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## CHAPTER 2

# THE SEPARATION OF THE NATIONAL POWERS

[Assignment 4]

The Constitution begins with a declaration of popular sovereignty: the Constitution is established by “We the People of the United States.” The Preamble is also a statement of the broad purposes for which this new government was created. Then the Constitution proceeds in its first three Articles to lay out the structure and powers of three branches of government: the Congress, the president, and the courts. Each branch is substantially independent of the others, and has separate functions. Yet each branch checks, and is checked by, the others. None is superior. All derive their authority to act from the same constitutional grant of power by the people.

This chapter considers the structure, nature, and functions of the three branches of the national government, which are considered in the order of their appearance within the Constitution. This chapter is therefore addressed primarily to the *separation of powers*: the distribution of power among the branches of the national government. The next chapter considers *federalism*: the distribution of power between the national government and the states.

### An Introduction to the Separation of Powers

*Art. I, § 1: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. . . .*

*Art. II, § 1: The executive Power shall be vested in a President of the United States of America. . . .*

*Art. III, § 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.*

Here in a nutshell is the separation of powers. We the People—remember the Preamble—have granted limited and enumerated powers to three branches of the federal government. Each branch may exercise only the powers given to it, not the powers given to the other branches. Note that this separation of powers is not absolutely pure, for the Constitution actually allocates some powers to *two* branches working in coordination. (This intermingling of powers was inspired by how the framers understood the largely unwritten English constitution and leading political theorists of the Enlightenment.) But even these shared allocations of power serve the purpose of ensuring that each branch is checked by the others. Consider a few of the checks and balances established by the Constitution:

Congress can check the president with its most formidable power—the power to raise revenues, called “the power of the purse.” It can, for example, shut down a war by refusing to fund it. The Senate can hobble the executive branch by refusing to confirm the president’s nominees. It can refuse to ratify the treaties the president

signs. Congress can check the judiciary by altering its size or jurisdiction. It can hamper the judiciary by constraining its funding. And with the cooperation of the states, Congress can enact a constitutional amendment that would overturn the Supreme Court's construction of the Constitution, something it has done several times in American history (see Amendments XI, XIV, XVI, XXVI). Congress can impeach and remove officers, including the president and the justices.

The president can check Congress by vetoing its bills, and by setting priorities in law enforcement and execution that are different than those of Congress. The president also has ample powers to check Congress in the conduct of foreign affairs. As for the judiciary, the president has a measure of control through the appointment of judges. The executive branch also influences the issues that the courts are able to decide; the president can evade judicial resolution of a suit against the executive branch by choosing to settle it.

The federal courts check Congress and the president in only one way, but it is a check that constrains every action those branches can take: the courts may decide that the legislative or executive branch has violated the Constitution.

The checks each branch has on the others can be seen in one of the most important cases ever decided by the Supreme Court: *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), also known as *The Steel Seizure Case*. At the height of the Korean War, the steel industry and the steel workers could not agree on wages and working conditions. The steel workers threatened to strike, and President Harry Truman feared that a strike would cripple the war effort. He issued an executive order that instructed the secretary of Commerce to seize the nation's steel mills and prescribe terms and conditions of employment as he saw fit.

President Truman's action was unilateral. Congress had not authorized it by legislation. Thus the steel seizure raised a question as to whether the president possesses either an inherent legislative power or a power to act in emergencies. *Youngstown* went to the Supreme Court in a tremendous rush, yet it produced enduring opinions by several Supreme Court justices.

The opinions in *Youngstown* illustrate the five types of constitutional argument (p. 42): text, historical context, structure, precedent and practice, and policy. As you read each opinion, look for its primary type or types of constitutional argument.

### **Youngstown Sheet & Tube Co. v. Sawyer**

343 U.S. 579 (1952)

■ MR. JUSTICE BLACK delivered the opinion of the Court.

We are asked to decide whether the President 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 in meeting this grave emergency 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. The issue emerges here from the following series of events:

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 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. The order 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. Twelve days later he sent a second message. Congress has taken no action.

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. Opposing the motion for preliminary injunction, 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 Government also contended that in any event no preliminary injunction should be issued because the companies had made no showing that their available legal remedies were inadequate or that their injuries from seizure would be irreparable. Holding against the Government on all points, the District Court on April 30 issued a preliminary injunction restraining the Secretary from "continuing the seizure and possession of the plants . . . and from acting under the purported authority of Executive Order No. 10340." On the same day the Court of Appeals stayed the District Court's injunction. Deeming it best that the issues raised be promptly decided by this Court, we granted certiorari on May 3 and set the cause for argument on May 12. . . .

*[The Court first considered the government's argument that the preliminary injunction was inappropriate because the companies were not suffering "irreparable injury," that is, the companies' losses could always be recovered later in a suit for damages if the seizure were held to be unconstitutional. The Court rejected that argument for several reasons, including the fact that the injuries suffered by the companies from the seizure would "be difficult, if not incapable, of measurement."—Editors]*

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 (§ 201(b) of the Defense Production Act) 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. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer.

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 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 first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the

United States. . . .” After granting many powers to the Congress, Article I goes on to provide that Congress may “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.”

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 preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution “in the Government of the United States, or in any Department or Officer thereof.”

The Founders of this Nation entrusted the law making 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.

■ MR. JUSTICE FRANKFURTER, concurring.

. . . The issue before us can be met, and therefore should be, without attempting to define the President’s powers comprehensively. . . . 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. These and other questions, like or unlike, are not now here. I would exceed my authority were I to say anything about them.

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. . . . 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. . . . Congress also has not left to implication that just compensation be paid: it has usually legislated in detail regarding enforcement of this litigation-breeding general requirement. . . .

In adopting the provisions which it did, by the Labor Management Relations Act of 1947, for dealing with a “national emergency” arising out of a breakdown in peaceful industrial relations, Congress was very familiar with Governmental seizure

as a protective measure. On a balance of considerations, Congress chose not to lodge this power in the President. It chose not to make available in advance a remedy to which both industry and labor were fiercely hostile. . . . [N]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947. . . .

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words. . . . 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." . . .

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. . . .

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." *Myers v. United States*, 272 U.S. 52, 177 (1926). The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government.

To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

Such was the case of *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). . . . In the *Midwest Oil* case, lands which Congress had opened for entry were, over a

period of 80 years and in 252 instances, and by Presidents learned and unlearned in the law, temporarily withdrawn from entry so as to enable Congress to deal with such withdrawals. No remotely comparable practice can be vouched for executive seizure of property at a time when this country was not at war, in the only constitutional way in which it can be at war. It would pursue the irrelevant to reopen the controversy over the constitutionality of some acts of Lincoln during the Civil War. Suffice it to say that he seized railroads in territory where armed hostilities had already interrupted the movement of troops to the beleaguered Capital, and his order was ratified by the Congress. . . .

[T]he list of executive assertions of the power of seizure in circumstances comparable to the present reduces to three in the six-month period from June to December of 1941. We need not split hairs in comparing those actions to the one before us, though much might be said by way of differentiation. Without passing on their validity, as we are not called upon to do, it suffices to say that these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution revealed in the *Midwest Oil* case. Nor do they come to us sanctioned by long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its 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. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. . . . 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*, at 240, 293. . . .

■ MR. JUSTICE DOUGLAS, concurring.

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 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. 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 had effected. . . .

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.

■ MR. JUSTICE JACKSON, concurring in the judgment and opinion of the Court.

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. . . .

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.

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. 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.

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. That takes away also the support of the many precedents and declarations which were made in relation, and must be confined, to this category.

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. . . .

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.

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.

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. 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.

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 illustrations 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.

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. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement. I suppose no one would doubt that Congress can take over war supply as a Government enterprise. On the other hand, if Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces can the Executive because of lawful disagreements incidental to that process, seize the facility for operation upon Government-imposed terms?

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. It is also empowered to make rules for the “Government and Regulation of land and naval Forces,” by which it may to some unknown extent impinge upon even command functions.

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. . . .

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 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.

Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. . . .

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.

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. . . .

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. . . .

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern

methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness. . . .

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. . . .

The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. 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.

■ [JUSTICE BURTON’s concurring opinion is omitted.]

■ MR. JUSTICE CLARK, concurring in the judgment of the Court.

One of this Court’s first pronouncements upon the powers of the President under the Constitution was made by Mr. Chief Justice John Marshall some one hundred and fifty years ago. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), he used this characteristically clear language in discussing the power of the President to instruct the seizure of the *Flying Fish*, a vessel bound from a French port:

It is by no means clear that the president of the United States whose high duty it is to “take care that the laws be faithfully executed” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing *to* a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel *not* bound to a French port.

Accordingly, a unanimous Court held that the President’s instructions had been issued without authority and that they could not “legalize an act which, without

those instructions would have been a plain trespass.” I know of no subsequent holding of this Court to the contrary.<sup>3</sup> . . .

In my view—taught me not only by the decision of Mr. Chief Justice Marshall in *Little v. Barreme*, 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. . . .

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, as in *Little v. Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand. . . .

■ MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE REED and MR. 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. . . . 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. . . .

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

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<sup>3</sup> Decisions of this Court which have upheld the exercise of presidential power include the following: *Prize Cases*, 67 U.S. (2 Black) 635 (1863) (subsequent ratification of President’s acts by Congress); *In re Neagle*, 135 U.S. 1 (1890) (protection of federal officials from personal violence while performing official duties); *In re Debs*, 158 U.S. 564 (1895) (injunction to prevent forcible obstruction of interstate commerce and the mails); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (acquiescence by Congress in more than 250 instances of exercise of same power by various Presidents over period of 80 years); *Myers v. United States*, 272 U.S. 52 (1926) (control over subordinate officials in executive department) [but see *Humphrey’s Executor v. United States*, 295 U.S. 602, 626–628 (1935)]; *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944) (express congressional authorization); cf. *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871) (imperative military necessity in area of combat during war); *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304 (1936) (power to negotiate with foreign governments); *United States v. United Mine Workers*, 330 U.S. 258 (1947) (seizure under specific statutory authorization).

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. . . .

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, represented by the United Steel Workers, were due to expire on December 31, 1951, and a strike shutting down the entire basic steel industry was threatened, the President acted to avert a complete shutdown of steel production. . . .

After bargaining had failed to avert the threatened shutdown of steel production, the President issued [an] Executive Order [describing the emergency the country faced as he directed seizure of the steel mills.] . . . The next morning, April 9, 1952, the President addressed [a] Message to Congress[. It concluded]:

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.

If the Congress does not deem it necessary to act at this time, I shall continue to do all that is within my power to keep the steel industry operating and at the same time make every effort to bring about a settlement of the dispute so the mills can be returned to their private owners as soon as possible.

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.” He illustrated by showing that 84% of the national production of certain alloy steel is currently used for production of military-end items and that 35% of total production of another form of steel goes into ammunition, 80% of such ammunition now going to Korea. The Secretary of Defense stated that: “We are holding the line [in Korea] with ammunition and not with the lives of our troops.” . . . 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.” . . .

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. . . .

*[Chief Justice Vinson then invoked presidential precedents, such as President Washington's Neutrality Proclamation, President Jefferson's Louisiana Purchase, the Monroe Doctrine, actions by President Lincoln including the seizure of rail and telegraph lines around the capital, President Hayes's use of federal troops to suppress the Railroad Strike of 1877, President Wilson's establishment of a War Labor Board to prevent strikes, and actions by President Franklin Roosevelt including the seizure of an aviation plant in California six months before Pearl Harbor and the seizure of coal mines in 1943.—Editors]*

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. The fact that temporary executive seizures of industrial plants to meet an emergency have not been directly tested in this Court furnishes not the slightest suggestion that such actions have been illegal. Rather, the 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.

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." . . .

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. In his Message to Congress immediately following the seizure, the President explained the necessity of his action in executing the military procurement and anti-inflation legislative programs and expressed his desire to cooperate with any legislative proposals approving, regulating or rejecting the seizure of the steel mills. Consequently, there 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 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. . . .

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. . . . 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."

. . . 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.

## NOTES

1. What is the dominant type of constitutional argument in each opinion? Which opinions are more flexible and which are more categorical? (In their own ways the opinions of Justice Black and Justice Jackson are categorical—the former categorizing powers as executive or legislative, and the latter categorizing situations as ones in which the president acts with Congress's support, in the face of Congress's silence, or over Congress's disapproval.) Which opinion is most persuasive to you? Why?

2. Justice Black reads the three vesting clauses more literally. He thinks the grant of the executive power to the president and of all legislative power to Congress means that the president has no inherent power to respond to emergencies or to deal with foreign affairs. There is no presidential prerogative power. Is Justice Black's reading of the text plausible?

3. Both Justice Frankfurter and Chief Justice Vinson cite past practice, but it leads them to different conclusions. Who has the better argument? How useful was practice as a guide when humanity seemed on the brink of another world war or even a nuclear apocalypse? Every emergency is unique, and the president who had access to all our military and intelligence secrets thought this one was really bad. Should the Court have deferred to the president because he had more information?

4. If the Constitution had a clause granting the executive "emergency powers," would that make the nation more secure in a crisis, or would it be inimical to the very idea of constitutional governance? (The constitution of the Weimar Republic actually had an emergency-powers clause, and its abuse helped bring Adolf Hitler to power.) Would such a clause be less dangerous if there had to be a resolution by two-thirds of both houses of Congress declaring a state of emergency? Is the U.S. Constitution's studied ambiguity on emergency power a good thing? Is the threat of eventual impeachment and removal from office a sufficient check on the executive?

The Constitution creates the separation of powers. But from the beginning, James Madison recognized that the success of the system of separated powers depends on more than a piece of paper. In *The Federalist No. 48*, he asked: “Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?” He was troubled: “experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government.”

In *The Federalist No. 51*, Madison sketched out his solution. To endure over time, the separation of powers had to be made to protect itself: “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” How could this be done? “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”

Does this sound unduly pessimistic? Here is Madison, again from *The Federalist No. 51*: “It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

As you read on and learn about the separation of powers in the U.S. Constitution, keep in mind Madison’s vision. The public officials and judges you will encounter on these pages were not angels. Look for their ambition. Look for the ambition of each branch counteracting the ambition of the others. Keep thinking about the system of checks and balances. Is this an ingenious way to maintain the rule of law? Is it an inefficient waste of time and effort? Is it an invitation to dangerous brinkmanship? Is there, ultimately, any better way?

[Assignment 5]

## I. ARTICLE I: THE LEGISLATIVE POWER

### A Map of Article I

*§ 1: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

The first section of Article I is an introduction and a statement of substantive principles.

First, Congress is not granted a general legislative power over every subject, but is instead granted only certain legislative powers—the ones “herein granted.” Most of those enumerated legislative powers are specified in Article I, Section 8.