused by the President's counsel departs from the early view of presidential power is shown by a comparison. **President Jefferson, without authority from Congress, sent the American fleet into the Mediterranean, where it engaged in a naval battle with the Tripolitan fleet. He sent a message to Congress on December 8, 1801, in which he said:**

> "Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean ...with orders to protect our commerce against the threatened attack...Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril...One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise* ...was captured, after a heavy slaughter of her men...**Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew.** The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. **I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.**"

Assuming that we are in a war *de facto*, whether it is or is not a war *de jure*, does that empower the Commander in Chief to seize industries he thinks necessary to supply our army?

de facto: "in reality" — *de jure*: "according to law;" "by right"

The Constitution expressly places in Congress power "to raise and *support* Armies" and "to *provide* and *maintain* a Navy." This certainly lays upon Congress primary responsibility for supplying the armed forces...**There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.** He has no monopoly of "war powers," whatever they are. **While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command...**

That military powers of the Commander in Chief were not to supersede representative government

of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the **Third Amendment** says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, **even in war time, his seizure of needed military housing must be authorized by Congress.** It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions..."

Article I, §8, clause 15, pg. 24.

Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, **underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy**.

Sounds like a compelling argument with regard to "domestic policy." What qualifies as "domestic policy"?

...**We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least <u>when turned against the outside world</u> for the security of our society**. **But, <u>when it is turned inward</u>, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence...What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.**

The third clause in which the Solicitor General finds seizure powers is that "**he shall take Care that the Laws be faithfully executed...**" That authority must be matched against words of the Fifth Amendment that "No person shall be...deprived of life, liberty or property, without due process of law..." One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules. The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, **the unarticulated assumption being that necessity knows no law**... [P]rudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.

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President Wilson, just before our entrance into World War I, went before the Congress and asked its approval of his decision to authorize merchant ships to carry defensive weapons. He said: "**No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers**; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it."

When our Government was itself in need of shipping whilst ships flying the flags of nations overrun by Hitler...were immobilized in American harbors where they had taken refuge, **President Roosevelt** did not assume that it was in his power to seize such foreign vessels to make up our own deficit. He informed Congress: "I am satisfied, after consultation with the heads of the interested departments and agencies of the Government, that we should have statutory authority to take over any such vessels as our needs may require..." The necessary statutory authority was shortly forthcoming. In his first inaugural address **President Roosevelt** pointed out two courses to obtain legislative remedies, one being to enact measures he was prepared to recommend, the other to enact measures "the Congress may build out of its experience and wisdom." He continued, "But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. *I shall ask the Congress for the one remaining instrument to meet the crisis* -- broad Executive power to wage a war against the emergency, **as great as the power that would be given to me if we were in fact invaded by a foreign foe.**"...

Clearly, we were invaded by a foreign foe on 9-11-2001. Does 911 give President Bush the degree of power President Roosevelt assumed he would have had **if we had been invaded by a foreign foe on his watch?**

The Solicitor General, acknowledging that Congress has never authorized the seizure here, says practice of prior Presidents has authorized it. He seeks color of legality from claimed executive precedents, chief of which is **President Roosevelt's seizure on June 9, 1941, of the California plant of the North American Aviation Company.** Its superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure.

The appeal, however, that we declare the existence of inherent powers [out of necessity] to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that **emergency powers would tend to kindle emergencies**. **Aside from**

suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis...

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored...

Great Britain also has fought both World Wars under a sort of temporary dictatorship created by legislation. As **Parliament is not bound by written constitutional limitations**, it established a crisis government simply by delegation to its Ministers of a larger measure than usual of its own unlimited power, which is exercised under its supervision by Ministers whom it may dismiss. This has been called the "high-water mark in the voluntary surrender of liberty," but, as Churchill put it, "Parliament stands custodian of these surrendered liberties, and its most sacred duty will be to restore them in their fullness when victory has crowned our exertions and our perseverance." Thus, parliamentary control made emergency powers compatible with freedom.

This contemporary foreign experience...suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

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...In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction...

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

CONCURRENCE: Justice Burton...**The present situation is not comparable to that of an imminent invasion or threatened attack**...The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of

seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.

CONCURRENCE: Justice Clark...**Some of our Presidents, such as Lincoln, "felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."**

In my view..., the Constitution **does** grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, **such a grant may well be necessary to the very existence of the Constitution itself.** As Lincoln aptly said, "is it possible to lose the nation and yet preserve the Constitution?" In describing this authority I care not whether one calls it "residual," "inherent," "moral," "implied," "aggregate," "emergency," or otherwise. I am of the conviction that those who have had the gratifying experience of being the President's lawyer have used one or more of these adjectives only with the...highest of purpose.

Tom C. Clark served as the civilian coordinator of the forced evacuation of Japanese-Americans from the West Coast during WWII. He served as Attorney General from 1945-1949 when President Truman appointed him to the Supreme Court.

I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here...Congress had prescribed methods to be followed by the President in meeting the emergency at hand.

Reserve judgment on the majority and concurring opinions until you read this powerful dissent!

DISSENT: Justice Vinson/Reed/Minton...[W]e must first consider the context in which [the Presidential] powers were exercised. Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more **terrifying global conflict**.

Accepting in full measure its responsibility in the world community, the United States was instrumental in securing adoption of the United Nations Charter, approved by the Senate by a vote of 89 to 2. The first purpose of the United Nations is to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the

peace, and for the suppression of acts of aggression or other breaches of the peace..." In 1950, when the United Nations called upon member nations "to render every assistance" to repel aggression in Korea, the United States furnished its vigorous support. **For almost two full years, our armed forces have been fighting in Korea, suffering casualties of over 108,000 men.** Hostilities have not abated. The "determination of the United Nations to continue its action in Korea to meet the aggression" has been reaffirmed. Congressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization, as hereinafter described...

Even this brief review of our responsibilities in the world community discloses the enormity of our undertaking. Success of these measures may, as has often been observed, dramatically influence the lives of many generations of the world's peoples yet unborn. Alert to our responsibilities, which coincide with our own self-preservation through mutual security, Congress has enacted a large body of implementing legislation. As an illustration of the magnitude of the over-all program, Congress has appropriated $130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea.

In the Mutual Security Act of 1951, Congress authorized "military, economic, and technical assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world..." Congress also directed the President to build up our own defenses. Congress, recognizing the "grim fact...that the United States is now engaged in a struggle for survival" and that "it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour," granted authority to draft men into the armed forces. As a result, we now have over 3,500,000 men in our armed forces.

Appropriations for the Department of Defense, which had averaged less than $13 billion per year for the three years before attack in Korea, were increased by Congress to $48 billion for fiscal year 1951 and to $60 billion for fiscal year 1952. A request for $51 billion for the Department of Defense for fiscal year 1953 is currently pending in Congress. The bulk of the increase is for military equipment and supplies -- guns, tanks, ships, planes and ammunition -- all of which require STEEL...

Congress recognized the impact of these defense programs upon the economy. Following the attack in Korea, the President asked for authority to requisition property and to allocate and fix priorities for scarce goods. In the Defense Production Act of 1950, Congress granted the powers requested and, *in addition*, granted power to stabilize prices and wages and to provide for settlement of labor disputes arising in the defense program. The Defense Production Act was extended in 1951, a Senate Committee noting that in the dislocation caused by the programs for purchase of military equipment "lies the seed of an economic disaster that might well destroy the military might we are straining to build." Significantly, the Committee examined the problem "in terms of just one commodity, steel," and found "a graphic picture of the over-all inflationary danger growing out of reduced civilian supplies and rising incomes." Even before Korea, steel production at levels above theoretical 100% capacity was not capable of supplying civilian needs alone. Since Korea, the tremendous military

demand for steel has far exceeded the increases in productive capacity. This Committee emphasized that the shortage of steel, even with the mills operating at full capacity, coupled with increased civilian purchasing power, presented grave danger of disastrous inflation.

The President has the duty to execute the foregoing legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel. Accordingly, when the collective bargaining agreements between the Nation's steel producers and their employees ...were due to expire...and a strike shutting down the entire basic steel industry was threatened, the President acted to avert a complete shutdown of steel production...[H]e certified the dispute to the Wage Stabilization Board, requesting that the Board investigate the dispute and promptly report its recommendation as to fair and equitable terms of settlement. The Union complied with the President's request and delayed its threatened strike while the dispute was before the Board. After a special Board panel had conducted hearings and submitted a report, the full Wage Stabilization Board submitted its report and recommendations to the President...which was acceptable to the Union but was rejected by plaintiffs. The Union gave notice of its intention to strike as of 12:01 a.m., April 9, 1952, but bargaining between the parties continued with hope of settlement until the evening of April 8, 1952. After bargaining had failed..., the President issued the following Executive Order:

> "WHEREAS on December 16, 1950, **I proclaimed the existence of a national emergency which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible...**; and
>
> "WHEREAS American fighting men and fighting men of other nations of the United Nations are **now engaged in deadly combat** with the forces of aggression in Korea...; and
>
> "WHEREAS the **weapons** and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and **steel is an indispensable component** of substantially all of such weapons and materials; and...
>
> "WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and...would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and...
>
> "WHEREAS **in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants**, facilities, and other property of the said companies as hereinafter provided:
>
> "NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

"1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation. . . ."

The next morning, April 9, 1952, the President addressed the following Message to Congress:

"*To the Congress of the United States*:...

"I took this action with the utmost reluctance. The idea of Government operation of the steel mills is thoroughly distasteful to me and I want to see it ended as soon as possible. However, in the situation which confronted me yesterday, I felt that I could make no other choice. **The other alternatives appeared to be even worse -- so much worse that I could not accept them.**

"...**It may be that the Congress will deem some other course to be wiser**. It may be that the Congress will feel we should give in to the demands of the steel industry for an exorbitant price increase and take the consequences so far as resulting inflation is concerned.

"It may be that the Congress will feel the Government should try to force the steel workers to continue to work for the steel companies for another long period, without a contract, even though the steel workers have already voluntarily remained at work without a contract for 100 days in an effort to reach an orderly settlement of their differences with management.

"It may even be that the Congress will feel that we should permit a shut-down of the steel industry, although that would immediately endanger the safety of our fighting forces abroad and weaken the whole structure of our national security.

"**I do not believe the Congress will favor any of these courses of action, but <u>that is a matter for the Congress to determine</u>**.

"It may be, on the other hand, that the Congress will wish to pass legislation establishing specific terms and conditions with reference to the operation of the steel mills by the Government. Sound legislation of this character might be very desirable.

> "**On the basis of the facts that are known to me at this time, I do not believe that immediate congressional action is essential; but I would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider...**"

Twelve days passed without action by Congress. On April 21, 1952, the President sent a letter to the President of the Senate in which he again described the purpose and need for his action and again stated his position that "The Congress can, if it wishes, reject the course of action I have followed in this matter." **Congress has not so acted to this date**...

Secretary of Defense Lovett swore that "a work stoppage in the steel industry will result immediately in **serious curtailment of production of essential weapons** and munitions of all kinds."...The Secretary of Defense stated that: "We are holding the line [in Korea] with ammunition and not with the lives of our troops." Affidavits of the Chairman of the Atomic Energy Commission, the Secretary of the Interior,...[etc.]...disclose an enormous demand for steel...Even ignoring for the moment whatever confidential information the President may possess as "the Nation's organ for foreign affairs," **the uncontroverted affidavits in this record amply support the finding that "a work stoppage would immediately jeopardize and imperil our national defense."**

Plaintiffs do not remotely suggest any basis for rejecting the President's finding that *any* stoppage of steel production would immediately place the Nation in peril...Plaintiffs' counsel tells us that "sooner or later" the mills will operate again. That may satisfy the steel companies and, perhaps, the Union. But our soldiers and our allies will hardly be cheered with the assurance that the ammunition upon which their lives depend will be forthcoming -- "sooner or later," or, in other words, "too little and too late."

Accordingly, if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case. The steel mills were seized for a public use. The power of eminent domain, invoked in this case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government. *Kohl v. United States.* Plaintiffs cannot complain that any provision in the Constitution prohibits the exercise of the power of eminent domain in this case. **The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." It is no bar to this seizure for, if the taking is not otherwise unlawful, plaintiffs are assured of receiving the required just compensation.**

Admitting that the Government could seize the mills, **plaintiffs claim that the implied power of eminent domain can be exercised only under an Act of Congress; under no circumstances, they say, can that power be exercised by the President unless he can point to an express provision in enabling legislation...**

Under this view, the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action. **Under this view,**

he is left powerless because a power not expressly given to Congress is nevertheless found to rest exclusively with Congress.

Consideration of this view of executive impotence calls for further examination of the nature of the separation of powers under our tripartite system of Government. The Constitution... [invests the whole of the executive power] in the President. Before entering office, the President swears that he "will faithfully execute the Office of President of the United States, and will to the best of his Ability, preserve, protect and defend the Constitution of the United States." Art. II, §1.

...Hamilton [said]: "Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." **It is thus apparent that the Presidency was deliberately fashioned as an office of power and independence.** Of course, the Framers created no autocrat capable of arrogating any power unto himself at any time. But neither did they create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake...

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[W]e are not called upon today to expand the Constitution to meet a new situation. For, in this case, we need only look to history and time-honored principles of constitutional law -- principles that have been applied consistently by all branches of the Government throughout our history. It is those who assert the invalidity of the Executive Order who seek to amend the Constitution in this case.

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, **at least to save those programs until Congress could act**. Congress and the courts have responded to such executive initiative with consistent approval.

...When the national revenue laws were openly flouted in...Pennsylvania, **President Washington**, without waiting for a call from the state government, summoned the militia and took decisive steps to secure the faithful execution of the laws. When international disputes engendered by the French revolution threatened to involve this country in war, and while congressional policy remained uncertain, Washington issued his Proclamation of Neutrality. Hamilton, whose defense of the Proclamation has endured the test of time, invoked the argument that the Executive has the duty to do that which will preserve peace until Congress acts and, in addition, pointed to the need for

keeping the Nation informed of the requirements of existing laws and treaties as part of the faithful execution of the laws...

Jefferson's initiative in the Louisiana Purchase, the Monroe Doctrine, and Jackson's removal of Government deposits from the Bank of the United States further serve to demonstrate by deed what the Framers described by word when they vested the whole of the executive power in the President.

Without declaration of war, President Lincoln took energetic action with the outbreak of the War Between the States. He summoned troops and paid them out of the Treasury without appropriation therefor. He proclaimed a naval blockade of the Confederacy and seized ships violating that blockade. Congress, far from denying the validity of these acts, gave them express approval. The most striking action of President Lincoln was the **Emancipation Proclamation**, issued in aid of the successful prosecution of the War Between the States, but wholly without statutory authority.

...**President Lincoln** without statutory authority directed the seizure of rail and telegraph lines leading to Washington. Many months later, Congress recognized and confirmed the power of the President to seize railroads and telegraph lines and provided criminal penalties for interference with Government operation. This Act did not confer on the President any additional powers of seizure. Congress plainly rejected the view that the President's acts had been without legal sanction until ratified by the legislature. Sponsors of the bill declared that its purpose was only to confirm the power which the President already possessed. Opponents insisted a statute authorizing seizure was unnecessary and might even be construed as limiting existing Presidential powers.

Other seizures of private property occurred during the War Between the States, just as they had occurred during previous wars. In *United States v. Russell*, three river steamers were seized by Army Quartermasters on the ground of "imperative military necessity." This Court affirmed an award of compensation, stating:

> "...Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

...**President Hayes** authorized the wide-spread use of federal troops during the Railroad Strike of 1877. **President Cleveland** also used the troops in the Pullman Strike of 1895 and his action is of special significance. No statute authorized this action. No call for help had issued from the Governor of Illinois; indeed Governor Altgeld disclaimed the need for supplemental forces. But the President's concern was that

federal laws relating to the free flow of interstate commerce and the mails be continuously and faithfully executed without interruption. To further this aim his agents sought and obtained the injunction upheld by this Court in *In re Debs.*[2] The Court scrutinized each of the steps taken by the President to insure execution of the "mass of legislation" dealing with commerce and the mails and gave his conduct full approval. Congress likewise took note of this use of Presidential power to forestall apparent obstacles to the faithful execution of the laws. By separate resolutions, both the Senate and the House commended the Executive's action.

President Theodore Roosevelt seriously contemplated seizure of Pennsylvania coal mines if a coal shortage necessitated such action. In his autobiography, President Roosevelt expounded the "Stewardship Theory" of Presidential power, stating that "the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service." Because the contemplated seizure of the coal mines was based on this theory, then ex-President Taft criticized President Roosevelt in a passage in his book relied upon by the District Court in this case. In the same book, however, President Taft agreed that such powers of the President as the duty to "take Care that the Laws be faithfully executed" could not be confined to "express Congressional statutes."...

During World War I, **President Wilson** established a War Labor Board without awaiting specific direction by Congress. With William Howard Taft and Frank P. Walsh as co-chairmen, the Board had as its purpose the prevention of strikes and lockouts interfering with the production of goods needed to meet the emergency. Effectiveness of War Labor Board decision was accomplished by Presidential action, including seizure of industrial plants. Seizure of the Nation's railroads was also ordered by President Wilson.

When Congress was considering the statute authorizing the President to seize communications systems whenever he deemed such action necessary during the war, Senator (later President) Harding opposed on the ground that there was no need for such stand-by powers because, in event of a present necessity, the Chief Executive "ought to" seize communications lines, "else he would be unfaithful to his duties as such Chief Executive."

Beginning with the Bank Holiday Proclamation and continuing through World War II, executive leadership and initiative were characteristic of **President Franklin D. Roosevelt**'s administration. In 1939, upon the outbreak of war in Europe, the President proclaimed a limited national emergency for the purpose of strengthening our national defense. In May of 1941, the danger from the Axis belligerents having become clear, the President proclaimed "an unlimited national emergency" calling for mobilization of the Nation's defenses to repel aggression. The President took the initiative in strengthening our defenses by acquiring rights from the British Government to establish air bases in exchange for overage destroyers.

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[2]Case 1-9 on this website.

In 1941, President Roosevelt acted to protect Iceland from attack by Axis powers, when British forces were withdrawn, by sending our forces to occupy Iceland. Congress was informed of this action on the same day that our forces reached Iceland. **The occupation of Iceland was but one of "at least 125 incidents" in our history in which Presidents, "without congressional authorization, and in the absence of a declaration of war, have ordered the Armed Forces to take action or maintain positions abroad."**

Some six months before Pearl Harbor, a dispute at a single aviation plant at Inglewood, California, interrupted a segment of the production of military aircraft. In spite of the comparative insignificance of this work stoppage to total defense production as contrasted with the complete paralysis now threatened by a shutdown of the entire basic steel industry, and even though our armed forces were not then engaged in combat, President Roosevelt ordered the seizure of the plant "pursuant to the powers vested in him by the Constitution and laws of the United States, as President of the United States of America and Commander in Chief of the Army and Navy of the United States." The Attorney General (Jackson) vigorously proclaimed that the President had the moral duty to keep this Nation's defense effort a "going concern." His ringing moral justification was coupled with a legal justification equally well stated:

> "The Presidential proclamation rests upon the aggregate of the Presidential powers derived from the Constitution itself and from statutes enacted by the Congress.
>
> "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 money and which it has directed the President to obtain."

At this time, Senator Connally proposed amending the Selective Training and Service Act to authorize the President to seize any plant where an interruption of production would unduly impede the defense effort. Proponents of the measure in no way implied that the legislation would add to the powers already possessed by the President and the amendment was opposed as unnecessary since

the President already had the power. The amendment relating to plant seizures was not approved at that session of Congress. Meanwhile, and also prior to Pearl Harbor, the President ordered the seizure of a shipbuilding company and an aircraft parts plant. Following the declaration of war, but prior to the Smith-Connally Act of 1943, five additional industrial concerns were seized to avert interruption of needed production. During the same period, the President directed seizure of the Nation's coal mines to remove an obstruction to the effective prosecution of the war...

Whether one believes Executive power should be interpreted as broad or narrow — whether one believes President Bush should or should not have power he has tapped and desires to maintain — it is imperative that we judge this President in light of how other Presidents and Justices have interpreted Presidential power. Indeed, how can we make the wisest of decisions without knowing as much as we can about our past? That is why ELL exists.

This is but a cursory summary of executive leadership. But it amply demonstrates that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution. At the minimum, the executive actions reviewed herein sustain the action of the President in this case. And many of the cited examples of Presidential practice go far beyond the extent of power necessary to sustain the President's order to seize the steel mills...[T]he fact that Congress and the courts have consistently recognized and given their support to such executive action indicates that such a power of seizure has been accepted throughout our history...

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Focusing now on the situation confronting the President on the night of April 8, 1952, we cannot but conclude that the President was performing his duty under the Constitution to "take Care that the Laws be **faithfully executed**" -- a duty described by President Benjamin Harrison as "the central idea of the office."...

President Truman gave Congress the go ahead to react to his order by “acting.” But, Congress did not act. Should the Supreme Court have acted?

The absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws -- both the military procurement program and the anti-inflation program -- has not until today been thought to prevent the President from executing the laws...

There is a distinction, though, between Congressional silence and Congressional direction, even if only by implication, is there not?

...In *United States v. Midwest Oil Co.*, this Court approved executive action where, as here, the

President acted to preserve an important matter until Congress could act -- **even though his action in that case was contrary to an express statute**.

Are President Bush's wiretap orders contrary to an express statute? Stay tuned!

In this case, there is no statute prohibiting the action taken by the President in a matter not merely important but threatening the very safety of the Nation. Executive inaction in such a situation, courting national disaster, is foreign to the concept of energy and initiative in the Executive as created by the Founding Fathers. The Constitution was itself "adopted in a period of grave emergency...While emergency does not create power, emergency may furnish the occasion for the exercise of power." The Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness. There is no cause to fear Executive tyranny so long as the laws of Congress are being faithfully executed. Certainly there is no basis for fear of dictatorship when the Executive acts, as he did in this case, only to save the situation until Congress could act.

...**Faced with immediate national peril** through stoppage in steel production on the one hand and faced with destruction of the wage and price legislative programs on the other, **the President took temporary possession of the steel mills as the only course open to him consistent with his duty to take care that the laws be faithfully executed.**

In the grand scheme, I wonder if past precedent makes a difference. Won't any President who believes he must act to "save" the Country do so, regardless of past edicts? Would we want any President to do less?

...The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon. There is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency for, under this view, the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law. Seizure of plaintiffs' property is not a pleasant undertaking. Similarly unpleasant to a free country are the draft which disrupts the home and military procurement which causes economic dislocation and compels adoption of price controls, wage stabilization and allocation of materials. The President informed Congress that even a temporary Government operation of plaintiffs' properties was "thoroughly distasteful" to him, but was necessary to prevent immediate paralysis of the mobilization program. Presidents have been in the past, and any man worthy of the Office should be in the future, free to take at least interim action necessary to execute legislative programs essential to survival of the Nation. A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must independently determine for itself whether the President was acting, as required by the Constitution, to "take Care that the

Laws be faithfully executed."...Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills. There is no question that the possession was other than temporary in character and subject to congressional direction -- either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. **The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution**. Accordingly, we would reverse the order of the District Court.