READING 5
The Court and the President

Constitutional Law for a Changing America

Institutional Powers and Constraints

11th Edition

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CHAPTER FOUR

THE EXECUTIVE

THE CONSTITUTION'S FRAMERS would have trouble recognizing today's presidency. To be sure, they believed that the Articles of Confederation were flawed because they did not provide for an executive, but many delegates had serious reservations about awarding too much authority to the executive branch after what they had suffered under the British monarchy. In fact, those who supported the New Jersey Plan envisioned a plural executive in which two individuals would share the chief executive position as insurance against excessive power accruing to a single person. With little doubt the framers would be amazed at the far-reaching domestic and foreign powers wielded by modern presidents, to say nothing of the hundreds of departments, agencies, and bureaus that constitute the executive branch.

Some of this growth likely traces to the rather loose wording of Article II. The article has neither the detail nor the precision of the framers' Article I description of the legislature; instead, it is dominated by issues of selection and removal and devotes less attention to powers and limitations. The wording is quite broad. Presidents are given the undefined "executive power" of the United States and are admonished to take care that the laws are "faithfully executed." Other grants of authority, such as the president's role as "Commander in Chief of the Army and Navy" and the preferential position given the chief executive in matters of foreign policy, allow for significant expansion.

The presidency also has grown in response to a changing world. As American society became more complex, the number of areas requiring government action mushroomed. Overwhelmed by these responsibilities, among other reasons, Congress delegated to the executive branch authority that the framers probably did not anticipate. In addition, the expanding importance of defense and foreign policy demanded a more powerful presidency.

As these changes took place, the Supreme Court was frequently called on to resolve disputes over the constitutional limits of executive authority. This chapter explores how the justices have interpreted Article II of the Constitution.

THE PRESIDENT'S CONSTITUTIONAL AUTHORITY

The first sentence of Article II—the vesting clause—vests "executive power" in "a President of the United States of America." What are these powers and how does the President execute them?

Constitutional uthorit of the President

The Constitution expressly gives the president powers in the domestic and foreign realms. Enumerated domestic powers include the following:

- To propose ("recommend") laws to Congress (Article II, Section 3)

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- To sign or veto bills passed by Congress (Article I, Section 7)
- To appoint judges and other government officers (with the "advice and consent" of the Senate) and to make recess appointments (Article II, Section 2)
- To "grant Reprieves and Pardons for Offenses against the United States" (Article II, Section 2)
- To "take Care that the Laws be faithfully executed" (Article II, Section 3)

In foreign affairs, the president's express powers include the following:

- To be "Commander in Chief of the Army and Navy of the United States" (Article II, Section 2)
- To "make Treaties" with the concurrence of two-thirds of the Senate (Article II, Section 2)
- To "appoint Ambassadors [and] other public Ministers and Consuls ("with the Advice and Consent of the Senate") (Article II, Section 2)
- To "receive Ambassadors and other public Ministers" (Article II, Section 3)

In this chapter, you will have ample opportunity to consider these powers because virtually all have been the subject of litigation in the Supreme Court. For now, we wish to make only a few general points that you should keep in mind as you read the cases to come.

First, some political scientists suggest that there are actually two "presidencies": one for domestic affairs and one for foreign policy. But this line is not always so clear. Consider President Trump's 2018 announcement that he would impose tar-iffs on imported steel. Imposing tariffs could be seen as an example of the president taking "Care that the Laws be faithfully executed" because various congressional acts give the president authority to impose tariffs. But tariffs—in essence, taxes imposed on imports from other countries—also have implications for foreign relations.

Second, all the president's key powers are listed in Article II with one notable exception: the authority to sign or veto bills passed by Congress, which is in Article I. The suggestion here is that Congress has primary authority to make laws but the president can check that authority by refusing to sign bills (though Congress can stop the president from so doing by overriding a veto). The power to appoint judges and other government officials works in the reverse. This appointment power falls under the president's Article II authority, but the Senate can block the president's choices by declining to confirm them (it can also refuse to ratify treaties the president makes).

Finally, notice the difference in wording in some of the powers listed earlier. Some seem quite specific, such as the president's power to "grant Reprieves and Pardons for Offenses against the United States," while others are more ambiguous. Consider the president's power to act as "Commander in Chief of the Army and Navy of the United States." Does that language apply only to international conflicts, or does it also have bearing on domestic concerns? For example, could the executive branch take over the nation's steel mills because the president needs steel for a war effort? Even the vesting clause of Article II—"The executive Power shall be vested in a President . . . " raises questions: What did the framers mean by the term *executive power*? Did they use that term simply to summarize the powers in Article II or as a general grant of power to the president?

THE FAITHFUL EXECUTION OF THE LAWS: DEFINING THE CONTOURS OF PRESIDENTIAL POWER

With that background in mind, let's turn to how the Supreme Court has interpreted the powers of the president, beginning with Article II's vesting clause—"The executive Power shall be vested in a President . . ."—and return to a question we raised earlier: What did the framers mean by the term executive power? Two possibilities are as (1) a mere designation of office or (2) a general grant of power.

The "mere designation" view holds that the first sentence of Article II simply summarizes the powers listed later on. That is, the president is limited to those specific grants of power contained in Sections 2 and 3 of Article II. This was the position James Madison implied in Federalist No. 51 and that President William Howard Taft advocated: "The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof."

Is there any constitutional or historical basis for this position? A common piece of support is based on pure logic: Why would the framers bother to list specific pow-ers, as they did in Article II, if they meant for the presi-dent to have more powers than those they enumerated?

Alexander Hamilton in *Federalist* No. 70 and other advocates of the "general grant of power" view (some-times called the stewardship theory) take a much dif-ferent position. On their account, the president has all the powers listed in Article II plus those additional pow-ers needed to run the nation—regardless of whether the Constitution specifically authorizes their exercise. In other words, as long as neither the Constitution nor Congress has restricted the president from doing some-thing for the common good, the president may do it. Seen in this way, the term *executive power* in Article II is a gen-eral grant of power to the president, who must exercise that power in ways that best serve the nation. As President Theodore Roosevelt, an advocate of this view, put it,

> The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it.

How do proponents of this view justify it? One way is through an appeal to common sense: as the only national leader who is available twenty-four hours a day, the president must be able to exercise personal judg-ment in addressing any problems that may arise. To do so, it is essential that the president have the latitude to deal with situations that the framers never envisioned. Another response relies on the take care clause of Article II, Section 3, which states that the president shall be given the responsibility to "take Care that the Laws be faithfully executed." To carry out this command, adherents of the stewardship theory argue, the president must have powers that go beyond those explicitly enumerated in Article II.

If the debate between these two camps reminds you of the controversy between Jefferson and Hamilton over the creation of the Bank of the United States and, more generally, over congressional powers, you would not be wrong. Just as Jefferson argued that the Constitution limits Congress to enumerated powers, advocates of the mere designation approach suggest that the presi-dent can exercise only the powers listed in Article II. And just as Hamilton asserted that the necessary and proper clause of Article I provides Congress with some degree of flexibility, adherents of the stewardship theory argue that the take care clause of Article II enables the president to exercise powers beyond those listed in Article II.

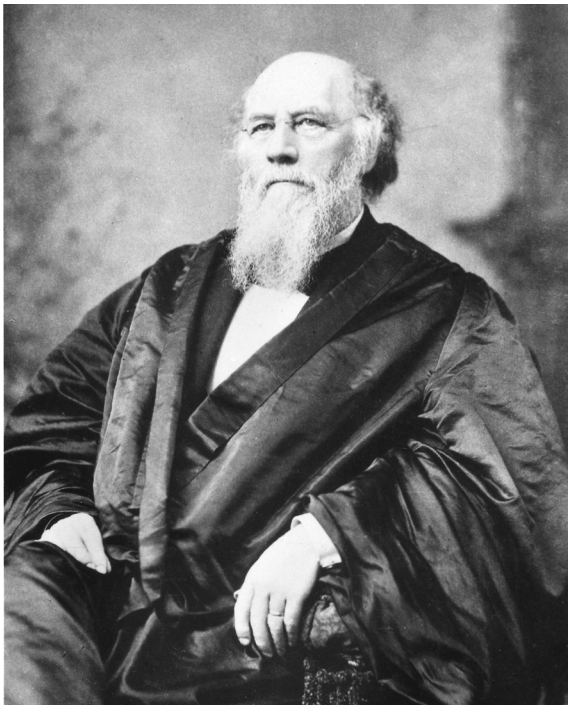
Which view would the Court adopt? The justices provided one answer in the important case of *In re Neagle* (1890). The appeal presenting this case was based on one of the more bizarre and twisted stories in constitu-tional history. The dispute began some three decades before the case reached the Supreme Court. When the trial court reviewed the essential facts, the telling took more than five hundred pages. As you read this deci-sion, consider the extent to which you think the Court's response was influenced by the fact that one of its own members had been threatened.

I. W. Taber, via Wikimedia Commons

Sarah Althea Hill Terry, wife of David Terry and central figure in the dispute with Justice Stephen Field that led to the killing of her husband.

Imperial Photography, San Francisco, via Wikimedia Commons

David S. Terry, former California state supreme court judge.



Library of Congress

Stephen J. Field, associate justice of the U.S. Supreme Court, 1863–1897.

In re Neagle

135 U.S. 1 (1890)
https://caselaw.findlaw.com/us-supreme-court/135/1.html
Vote: 6 (Blatchford, Bradley, Brewer, Gray, Harlan, Miller)
2 (Fuller, Lamar)

OPINION OF THE COURT: *Miller*

DISSENTING OPINION: *Lamar*

NOT PARTICIPATING: *Field*

FACTS:

Stephen J. Field and David S. Terry both went to California during the 1849 gold rush—Field from New England and Terry from the South.

Both became judges on the California Supreme Court, with Terry its chief judge.[27] In 1859 a bitter dispute erupted between Chief Judge Terry and David Broderick, a U.S. senator. Terry resigned his position, challenged Broderick to a duel, and killed him. Field had been a close friend of Broderick, and he vowed never to forget the killing. Field was then elevated to the chief justiceship of the state court, and four years later President Abraham Lincoln appointed him to the U.S. Supreme Court.

Terry went into private practice and eventually came to represent Sarah Althea Hill in a divorce action. Hill claimed to be the wife of William Sharon, a former U.S. senator from Nevada, who was a millionaire mine operator and hotel owner. Hill charged Sharon with adultery and sued for divorce, but Sharon denied ever having married her. Many believed that she was just another in a long line of mistresses Sharon had after his wife died. Sarah Hill claimed to have a document proving the marriage was valid, but during the divorce hearing the court ruled the document to be a forgery and dismissed her action.

When William Sharon died, his son Frederick took legal action to dismantle any claim Sarah Hill had to his father's estate. Attorney Terry by this time had fallen in love with his beautiful client (and perhaps with her potentially large inheritance) and married her. As chance would have it, in September 1888 Justice Field was assigned to a three-judge circuit court to decide the suit brought by Frederick Sharon against Sarah Terry. When the judges announced their ruling in favor of Sharon, violence erupted in the courtroom. Sarah Terry shouted accusations that Field had been bribed to reach his decision. Field ordered the marshals to remove her, and David Terry, defending his wife, struck a marshal and knocked out a tooth. He also brandished a bowie knife, and Sarah attempted to pull a revolver from her purse. The marshals subdued both of them. Sarah Terry was sentenced to one month in jail for contempt, and David Terry to six months in jail.

During his imprisonment, Terry's hatred of Field festered. On several occasions and before numerous witnesses, he pledged to horsewhip and then kill Field if the justice ever returned to California. Sarah Terry also threatened to kill Field. In response, President Benjamin Harrison and the U.S. attorney general decided to provide protection for Justice Field on his next judicial visit to California. The administration authorized a federal marshal, David Neagle, to act as Field's bodyguard when the justice was on circuit court duty in California.

Field returned to California in the summer of 1889, and Neagle was with him at all times. Traveling from Los Angeles to San Francisco by train, Field disembarked at Lathrop to eat breakfast in the station dining room. The Terrys, who had been on the same train, entered the dining room and saw him. Sarah returned to the train to get her revolver, while David walked up behind Field, slapped him twice on the side of the face, and raised his fist for a third blow. Neagle immediately rose from his seat with his revolver drawn and ordered Terry to stop. Terry reached into his coat, and Neagle, fearing that he was going for a weapon, fired two shots, one to the chest and the other to the head, killing him. When Terry's body was searched, no weapons were found.

Sarah Terry, who was to spend her last forty-five years in a state mental institution, claimed that Neagle, in conspiracy with Field, murdered her husband. She was sufficiently convincing that the bodyguard was arrested and charged with murder. Charges also were filed against Field as an accomplice, but they were later dropped.

A federal court granted a writ of habeas corpus ordering state authorities to release Neagle, and California appealed. The central question was whether the president, without congressional action, could issue an executive order through the U.S. attorney general to authorize a bodyguard to protect Justice Field. If he did, then Neagle likely had authority to act as he did; if not, he could be tried for murder in California.

ARGUMENTS:

For the appellant, Thomas Cunningham, sheriff of San Joaquin County, California:

- Under California law, Neagle's rights to use force to protect Justice Field were limited to protecting him within the courthouse. Neither the president nor the attorney general has the power to authorize Neagle to guard Field outside the courthouse.
- If the president has any such power, what is its source? If the president has power, within the jurisdiction of the several states, to assign a bodyguard to all federal officials, he has power to place a marshal in the house of every American citizen to shield him from harm at the hands of his fellow citizens. And, if it has come to this, what use do we have for state governments?

For the appellee, David Neagle:

- The president is constitutionally required to "take Care that the Laws be faithfully executed," and that clause invests in the president implied powers beyond expressly listed executive powers in the Constitution, independent of congressional statutes.
- The doctrine of necessary and implied powers is not limited to Congress. On the contrary, because the Constitution

[27]For an account of the events surrounding this case, see Robert Kroninger, "The Justice and the Lady," in *Yearbook 1977 of the Supreme Court Historical Society* (Washington, DC: Supreme Court Historical Society, 1977), 11–19.

invests the president with executive power and confers on him the power to "take Care that the Laws be faithfully executed," it gives him all power reasonably incident to exercise the executive function and necessary to enforce the laws. As long as the power has not been withheld from him by the Constitution and flows from the Constitution, the power is his.

- It was the duty of the executive branch to guard and protect the life of Justice Field in the discharge of his duty because protection of courts and judges is essential to the very existence of the government, as the framers emphasized in *The Federalist Papers.*

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

The justices of the Supreme Court have been members of the Circuit Courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying cases. . . .

Justice Field had not only left Washington and travelled the three thousand miles or more which were necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry. . . .

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language [of a federal law], that the party seeking the benefit of the writ of *habeas corpus* must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a bodyguard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. . . .

In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. . . .

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the

Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed." Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .

[I]f the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go? . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. . . .

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case. . . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

MR. JUSTICE LAMAR (WITH WHOM CONCURRED MR. CHIEF JUSTICE FULLER) DISSENTING.

[W]e deny that upon the facts of this record, [Neagle], as deputy marshal Neagle, or as private citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge Field as a Circuit Justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever in fact of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and, therefore, we think that the courts of the United States have in the present state of our legislation no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the sheriff. . . .

The gravamen of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority must show the authority. If he claims the authority of law, then what law? And if a law, how came it to be a law? Somehow and somewhere it must have had an origin. Is it a law because of the existence of a special and private authority issued from one of the executive departments? So in almost these words is claimed in this case. Is it a law because of some constitutional investiture of sovereignty in the persons of judges who carry that sovereignty with them wherever they may go? Because of some power inherent in the judiciary to create for others a rule or law of conduct outside of legislation, which shall extend to the death penalty? So, also, in this case, . . . it is claimed. We dissent from both these claims. There can be no such law from either of those sources. The right claimed must be traced to legislation of Congress; else it cannot exist.

In *Neagle* the Court seemed to adopted the "general grant" perspective of executive power. The justices held that the president has the constitutional power to take

those actions necessary to enforce the laws of the nation, even if the Constitution does not provide an explicit authorization for doing so.

[Would the Court continue to follow the general grant perspective? *Youngstown,* on the next page, provides some answers.]

Korean Conflict

During the war in Korea the justices were called on to decide the constitutional validity of executive action taken in the name of national security. As you read Justice Black's opinion for the Court in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), consider which view of executive power it adopts. Also consider the analysis provided in Justice Jackson's concurring opinion, in which he lays out an approach for deciding questions of presidential power in relation to congressional action. Finally note the dissenting opinion of Chief Justice Fred M. Vinson, who concludes that the national emergency justified the president's actions.

Youngstown Sheet & Tube Co. v. Sawyer

343 U.S. 579 (1952)
https://caselaw.findlaw.com/us-supreme-court/343/579.html
Vote: 6 (Black, Burton, Clark, Douglas, Frankfurter, Jackson)
3 (Minton, Reed, Vinson)

OPINION OF THE COURT: ***Black***

CONCURRING OPINIONS: ***Burton, Clark, Douglas, Frankfurter, Jackson***

DISSENTING OPINION: ***Vinson***

FACTS:

In 1951 a labor dispute began in the American steel industry. In December the United Steelworkers union announced that it would call a strike at the end of that month, when its contract with the steel companies expired. For the next several months the Federal Mediation and Conciliation Service and the Federal Wage Stabilization Board tried to work out a settlement, but without success. On April 4, 1952, the union said that its strike would begin on April 9.

President Harry S. Truman was not about to let a strike hit the steel industry. The nation was engaged in a war in Korea, and steel was needed to produce arms and other military equipment. Only hours before the strike was to begin, Truman issued an executive order commanding Secretary of Commerce Charles Sawyer to seize the nation's steel mills and keep them in operation. Sawyer in turn ordered the mill owners to continue to run their facilities as operators for the United States.

Truman's seizure order cited no statutory authority for his action because there was none. Federal statutes allowed government seizure of industrial plants for certain specified reasons, but the settlement of a labor dispute was not one of them. In fact, the Taft-Hartley Act of 1947 rejected the idea that labor disputes could be resolved by such means. Instead, the act authorized the president to impose an eighty-day cooling-off period as a way to postpone any strike that seriously threatened the public interest. Truman, however, had little regard for the Taft-Hartley Act, which Congress had passed over his veto. The president ignored the cooling-off period alternative and took the direct action of seizing the mills. The authority vested to him as president and commander in chief was enough, in Truman's view, to authorize the action.

Congress might have improved the president's legal ground by immediately passing legislation authorizing such seizures retroactively, but it did not (nor did it take any action to stop the president's seizures). The mill owners complied with the seizure orders under protest and filed suit in federal court to have Truman's action declared unconstitutional. The district court ruled in favor of the steel industry, enjoining the secretary from seizing the plants, but the court of appeals stayed the injunction the same day.

ARGUMENTS:

For the petitioners, Youngstown Sheet & Tube Co. et al.:

- The president's action was inconsistent with and contrary to the remedy Congress expressly provided in the Taft-Hartley Act. There was and could be no valid reason for disregarding the congressional remedy.
- The seizure was not an action taken to meet a sudden national emergency in a situation where no other remedy was available. It was taken with the goal of settling a labor dispute by executive fiat when another remedy was available. Petitioners stand ready to settle the strike in the manner prescribed by Congress.

- The Constitution does not give the president the power to seize the petitioners' property. The seizure cannot be justified by the president's power as commander in chief because that power is limited to a command or executive function. The president's military functions do not cover any power to legislate on the war or related questions.
- If executive action is not authorized by the Constitution or by Congress—as is the case here—it is invalid. There is no place under the Constitution for the concept of inherent powers.

For the respondent, Charles Sawyer, secretary of commerce:

- The president took action, temporary in nature, to meet a critical emergency. In so doing, he acted in the discharge of his constitutional function as chief executive and as commander in chief and of his unique constitutional responsibility for the conduct of foreign affairs. In short, he used his constitutional powers to deal with an emergency situation.
- In addition to the general grant of executive power in Article II, Section 1, and the powers stemming from the commander in chief clause, the president has a duty to "take Care that the Laws be faithfully executed." In *In re Neagle* the Court made clear that this clause is available to the president to justify actions taken in the interests of carrying out national policy and protecting the nation's security.
- American history and case law for 150 years support the conclusion that the president has, as the Court noted in *Hirabayashi,* a "wide scope for the exercise of judgment and discretion" in determining the nature and extent of threats to the United States.
- The Taft-Hartley Act was not intended to be either an exclusive or a mandatory means of dealing with labor disputes that threaten the security of the United States. In the Defense Production Act of 1950, Congress wrote, "It is the intent of Congress, in order to . . . maintain uninterrupted production, that there be effective procedures for the settlement of labor disputes affecting national defense."

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 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 (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. . . .

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. . . . 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.

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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. . . ."

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 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.

The judgment of the District Court is

Affirmed.

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. But, as we approach the question of presidential power, we half overcome mental hazards by recognizing them. The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. 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. 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. . . .

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 . . . 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. . . .

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.

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. . . .

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. . . .

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. . . .

The appeal . . . 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. . . .

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

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 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. . . .

I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

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.

MR. CHIEF JUSTICE VINSON, WITH WHOM MR. JUSTICE REED AND MR. JUSTICE MINTON JOIN, DISSENTING.

The District Court ordered the mills returned to their private owners on the ground that the President's action was beyond his powers under the Constitution.

This Court affirms. . . . Because we cannot agree that affirmance is proper on any ground, and because of the transcending importance of the questions presented not only in this critical litigation, but also to the powers of the President and of future Presidents to act in time of crisis, we are compelled to register this dissent. . . .

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.

Our first President displayed at once the leadership contemplated by the Framers. When the national revenue laws were openly flouted in some sections of Pennsylvania, President Washington, without waiting for a call from the state government, summoned the militia and took decisive steps to secure the faithful execution of the laws. . . .

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 [Franklin] 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. . . .

Focusing now on the situation confronting the President . . . , we cannot but conclude that the President was performing his duty under the Constitution to "take Care that the Laws be faithfully executed." . . .

The absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws . . . has not until today been thought to prevent the President from executing the laws. Unlike . . . the head of 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. This practical construction of the "Take Care" clause [was] adopted by this Court in *In re Neagle* . . . and other cases. . . .

In this case, there is no statute prohibiting the action taken by the President in a matter not merely important, but threatening the very safety of the Nation. Executive inaction in such a situation, courting national disaster, is foreign to the concept of energy and initiative in the Executive as created by the Founding Fathers. . . .

The Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness. . . .

[Yet, the Court says that] [t]he broad executive power granted by Article II to an officer on duty 365 days a year cannot . . . 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. . . .

Presidents have been in the past, and any man worthy of the Office should be in the future, free to take at least interim action necessary to execute legislative programs essential to survival of the Nation. A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must independently determine for itself whether the President was acting, as required by the Constitution, to "take Care that the Laws be faithfully executed."

Youngstown is interesting in at least two regards. First, the justices were sharply divided over the nature of executive power.

Two members of the Court (Douglas and Black) adopted the "mere designation" or enumerated approach, writing, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Three justices (Vinson, Stanley Reed, and Sherman Minton) took the opposite position. In their opinion, the take care clause of Article II provided the president with a sufficient constitutional basis for his actions: he was taking steps that were in the best interest of the country until Congress could act. Jackson's famous concurrence settled somewhere between the two extremes. Although he seems to read the vesting clause of Article II as a mere designation of office, as do Black and Douglas, Jackson concedes that other clauses in Article II can and should be interpreted flexibly to accommodate the modern presidency. But, in contrast to the dissenters, he argued that President Truman could not seize the mills because he had acted against the "implied" desires of Congress. As Jackson puts it, "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." In other words, when the president is at odds with Congress, he must show that he alone has conclusive and exclusive power, and Congress has none (since Congress withdrew whatever it has).

A second interesting point is this: although it is typically the majority opinion that establishes precedent for the nation, in *Youngstown* legal analysts regard Jackson's concurrence as the most important statement coming out of the case. Indeed, some scholars deem it the most important concurrence ever written. The explanation, it seems, is that Jackson provided a useful framework for dealing with presidential power vis-à-vis Congress.