Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizure Case)

The New Deal increased American involvement in world affairs, and the nature of twentieth-century military struggles raised basic questions about the viability of eighteenth-century notions of separation of powers in a twentieth-century world. These issues were at the heart of Youngstown Sheet & Tube, *a decision that has acquired canonical status as the leading modern expression of contemporary constitutional understandings of executive capacity to act unilaterally. One school of thought, exemplified by Justice Black, insists that the Constitution of 1789 clearly spells out the division of powers between the president and Congress. The other school of thought, exemplified by Justices Frankfurter and Jackson, insists that the constitutional text has very little to say about modern problems; constitutional standards must therefore be worked out through analysis of historical developments and pragmatic accommodations. The latter view has become increasingly dominant in American constitutionalism. Jackson's three-part categorization of separation of powers situations set the standard for judicial thinking about conflicts between Congress and the president.*

In December 1951, during the Korean War, the United Steelworkers of America gave notice of their intention to strike when the collective bargaining agreement between the steel mills and their employees expired at the end of that year. Federal mediation failed to resolve the impasse. In April 1952 the union called for a nationwide strike. President Harry Truman responded with an executive order directing Secretary of Commerce Charles Sawyer to take control of the steel mills and keep them operational. He argued that the continued production of steel was essential to the war effort and that the president had intrinsic constitutional authority under Article II to take such an action to secure the national interest. The commerce secretary took possession of the steel mills and directed their management to keep them running in accord with his directives. The president reported his orders to Congress, but Congress took no immediate action. The steel companies complied with the order but sought an injunction restraining the enforcement of the order. In an expedited process, the district court for the District of Columbia issued the injunction, which was stayed by the Court of Appeals. The Supreme Court heard arguments in the case less than two weeks later.

At the time of the Steel Seizure Case, *the Court included four Truman appointees, individuals who had also been political intimates of the president. The Truman justices split evenly, with two joining the majority (Burton and Clark) against the president and two in dissent (Vinson and Minton). In 1952 the justices also had a significant amount of personal experience with the challenges of presidential policy and administration. Jackson and Clark were former attorneys general, who had grappled with these kinds of legal issues from the perspective of the executive branch, and Vinson was a former secretary of treasury. Two others, Black and Burton, had come from the other end of Pennsylvania Avenue, both having served in the U.S. Senate. Clark had prepared a memo as Truman's attorney general defending inherent presidential power and advocating presidential seizures of key industrial plants during labor disputes as a good policy during wartime. Vinson had directly advised President Truman that a seizure of the steel mills would be constitutional. He might well have expected his dissenting opinion to have commanded the votes of the majority of the justices.*

JUSTICE BLACK delivered the opinion of the Court.

. . .

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 statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes . . . as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. . . .

It is clear that if the President had authority to issue the order he did, it must be found in some provisions 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 lawmakers, not for its military authorities.

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 limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . .

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. . . . The Constitution did not subject this lawmaking power of Congress to presidential or military supervision or control.

. . .

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

JUSTICE JACKSON, concurring.

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 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. . . . The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.

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. . . .

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 oversimplified 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. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal

sovereignty. 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.

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.[32]

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.[33] 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. . . . 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. . . .

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. 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 niggardly 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." If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.

. . . 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.

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32. [Justice Jackson's footnote] Since the Constitution implies that the writ of habeas corpus may be suspended in certain circumstances but does not say by whom, President Lincoln asserted and maintained it as an executive function in the face of judicial challenge and doubt. *Ex parte Merryman*. . . . Congress eventually ratified his action. . . .

33. [Justice Jackson's footnote] President Roosevelt's effort to remove a Federal Trade Commissioner was found to be contrary to the policy of Congress and impinging upon an area of congressional control, and so his removal power was cut down accordingly. *Humphrey's Executor v. United States*. . . . However, his exclusive power of removal in executive agencies, affirmed in *Myers v. United States* . . . continued to be asserted and maintained.

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. . . . 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.

. . .

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.

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? The Constitution expressly places in Congress power "to raise and *support* Armies" and "to *provide* and *maintain* a Navy." (Emphasis supplied.) 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.

. . .

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 when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . .

. . .

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.

. . .

The appeal, however, that we declare the existence of inherent powers ex necessitate 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. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.

. . .

[The] contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it 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.

> *In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. In 1939, upon congressional request, the Attorney General listed ninety-nine such separate statutory grants by Congress of emergency or war-time executive powers. They were invoked from time to time as need appeared. Under this procedure we retain Government by law—special, temporary law, perhaps, but law nonetheless. . . .*
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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.*
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> . . .
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> But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.
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> JUSTICE BURTON, concurring.
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> JUSTICE CLARK, concurring.
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> The limits of presidential power are obscure. However, Article II, no less than Article I, is part of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." 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." Others, such as Theodore Roosevelt, thought the President to be capable, as a "steward" of the people, of exerting all power save that which is specifically prohibited by the Constitution or the Congress. In my view—taught me not only by the decision of Chief Justice Marshall in *Little v. Barreme* (1804) . . . but also by a score of other pronouncements of distinguished members of this bench—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 utmost of sincerity and the highest of purpose.
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> 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 . . . Congress had prescribed methods to be followed by the President in meeting the emergency at hand.
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> . . .
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> JUSTICE DOUGLAS, concurring.
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> 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. The Congress, as well as the President, is trustee of the national welfare. The President can act more quickly than the Congress. The President with the armed services at his disposal can move with force as well as with speed. All executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency.

Legislative power, by contrast, 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. Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient. But as Mr. Justice Brandeis stated in his dissent in *Myers v. United States* (1926) . . . "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 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. . . .

. . .

. . . Some future generation may . . . deem it so urgent that the President have legislative authority that the Constitution will be amended. We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. Such a step would most assuredly alter the pattern of the Constitution.

We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many. Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.

JUSTICE FRANKFURTER, concurring.

. . .

A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. . . . [History] sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

. . .

The issue before us can be met, and therefore should be, without attempting to define the President's powers comprehensively. . . .

The question before the Court comes in this setting. 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 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 need for new legislation does not enact it. Nor does it repeal or amend existing law.

. . .

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 wellbeing, 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 on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world.

. . .

CHIEF JUSTICE VINSON, with whom JUSTICE REED and JUSTICE MINTON join, dissenting.

. . .

In passing upon the question of Presidential powers in this case, we must first consider the context in which those 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. . . .

. . . The need for mutual security is shown by the very size of the armed forces outside the free world. Defendant's brief informs us that the Soviet Union maintains the largest air force in the world and maintains ground forces much larger than those presently available to the United States and the countries joined with us in mutual security arrangements. Constant international tensions are cited to demonstrate how precarious is the peace.

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. . . .

. . .

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. . . . [A Senate] 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 . . . a strike shutting down the entire basic steel industry was threatened, the President acted to avert a complete shutdown of steel production. . . .

Twelve days passed [after the initial executive order] 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.

. . .

One is not here called upon even to consider the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant. Such considerations arise only when one ignores the central

fact of this case—that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure. 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."

. . .

This comprehensive grant of the executive power [in Article II] to a single person was bestowed soon after the country had thrown the yoke of monarchy. Only by instilling initiative and vigor in all of the three departments of Government, declared Madison, could tyranny in any form be avoided. Hamilton added: "Energy in the Executive is a leading character in the definition of good government." . . . 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.

In passing upon the grave constitutional question presented in this case, we must never forget, as Chief Justice Marshall admonished, that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," and that "(i)ts means are adequate to its ends." Cases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations. But we 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.

. . .

In an action furnishing a most apt precedent for this case, 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.

. . .

. . .

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 [Robert 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. . . . 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.

. . .

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. . . . [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.

History bears out the genius of the Founding Fathers, who created a Government subject to law but not left subject to inertia when vigor and initiative are required.

. . .

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. Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head to a department when administering a particular statute, the President is a constitutional officer charged with taking care that a "mass of legislation" be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. . . .

There is no statute prohibiting seizure as a method of enforcing legislative programs. . . .

Whatever the extent of Presidential power on more tranquil occasions, and whatever the right of the President to execute legislative programs as he sees fit without reporting the mode of execution to Congress, the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act. The President's action served the same purposes as a judicial stay entered to maintain the status quo in order to preserve the jurisdiction of a court. . . . [T]here is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will.

. . . 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.

. . .

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

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; under this view, the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law.

. . .

As the District Judge stated, this is no time for "timorous" judicial action. But neither is this a time for timorous executive action. 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.

United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936)

The delegation of power over foreign affairs to the president was less controversial during the early New Deal than the delegation of power over domestic policy. Many nineteenth-century conservatives worried that an increased American presence in international affairs would unconstitutionally increase national powers and aggrandize the executive branch. In contrast, many twentieth-century conservatives insisted on a sharp difference between constitutional authority in domestic affairs and constitutional authority in foreign affairs. During World War I, the conservative Republican senator George Sutherland wrote an important book detailing why the federal government and the president had more authority in foreign policy than in domestic policy.[34] *He was soon given an opportunity to write those views into constitutional law when he was appointed to the U.S. Supreme Court in 1922. Sutherland's opinion in the* Curtiss-Wright *case became the source of the "sole organ" doctrine, which contends that the president is the "sole organ of the federal government in the field of international relations." Proponents of presidential power have subsequently cited Sutherland's argument as a reason to oppose any significant congressional intervention in foreign policy. Sutherland likewise emphasized in* United States v. Belmont *(1933) the unilateral power of the president to make international executive agreements that could trump state law.*

Curtiss-Wright *began with a 1934 congressional resolution authorizing the president, at his discretion, to prohibit or regulate arms sales to Bolivia and Paraguay, which were engaged in a border war. President Roosevelt immediately issued a proclamation barring the arms sales. Curtiss-Wright Export Corporation and others were indicted in federal district court for violating the arms embargo during the several months that it was in effect. They challenged the indictment on several grounds, including the constitutional objection that Congress had delegated excessive lawmaking authority to the president. The district court agreed, leading the government to appeal to the Supreme Court.*

The Supreme Court quickly disposed of those constitutional objections. Justice McReynolds aside, no other justice had difficulty finding a constitutional basis for legislation granting the president broad discretion in foreign affairs. As you read this opinion, consider whether Justice Sutherland made a convincing distinction between constitutional authority over domestic affairs and constitutional authority over foreign affairs.

JUSTICE SUTHERLAND delivered the opinion of the Court.

. . .

Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

34. George Sutherland, *Constitutional Power and World Affairs* (New York: Columbia University Press, 1919).