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## The Story of the *Steel Seizure Case*\*

*Youngstown Sheet & Tube & Co. v. Sawyer*, in which the Supreme Court invalidated President Truman's seizure of the nation's steel industry, is perhaps the best known of the Court's presidential power cases. For modern students of constitutional law, the *Steel Seizure* case is typically the framing separation-of-powers case, offered both to illustrate the "formal" and "functional" threads in the Court's decisions and to introduce the Court's approach to questions about the relative powers of the President and Congress in foreign affairs. Some observers regard the *Steel Seizure* case not only as a significant case in the Supreme Court's separation-of-powers canon, but also as a turning point in the Court's handling of politically charged constitutional questions.<sup>1</sup>

When President Truman announced the seizure of the nation's steel industry on April 8, 1952, few could have predicted the steel controversy's legacy. President Truman's action was taken in the midst of the Korean conflict, at a time when high-level military advisers claimed that the United States and its allies were holding the line against the advance of Communism with ammunition rather than soldiers' lives. Past presidents had seized private property—even entire industries—when necessary to preserve wartime production. In this case, moreover, the President and many of his advisers saw no legitimate labor-management dispute, but instead believed that the steel companies were using the specter of a strike to strong-arm the government into raising steel prices. The seizure was a way to maintain steel production while bringing the industry back to the bargaining table, not an opportunity to litigate great and unanswered questions of presidential power.

In the weeks that followed the seizure, however, a series of tactical blunders by the government brought those questions to the fore in district court. Soon, as the government defended the seizure by invoking an extremely broad theory of presidential power, the image of profit-hungry steel companies gave way to the image of a power-hungry President. The pillars of the government's theory were far from novel. Indeed, they had been explicitly propounded or otherwise supported by three of the sitting Justices of the Supreme Court, including two who had served as advisers to President Roosevelt when he faced threatened work stoppages before and

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<sup>1</sup> See Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (1977). Marcus's work remains the definitive treatment of the *Steel Seizure* case. For a collection of more recent reflections on the impact of the *Steel Seizure* case, see *Youngstown at Fifty: A Symposium*, 19 Const. Comm. 1 (2002).

during World War II<sup>2</sup> and one who, as President Truman's Attorney General, had supported a broad conception of "inherent" presidential powers to act in an emergency.<sup>3</sup> But the government's position before the district court was so extreme that even a prompt disavowal could not save the case.

The story of the *Steel Seizure* case provides important context for modern readers who might perceive a chasm between what the decision stands for and what it says. The decision has tremendous rhetorical and symbolic significance in justifying judicial policing of executive action in a range of contexts. Yet as a matter of doctrine, it is difficult to see why the case occupies this position. The decision leaves open a major question about executive power—whether the President can ever claim a nontextual constitutional power to act in an emergency absent, or even contrary to, congressional action. Even the most enduring opinion of the case, Justice Jackson's concurrence, can support both narrow and broad judicial constructions of presidential power.

In resolving the *Steel Seizure* case, the district court and the Supreme Court could have avoided deciding the underlying constitutional question at several turns. That fact is significant. After the executive branch's own actions provoked the district court to forcefully reject the government's claims, the government moderated its claims, thus inviting the Supreme Court to uphold the seizure on narrow factual grounds. The significance of the *Steel Seizure* case lies in part in the fact that the Court chose to forgo this path. Courts now invoke the *Steel Seizure* precedent in the most delicate of cases involving perceived government abuses of power.

In celebrating the *Steel Seizure* case's implications for the judiciary, however, we should not overlook its messages to the political branches, particularly the messages of Justice Jackson's concurrence. The concurrence is famous for the framework it supplies for courts to evaluate presidential power claims—a framework that turns out to be less robust in theory and more malleable in practice than those who celebrate it might prefer. The concurrence's most pointed messages about how to preserve the balance of power between Congress and the President, however, are directed to the political branches. The story of the *Steel Seizure* case holds lessons not only for those who decide separation of powers questions, but also for those who generate them.

### *Factual Background*

#### *The Labor and Price Dispute*

The dispute that precipitated President Truman's seizure of the steel mills was not purely a dispute between labor and management. The United States' involvement in the Korean conflict had produced considerable inflationary pressure. Government price controls were a key

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<sup>2</sup> Justice Robert H. Jackson, of course, served as President Roosevelt's Attorney General. Chief Justice Fred M. Vinson had served, among other positions, as Director of the Office of Economic Stabilization, and in that capacity had filed an affidavit in connection with President Roosevelt's December 1944 seizure of the plants and facilities of Montgomery Ward & Co. I discuss the Montgomery Ward seizure *infra* notes 23-31.

<sup>3</sup> Justice Tom C. Clark served as President Truman's Attorney General before being appointed to the Court. For discussion of his advice to President Truman, see *infra* notes 39, 219.

component of the administration's plan to control those pressures. The Defense Production Act, passed in 1950 to give the President discretionary authority to establish price ceilings on individual goods and services, required the President to stabilize wages in affected industries when he did so.<sup>4</sup> To implement the Act, the President established separate entities to deal with wage and price stabilization issues, the Wage Stabilization Board (WSB) and the Director of Price Stabilization respectively.<sup>5</sup> As of the time of the steel dispute, the President by Executive Order had given the WSB the power to make recommendations to the President when a labor dispute threatened the national defense.<sup>6</sup>

On November 1, 1951, the United Steelworkers of America, C.I.O., provided notice of its intent to seek a new contract for its members. The union believed that, despite government price controls, the steel industry was operating at a high level of profits. The union therefore sought a substantial package of wage and benefit changes as well as a union shop in the steel mills. Almost immediately, the steel companies indicated that they would not grant a wage increase without a price increase.<sup>7</sup> The United States, meanwhile, refused to provide the steel companies any assurances that they would receive a price increase. Under the administration's approach to such cases, the Director of Price Stabilization would grant a price increase only under its existing formula, which tied price increases to the industry's profit level over a period of years.<sup>8</sup>

From the start, then, the steel dispute's awkward trilateral posture hampered productive negotiations between the union and the companies. The steel companies refused to make an offer to the union.<sup>9</sup> As the December 31 contract expiration approached and the threat of a strike loomed, President Truman referred the dispute to the WSB to recommend a settlement.<sup>10</sup> The WSB's recommendations would not be binding on the parties, but they would be submitted to the President for further action. While the WSB considered the wage issue, the Office of Price Stabilization considered whether the steel industry would be entitled to price relief. The union, meanwhile, postponed its threatened strike.

The WSB recommended a package of wage and benefit measures to the President on March 20, over the objection of the industry members of the Board. Over the next two weeks, government officials attempted to work out a package of wages and benefits that would satisfy the union as well as a price adjustment that would satisfy the steel companies. Just days before the threatened strike, however, the steel companies and the government remained far apart. The average price of steel stood at approximately \$110 per ton.<sup>11</sup> The Office of Price Stabilization

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<sup>4</sup> Defense Production Act of 1950, ch. 932, § 402(b), 64 Stat. 798, 803.

<sup>5</sup> Exec. Ord. 10,161, 3 C.F.R. 339 (1949-1953).

<sup>6</sup> Exec. Ord. 10,233, 3 C.F.R. 743 (1949-1953).

<sup>7</sup> A.H. Raskin, *Steel Puts Pay Rise Up to Government*, N.Y. Times, Nov. 16, 1951, at 17.

<sup>8</sup> More specifically, under the "industry earnings standard," OPS would increase a price ceiling only when an industry could not absorb cost increases without reducing its earnings below 85 percent of the three best years of the 1946-1949 period. See Office of Price Stabilization, Price Operations Memorandum No. 25 (Feb. 15, 1952) (discussing industry earnings standard announced on April 21, 1951) (on file with author); see also James A. Durham, *The Present Status of Price Control Authority*, 52 Colum. L. Rev. 868, 873 (1952).

<sup>9</sup> Marcus, *supra* note 1, at 59.

<sup>10</sup> Statement by the President on the Labor Dispute in the Steel Industry, 1951 Pub. Papers 651 (Dec. 22, 1951).

<sup>11</sup> *Wilson Declares Steel Plan Blow to Stabilization*, N.Y. Times, Mar. 25, 1952, at 1.

wished to grant the steel industry a price increase of about \$3 per ton, while the steel companies claimed that only an increase of \$12 a ton would offset the increased labor costs.<sup>12</sup>

Throughout the dispute, the union had agreed that it would provide a least 96 hours' notice of a strike, to enable the industry to bank its furnaces. On April 4, the union affirmed that a strike would begin at 12:01 a.m. on April 9, and the steel companies began the process of shutting down the mills.

### *The Seizure Decision*

As the strike loomed, the White House considered its options for maintaining an uninterrupted supply of steel for U.S. military efforts in Korea. The problem of how to prevent a threatened work stoppage from interfering with defense efforts was not a new one. In 1917 alone, the year the United States entered World War I, more than one million workers engaged in more than 4,000 strikes.<sup>13</sup> The federal government intervened when strikes threatened output in major industries, mainly by creating sector-specific boards to mediate disputes. Because the boards could neither compel the parties to submit to their jurisdiction nor bind the parties to accept a particular resolution, they were often ineffective in resolving disputes short of a strike. Immediately before and during the war, Congress passed statutes granting the President seizure authority in limited circumstances.<sup>14</sup> President Wilson seized numerous businesses throughout the war, sometimes citing specific statutory authority and sometimes citing the Constitution and laws of the United States.<sup>15</sup>

On the eve of U.S. involvement in World War II, President Roosevelt sought to prevent strikes by extracting a no-strike/no-lockout pledge from industry and labor leaders and by creating agencies—in this case, national and regional rather than sector-specific—to resolve disputes.<sup>16</sup> As in World War I, when such efforts failed, the government resorted to seizure to prevent labor disputes from disrupting war production. The first seizure episode occurred six months before the attack on Pearl Harbor. The dispute concerned the North American Aviation plant in Inglewood, California. The plant produced one-fifth of the nation's military airplanes, and the U.S. and British militaries had placed \$200 million worth of orders with the plant. After a strike closed the plant in early June of 1941, the government considered how to ensure that its orders would be fulfilled. National union leaders claimed that the strike was called by local union leaders without their approval and that the strike reflected the maneuvering of the Communist Party.<sup>17</sup> At the time, no statute spoke directly to how the government could respond

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<sup>12</sup> Marcus, *supra* note 1, at 73-74.

<sup>13</sup> Melvyn Dubofsky & Foster Rhea Dulles, *Labor in America: A History* 82-86 (7th ed. 2004) (1949).

<sup>14</sup> In one such statute, the Army Appropriations Act of 1916, Congress authorized the President to take control of any system of transportation necessary to move troops or equipment. Act of Aug. 29, 1916, ch. 418, 39 Stat. 619, 645. In December 1917, President Wilson relied on this statute to place major railroads—then beset by numerous strikes—under federal control. Pres. Procl. of Dec. 26, 1917, 40 Stat. 1733. Congress specifically ratified the President's action the following year. Act of Mar. 21, 1918, ch. 25, 40 Stat. 451, 451.

<sup>15</sup> The seizures are catalogued in Appendix II to Justice Frankfurter's opinion in the *Steel Seizure* case. 343 U.S. 579, 620-21 (Frankfurter, J., concurring).

<sup>16</sup> E.g., Exec. Ord. 8716, § (2), 6 Fed. Reg. 1532 (1941) (creating National Defense Mediation Board); Exec. Ord. 9017, 7 Fed. Reg. 237 (1942) (creating National War Labor Board).

<sup>17</sup> *Text of Frankenstein's Declaration on Aviation Strike*, N.Y. Times, June 8, 1941, at 37.

to threatened unrest in a vital defense industry. President Roosevelt issued an Executive Order directing the Secretary of War to take charge of the plant,<sup>18</sup> and the striking workers yielded to 2,500 federal troops.<sup>19</sup>

Following issuance of the Executive Order, Robert H. Jackson, then serving as President Roosevelt's Attorney General, opined as follows on the legality of the Order:

The Presidential proclamation rests upon the aggregate of the Presidential powers derived from the Constitution itself and from statutes enacted by Congress.

The Constitution lays upon the President the duty "to take care that the laws be faithfully executed." Among the laws which he is required to find means to execute are those which direct him to equip an enlarged Army, to provide for a strengthened Navy, to protect Government property, to protect those who are engaged in carrying out the business of the Government, and to carry out the provisions of the Lease-Lend Act. For the faithful execution of such laws the President has back of him not only each general law enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.

The Constitution also places on the President the responsibility and vests in him the powers of Commander in Chief of the Army and of the Navy. These weapons for the protection of the continued existence of the nation are placed in his sole command and the implication is clear that he should not allow them to become paralyzed by failure to obtain supplies for which Congress has appropriated the money and which it has directed the President to obtain.

The situation at the North American plant more nearly resembles an insurrection than a labor strike. The President's proclamation recites the persistent defiance of Governmental efforts to mediate any legitimate labor differences. The distinction between loyal labor leaders and those who are following the Communist Party line is easy to observe. Loyal labor leaders fight for a settlement of labor grievances. Disloyal men who have wormed their way into the labor movement do not want settlements; they want strikes. That is the Communist Party line which those who have defied both the Government and their own loyal leaders to prevent a settlement of the strike have followed. There can be no doubt that the duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the Defense effort of the United States a going concern.<sup>20</sup>

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<sup>18</sup> Exec. Ord. 8773, 6 Fed. Reg. 2777 (1941).

<sup>19</sup> Foster Hailey, *Bayonets on Coast*, N.Y. Times, June 10, 1941, at 1.

<sup>20</sup> Statement of Attorney General Robert H. Jackson, June 9, 1941. This statement was excerpted in the major newspapers. See, e.g., Louis Stark, *Roosevelt Explains Seizure; Jackson Cites Insurrection*, N.Y. Times, June 10, 1941, at 1, 16. The full statement appears in the district court record in the *Montgomery Ward* case, accompanied by a letter from the Assistant Solicitor General indicating that the Department of Justice considered the statement to constitute an opinion of the Attorney General. Letter of Jan. 12, 1945, from Hugh B. Cox, Assistant Solicitor General, to Al Woll, United States Attorney, *United States v. Montgomery Ward & Co.*, No. 44 C 1611; Box No.

The North American Aviation seizure, and in particular its reliance on the President's constitutional authority, would become an important precedent for subsequent seizures. Although the government invoked no specific statute in the North American Aviation seizure in 1941, between 1940 and 1944 Congress passed several laws authorizing seizures in a variety of circumstances. The most significant of these was the War Labor Disputes Act, passed in June 1943 over President Roosevelt's veto. The statute authorized the President to take over plants in which labor disputes threatened to disrupt war production.<sup>21</sup> President Roosevelt invoked this authority to seize more than 40 businesses throughout World War II.<sup>22</sup>

President Roosevelt also seized plants when application of the War Labor Disputes Act was highly questionable, and arguments regarding the President's *constitutional* powers figured prominently in those disputes. Among the more notable seizures was the seizure of the Chicago offices of Montgomery Ward & Co. in April 1944 by U.S. Army troops, four months into a nationwide strike by the company's 12,000 workers. Montgomery Ward had refused to comply with a War Labor Board order to recognize the United Retail, Wholesale and Department Store Union and institute the terms of a collective bargaining agreement. The Executive Order directing the seizure cited no statutory authority.<sup>23</sup> Eight months later, when Montgomery Ward continued to refuse to recognize the union, President Roosevelt issued an Executive Order seizing all of Montgomery Ward's property nationwide, citing the War Labor Disputes Act as well as his power under the Constitution as Commander in Chief.<sup>24</sup>

The seizure was legally questionable because, by its terms, the War Labor Disputes Act authorized seizure of "any plant, mine, or facility *equipped for the manufacture, production, or mining* of any articles or materials which may be required for the war effort or which may be useful in connection therewith."<sup>25</sup> Montgomery Ward was a retail and mail order business and therefore claimed that it was not "equipped" for "manufacture, production, or mining." The day after the President issued the Executive Order, the United States filed suit in federal district court seeking a declaratory judgment that the seizure was proper and moved for a preliminary injunction prohibiting the company from interfering with its possession. In addition to arguing that the term "production" in the War Labor Disputes Act should be broadly construed to encompass Montgomery Ward's business, the government argued that the President had inherent constitutional authority to seize the company's property.<sup>26</sup> Fred M. Vinson, who would serve as

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899; Civil Action Files; U.S. District Court for the Northern District of Illinois (N.D. Ill.); Records of District Courts of the United States, Record Group 21 (RG 21); National Archives and Records Administration—Great Lakes Region (Chicago) (NARA—Chicago).

<sup>21</sup> See War Labor Disputes Act, § 3, Pub. L. No. 89, 57 Stat. 163, 164 (1943).

<sup>22</sup> The seizures are catalogued in Appendix II to Justice Frankfurter's opinion in the *Steel Seizure* case. 343 U.S. 579, 622-26 (Frankfurter, J., concurring).

<sup>23</sup> Exec. Ord. 9438, 9 Fed. Reg. 4459 (1944).

<sup>24</sup> Exec. Ord. 9508, 9 Fed. Reg. 15079 (1944).

<sup>25</sup> War Labor Disputes Act § 3, 57 Stat. at 164 (emphasis added).

<sup>26</sup> Brief for the United States in Support of its Motion for a Temporary Injunction at 48, *United States v. Montgomery Ward & Co.*, No. 44 C 1611; Box No. 899; Civil Action Files; N.D. Ill.; RG 21; NARA—Chicago.

Chief Justice when the Court heard the *Steel Seizure* case, was then Director of Economic Stabilization and filed an affidavit in the case.<sup>27</sup>

The district court rejected the government's statutory and constitutional arguments and directed the return of the company's property.<sup>28</sup> On appeal, however, the U.S. Court of Appeals for the Seventh Circuit reversed the district court on the statutory interpretation question<sup>29</sup> and declined to address the constitutional question.<sup>30</sup> In 1945, President Truman ended the seizure and the Supreme Court dismissed a pending appeal as moot.<sup>31</sup>

The legal landscape changed significantly after the end of World War II. Fueled in part by public hostility to the wave of strikes that followed World War II, the congressional elections of 1946 brought an end to the stronghold of Roosevelt New Deal Democrats. In June 1947, Congress adopted the Labor Management Relations Act, also known as the Taft-Hartley Act, which reduced the power of unions. The seizure provisions of the War Labor Disputes Act were to expire of their own force on June 30, 1947, six months after President Truman proclaimed the cessation of hostilities of World War II.<sup>32</sup> The Taft-Hartley Act took a different approach to the problem of strikes that threatened defense industries. Rather than authorizing seizure, the statute permitted the President to appoint a board of inquiry when he believed that a threatened strike would "imperil the national health or safety."<sup>33</sup> Once the board issued its report, the Attorney General could petition a federal district court to enjoin a strike for a period of 80 days.<sup>34</sup> Congress supplemented those provisions in 1948 with an amendment to the Selective Service Act. The amendment permitted the President to take possession of facilities that failed to fill orders placed by the government for goods required for national defense purposes.<sup>35</sup> In addition, in 1951, Congress amended the Defense Production Act to authorize the President to institute condemnation proceedings to requisition property when needed for the national defense.<sup>36</sup>

The legal and political landscape facing President Truman and his advisers at the time the steel crisis was thus complex. On the one hand, multiple Presidents had seized property for defense efforts, sometimes under specific statutory authority, sometimes with questionable interpretations of existing statutes, and on occasion with no claim of statutory authority

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<sup>27</sup> Affidavit No. 8, *United States v. Montgomery Ward & Co.*, No. 44 C 1611; Box No. 899; Civil Action Files; N.D. Ill.; RG21; NARA—Chicago.

<sup>28</sup> *United States v. Montgomery Ward & Co.*, 57 F. Supp. 408 (N.D. Ill. 1945).

<sup>29</sup> *United States v. Montgomery Ward & Co.*, 150 F.2d 369 (7th Cir. 1945). The court reasoned that the word "production," although undefined in the War Labor Disputes Act, should be construed in the same manner as the term "production" under the Fair Labor Standards Act. Under that statute, production is defined as "produced, manufactured, mined, handled, or in any other manner worked on in any State," and the court concluded that the definition was broad enough to encompass transportation of products. *Id.* at 377.

<sup>30</sup> *Id.* at 382.

<sup>31</sup> *Montgomery Ward & Co. v. United States*, 326 U.S. 690 (1945).

<sup>32</sup> See War Labor Disputes Act, Pub. L. No. 89, § 10, 57 Stat. 163, 168 (1943); 3 CFR 77 (1946 Supp.) (proclaiming on December 31, 1946, the termination of hostilities of World War II).

<sup>33</sup> Labor Management Relations Act, ch. 120, § 206, 61 Stat. 136, 155 (1947).

<sup>34</sup> *Id.* §§ 208-210, 61 Stat. at 155-56.

<sup>35</sup> Selective Service Act of 1948, ch. 625, § 18(a), 62 Stat. 604, 626.

<sup>36</sup> See Defense Production Act of 1950, ch. 932, § 201(a), 64 Stat. 798, 799-800 (authorizing President to requisition property); Amendments to Defense Production Act of 1950, ch. 275, § 102, 65 Stat. 131, 132 (requiring President to institute condemnation proceedings to obtain real property).

whatsoever. On the other hand, the legal framework had changed significantly over time. The World War I patchwork of sector-specific responses to labor unrest had given way to the more comprehensive regulation of labor-management relations. And although the post-World War II amendments to the labor laws tended to shift the balance back towards management, the severe anti-strike provisions of the War Labor Disputes Act had expired. The Taft-Hartley Act authorized injunctions to ward off strikes but omitted any mention of seizure authority. That injunction mechanism was supplemented only by the fairly narrow provisions of the Selective Service Act addressing government orders and the condemnation provisions of the Defense Production Act.

Against this backdrop, President Truman's options were limited.<sup>37</sup> He had already referred the dispute to the Wage Stabilization Board, and union members had continued to work since December 31 without a contract. By the time the WSB issued its report on March 20, the union had postponed its strike for 80 days—all that could have been achieved under the Taft-Hartley Act. Congress had passed the Taft-Hartley Act over President Truman's veto and he and was therefore hostile to invoking it; moreover, numerous advisers perceived invoking it in these circumstances to be grossly unfair to the union, as to which the government had already achieved the full relief to which it was entitled.<sup>38</sup>

In short, the President's advisers could identify no statute clearly supporting the President's authority to intervene in operation of the steel mills so as to prevent a curtailment of steel production. On the question of what powers the President might have under the Constitution, President Truman's legal advisers apparently gave mixed advice. In 1949, then-Attorney General Tom C. Clark had written of a President's "inherent" powers to act in an emergency—powers that he characterized as "exceedingly great."<sup>39</sup> Advisers could cite instances involving presidential seizure of businesses, some under statutory authority and a handful involving questionable interpretations of statutes or no statutory authority. But no court had directly addressed the scope of the President's constitutional powers to seize and operate a private business—except perhaps the district court in *Montgomery Ward*, which had cast doubt upon the legality of such action and which the Court of Appeals had reversed on statutory rather than constitutional grounds.

President Truman announced his decision to the nation in a radio address at 10:30 pm on April 8, 1952. The President stated that he had ordered Secretary of Commerce Charles Sawyer to operate the steel mills on behalf of the government of the United States. The Executive Order itself claimed that "steel is an indispensable component of substantially all" of the weapons and other materials needed by U.S. and other armed forces, that steel is "likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts," and that a "continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends."<sup>40</sup>

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<sup>37</sup> For discussion of the advice President Truman received, see Marcus, *supra* note 1, at 74-80.

<sup>38</sup> *Id.* at 75-76.

<sup>39</sup> Hearings on S. 249 Before the S. Comm. on Labor and Public Welfare, 81st Cong., 1st Sess. 232 (1949); *see also* Marcus, *supra* note 1, at 338 n.51 (discussing Clark's support for President's inherent powers).

<sup>40</sup> Exec. Ord. 10,340, 17 Fed. Reg. 3139 (1952).

The President's speech, however, went considerably beyond the terms of the order. The President rebuked the steel companies for demanding a significant price increase. He argued that stabilization formulas had been applied to the dispute and accepted by the union, but that the steel companies were using the threatened work stoppage to extort a substantial profit, at the expense of economic stability. The President described the companies' position as "about the most outrageous thing I ever heard of. They not only want to raise their prices to cover any wage increase; they want to double their money on the deal."<sup>41</sup>

Within an hour of the President's address, lawyers for two of the major steel companies, Youngstown Sheet & Tube and Republic Steel Corporation, arrived at the home of Judge Bastian of the U.S. District Court for the District of Columbia to request a temporary restraining order barring Secretary Sawyer from carrying out the President's Executive Order. Judge Bastian declined to grant the order without notice to the government and directed the lawyers to provide such notice at 9:00 am the following day and appear in court for a hearing at 11:30 am.<sup>42</sup>

As the legal proceedings began the following day, President Truman sent the first of two messages to Congress concerning the steel seizure. After explaining the reasons for his action, he 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.<sup>43</sup>

Twelve days later, the President reiterated his position in a letter to the President of the Senate: "The Congress can, if it wishes, reject the course of action I have followed in this matter."<sup>44</sup>

### *The District Court Proceedings*

Lawyers for Youngstown Sheet & Tube and Republic Steel, along with lawyers for five other major steel companies, appeared at 11:30 am on April 9 before Judge Alexander Holtzoff, who was assigned to hear motions that day.<sup>45</sup> Because the steel companies sought temporary restraining orders, they had to demonstrate not only that they would likely succeed on the merits, but also that the government's actions would lead to immediate and irreparable injury and that

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<sup>41</sup> Press Release of April 8, 1952, at 4, reprinted in *The Constitutional Crisis over President Truman's Seizure of the Steel Industry in 1952*, 30 Documentary History of the Truman Presidency 109, 112 (Dennis Merrill, ed.) (2001).

<sup>42</sup> Marcus, *supra* note 1, at 102.

<sup>43</sup> H.R. Doc. No. 82-422 (1952), reprinted in 1952 U.S.C.C.A.N. 883.

<sup>44</sup> Cong. Rec., Apr. 21, 1952, p. 4192.

<sup>45</sup> Transcript of Hearing of April 9, 1952, before Judge Holtzoff [hereinafter Holtzoff Hearing], in Transcript of Record, *Youngstown Sheet & Tube Co. v. Sawyer*, Nos. 744 & 745, at 217, available in U.S. Supreme Court Records and Briefs, 1832-1978 (Thomson Gale Doc. No. DW3901733850) [hereinafter Transcript of Record].

the steel companies would have no adequate remedy at law. Proving immediate and irreparable injury was going to be difficult. The Executive Order stated that, despite the plants being under the direction of the Secretary of Commerce, “the managements of the plants, facilities, and other properties . . . shall continue their functions.”<sup>46</sup> The Secretary of Commerce had sent telegrams designating the President of each steel company covered by the order an “Operating Manager” for the United States. The telegrams directed each President “to continue operations for the United States” and required all officers and employees “to perform their usual functions and duties in connection with plant and office operation, and sale and distribution of products.”<sup>47</sup> In other words, business would proceed as usual, except that the companies would fly the flag of the United States and post a notice of the United States’ possession.<sup>48</sup>

If the seizure meant only that the steel companies’ plants and facilities would fly the flag of the United States, then it was difficult to see how the companies would suffer irreparable injury. In the hearing before Judge Holtzoff, the companies argued principally that the government would alter the terms of employment and then require the steel companies to accept the new terms as a condition of the return of the companies’ property. The companies’ argument thus rested on a provision of the Executive Order, not yet invoked, empowering the Secretary of Commerce to “determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated.”<sup>49</sup> The companies pointed out that the government had taken precisely this course in connection with its seizures of the coal industry in 1943 and 1945. Judge Holtzoff, however, viewed the mere possibility that the government would displace management or supersede its control over labor relations as insufficient to demonstrate immediate and irreparable injury. His brief opinion denied temporary relief but noted that the steel companies could renew their applications if circumstances changed.<sup>50</sup>

The occasion for the plaintiffs to renew their applications for preliminary relief arrived within ten days. On April 18, Secretary Sawyer announced that he would examine the terms of employment in the steel industry<sup>51</sup>—an announcement amplified two days later by his public statement that there would “certainly” be “some” wage increases.<sup>52</sup> Since April 10, Youngstown and Republic Steel had supplemented their complaints with motions for preliminary injunctions, and the other steel companies, including Bethlehem Steel, United States Steel, Armco Steel, and E.J. Lavino & Co., had also filed complaints. The task of considering the preliminary injunction motions fell to Judge David A. Pine, who set a hearing for April 24, 1952. Before the steel companies filed memoranda supporting their motions for preliminary injunctions, the Justice Department filed a memorandum of law in opposition. The steel companies filed responsive memoranda supporting the motion on the morning of the district court hearing.

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<sup>46</sup> Exec. Ord. 10,340, par. 3, 17 Fed. Reg. 3139 (1952).

<sup>47</sup> Telegram from Charles Sawyer, Attachment to Defendant’s Opposition to Plaintiff’s Motion for a Preliminary Injunction, *in* Transcript of Record, *supra* note 45, at 21.

<sup>48</sup> *Id.*

<sup>49</sup> Exec. Ord. 10,340, par. 3, 17 Fed. Reg. 3139 (1952).

<sup>50</sup> Holtzoff Hearing, *supra* note 45, at 265.

<sup>51</sup> *Sawyer Says He Will Order Steel Pay Boosts Next Week Unless Accord Is Reached*, Wall St. J., Apr. 19, 1952, at 2.

<sup>52</sup> *Steel Union To Get Raise, Sawyer Says*, Wash. Post, Apr. 21, 1952, at 1.

When the hearing arrived, the steel companies apparently perceived that they would be fighting an uphill battle, and that Judge Pine was unlikely to focus on the merits of the seizure itself, let alone to enjoin it. The companies' strategy was to steer Judge Pine toward a moderate course of action: that of enjoining changes to the terms and conditions of employment and thus protecting the companies' interests without ruling against the government on the ultimate question of the seizure's legality. The six attorneys who planned to argue on behalf of the large steel companies<sup>53</sup> at the April 24 hearing had divided the issues, with some focusing on the propriety of granting equitable relief and others focusing on the purported legal basis for the seizure. The steel companies opened with an argument by Theodore Kiendl, representing the United States Steel Company. Rather than addressing the purported legal basis for the seizure, Kiendl moved directly to whether the steel companies would have an adequate remedy at law in the absence of injunctive relief and whether the injury claimed by the steel companies was in fact immediate and irreparable.<sup>54</sup> The claim as to the immediacy of the injury again rested on the possibility—now more concrete in view of Secretary Sawyer's public statements—that the government would change the terms and conditions of employment. In light of this claimed injury, Kiendl stated that his client sought a preliminary injunction against the Secretary of Commerce's *threatened change in the terms of employment* rather than a preliminary injunction against the government's *possession of the steel mills*.<sup>55</sup> The strategy here seems clear, and it is difficult to believe that it had not been embraced by all of the steel companies: The companies sought to offer Judge Pine a middle course—a way to protect the companies' interests without ruling against the government on the underlying constitutional issue.

Judge Pine was surprised by the limited nature of the requested relief. He could not fathom why the steel companies would seek a preliminary ruling on the legality of the seizure but request an injunction that would perpetuate the claimed illegality—that is, Sawyer's continuing possession and control of the property.<sup>56</sup> As the steel companies' lawyers began to recognize the significance of the judge's skepticism about Kiendl's position, they quickly broke ranks with Keindl and shifted strategy. When Judge Pine began polling the other parties concerning the relief they sought, Bruce Bromley, the lawyer for Bethlehem Steel, was the first to respond. Bethlehem Steel, he said, wanted “the whole hog”<sup>57</sup>—a preliminary injunction against the government's continued possession of its mills. When Judge Pine asked Youngstown's counsel, “If you should convince me of [the illegality of the seizure], you wouldn't want me to perpetuate the illegality, would you?,” counsel responded, “I never look a

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<sup>53</sup> The six large steel companies included United States Steel, Bethlehem Steel, Republic Steel, Armco, Jones & Laughlin, and Youngstown. These companies claimed to account for approximately 70 percent of the steel industry. Transcript of Proceedings, Motion for Preliminary Injunction, Youngstown Sheet & Tube v. Sawyer, Civ. Action No. 1550-52, in Transcript of Record, *supra* note 45, at 291 [hereinafter Preliminary Injunction Hearing]. E.J. Lavino & Co. was also a party to the case and argued in the district court. In addition to the general arguments about the legality of the government's actions, E.J. Lavino & Co. also argued that it was not engaged in manufacturing steel and should not have been subject to the Executive Order or the implementing order issued by the Secretary of Commerce. *Id.* at 421.

<sup>54</sup> *Id.* at 285.

<sup>55</sup> *Id.* at 311.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 313.

gift horse in the face, Your Honor.”<sup>58</sup> Ultimately, Kiendl was alone in arguing that the court need not consider whether to enjoin the government’s continued possession of the mills.

Judge Pine’s focus on the underlying legality of the seizure exposed a significant misstep on the government’s part. Recall that the government filed its brief opposing the preliminary injunction motion first, despite the fact that the government was the non-moving party. As the non-moving party, the government should have tried to emphasize the equities surrounding the grant of preliminary relief rather than on the legality of the seizure. The government’s brief, however, devoted over forty-five pages to the question of the President’s constitutional authority to order the seizure of the mills—more than twice what it devoted to all of the equity issues combined.<sup>59</sup>

The government’s ability to marshal a full argument on the question of presidential power in the short period of time between the filing of the plaintiffs’ complaint and the filing of its memorandum of law was likely attributable to the litigation in the *Montgomery Ward* case. The government was the plaintiff and the moving party in *Montgomery Ward*, and it had fully briefed the question of the President’s constitutional authority to seize private property in wartime at the district court,<sup>60</sup> in a petition for a writ of certiorari prior to judgment in the court of appeals,<sup>61</sup> and in the court of appeals.<sup>62</sup> Although the *Montgomery Ward* case involved a statutory issue not present in the *Steel Seizure* case—whether Montgomery Ward was engaged in “production” for purposes of the War Labor Disputes Act—the government had defended the seizure on constitutional grounds as well. The government’s brief in the *Steel Seizure* case simply replicated these constitutional arguments, with some organizational changes.<sup>63</sup>

The government’s posture as plaintiff in *Montgomery Ward* and defendant in the *Steel Seizure* case, however, made that strategy highly questionable. As plaintiff in *Montgomery Ward*

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<sup>58</sup> *Id.* at 315.

<sup>59</sup> Compare Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 25-69, *Youngstown Sheet & Tube v. Sawyer*, No. 1550-52, Box. No. 1160; Civil Action Files; U.S. District Court for the District of Columbia (D.D.C.); Records of the District Courts of the United States, Record Group 21 (RG21); National Archives Building, Washington D.C. (NAB), *with id.* at 7-24.

<sup>60</sup> See Brief for the United States in Support of its Motion for a Temporary Injunction, *United States v. Montgomery Ward & Co.*, No. 44 C 1611; Box No. 899; Civil Action Files; N.D. Ill.; RG21; NARA—Chicago.

<sup>61</sup> Petition for Writ of Certiorari at 21-27, *United States v. Montgomery Ward*, 324 U.S. 858 (1945), No. 949.

<sup>62</sup> The available files on the *Montgomery Ward* case do not contain the government’s brief before the court of appeals, but the fact that the government focused heavily on that issue is apparent both from the court of appeals decision, *United States v. Montgomery Ward*, 150 F.2d 369, 381 (1945) (noting that the government advanced its constitutional arguments “even more elaborately than the point on which we rest our decision”), and from *Montgomery Ward’s* petition for a writ of certiorari after the court of appeals decision, *Petition for a Writ of Certiorari* at 21-23, *Montgomery Ward v. United States*, 326 U.S. 690 (1945), No. 408.

<sup>63</sup> Stanley Temko, who was among U.S. Steel’s attorneys during the *Steel Seizure* case, has suggested that the government largely copied its *Montgomery Ward* court of appeals brief into its district court brief in the *Steel Seizure* case. See President Truman and the Steel Seizure Case: A 50-Year Retrospective, 42 *Duq. L. Rev.* 685, 699 (2003); see also Marcus, *supra* note 1, at 302-03 n.51. The absence of the court of appeals brief from the available *Montgomery Ward* files makes it difficult to confirm the extent of this claim. Archival research does, however, confirm the government’s heavy reliance on the *Montgomery Ward* materials. Compare Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 25-57, *Youngstown Sheet & Tube v. Sawyer*, No. 1550-52, *with* Brief for the United States in Support of its Motion for a Temporary Injunction at 48-58, 63-66, *United States v. Montgomery Ward & Co.*, No. 44 C 1611.

seeking a declaratory judgment that its seizure action was proper, and as the movant for preliminary injunctive relief rather than the party opposing it, the government in *Montgomery Ward* necessarily would have sought to direct the court's attention to its central contentions about the legality of the Executive Order rather than the other equitable factors involved. As the non-moving party in the *Steel Seizure* case, however, the government should have sought to direct the court's attention to the inappropriateness of preliminary injunctive relief on the facts of that particular case.<sup>64</sup> The government's tactical error both allowed the steel companies to use their own memoranda of law to engage the government on the merits more fully than otherwise would have been possible and drew Judge Pine's attention squarely to that issue.

When the government finally took to the podium late in the afternoon of April 24, the task of arguing on behalf of the Secretary of Commerce fell to Holmes Baldrige, Assistant Attorney General for the Claims Division (now known as the Civil Division) of the Department of Justice. The government tried unsuccessfully to shift the court's focus back to questions surrounding the propriety of granting injunctive relief, arguing both that the steel companies had an adequate remedy at law and that the balance of equities favored the government. Judge Pine, however, quickly brought Baldrige back to the merits. Baldrige initially described the government's position as follows:

Mr. Baldrige: We say that when an emergency situation in this country arises that is of such importance to the entire welfare of the country that something has to be done about it and has to be done now, and there is no statutory provision for handling the matter, that it is the duty of the Executive to step in and protect the national security and the national interests. We say that Article II of the Constitution, [which] provides that the Executive power of the Government shall reside in the President, that he shall faithfully execute the laws of the office and he shall be Commander-in-Chief of the Army and of the Navy and that he shall take care that the laws be faithfully executed, are sufficient to permit him to meet any national emergency that might arise, be it peace time, technical war time, or actual war time.<sup>65</sup>

Although this starting point was not far from the government's past arguments in relation to specific seizure episodes such as the North American Aviation incident or the Montgomery Ward incident, Judge Pine's highly critical questioning led Baldrige into statements from which the government would never recover, either in court or in the press:

The Court: So you contend the Executive has unlimited power in time of an emergency?

Mr. Baldrige: He has the power to take such action as is necessary to meet the emergency.

The Court: If the emergency is great, it is unlimited, is it?

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<sup>64</sup> Marcus reaches a similar conclusion. See Marcus, *supra* note 1, at 111.

<sup>65</sup> Preliminary Injunction Hearing, *supra* note 53, at 371.

Mr. Baldrige: I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment.

The Court: Then, as I understand it, you claim that in time of emergency the Executive has this great power.

Mr. Baldrige: That is correct.

The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.

Mr. Baldrige: That is correct.<sup>66</sup>

Asked for “any case that sustains such a position as that,”<sup>67</sup> Baldrige sought to rest on past instances of executive seizures in the absence of statutory authorization. Judge Pine rejected the relevance of executive practice in the absence of judicial interference, arguing that “[t]he fact that a man reaches in your pocket and steals your wallet is not a precedent for making that a valid act.”<sup>68</sup> The court recessed for the day and asked the government to be prepared to provide such authority the following morning.

The following morning, the district court’s pointed questioning of the government’s position continued unabated:

The Court: . . . Supposing the President should declare that the public interest required the seizure of your home and directed an agent to seize it and to dispossess you: Do you think or do you contend that the court could not restrain that act because the President had declared an emergency and because he had directed an agent to carry out his will?

Mr. Baldrige: I would rather, Your Honor, not answer a case in that extremity. We are dealing here with a situation involving a grave national emergency. . . . I do not believe any President would exercise such unusual power unless, in his opinion, there was a grave and an extreme national emergency existing. . . .<sup>69</sup>

In response to further questioning, Baldrige asserted that the Constitution distinguishes between the legislative and executive branches by enumerating only specific powers that Congress can exercise but vesting all executive power in the President. Judge Pine was astounded by the breadth of the government’s argument: “So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution [and] limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?” When Baldrige confirmed that “[t]hat is the way we read Article II of

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<sup>66</sup> *Id.* at 371-72.

<sup>67</sup> *Id.* at 372.

<sup>68</sup> *Id.* at 372-73.

<sup>69</sup> *Id.* at 376

the Constitution, Judge Pine observed that “I have never heard that view expressed in any authoritative opinion of any court.”<sup>70</sup>

The public reaction to the government’s claims was swift and negative. President Truman disavowed the claims almost immediately,<sup>71</sup> and the government submitted a supplemental memorandum “clarifying” its position in light of “misunderstandings which may have arisen during the course of oral argument”: “[T]he President possesses the constitutional power and duty to take action in a grave national emergency such as existed here. Beyond this, of course, we do not go.”<sup>72</sup>

The memorandum, filed on April 29, 1952, could not undo the damage. The district court issued its opinion in the case the same day. The court focused first on whether the seizure was authorized by law. Unsurprisingly, the court’s opinion on this point was a scathing indictment of the government’s theory of presidential power. The court concluded that the Constitution did not grant the President the authority “to take such action as he may deem to be necessary . . . whenever in his opinion an emergency exists requiring him to do so in the public interest.”<sup>73</sup> After canvassing the cases cited by the government and concluding that all involved the President’s exercise of authority under specific statutes, the court responded to the argument that past executive practice supported the legality of the President’s action:

[I]t is difficult to follow [the] argument that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition clothe a later unauthorized act with the cloak of legality. Apparently, according to [this] theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree.<sup>74</sup>

The court concluded its discussion of executive power by noting the “utter and complete lack of authoritative support for defendant’s position.”<sup>75</sup> The court then analyzed the equities and held that they weighed in favor of granting the injunction. The court observed that it was unwilling to issue the more limited injunction proposed by United States Steel because of its “stultifying implications”: “I could not consistently issue such an injunction which would contemplate a possible basis for the validity of defendant’s acts.”<sup>76</sup> The court thus invited United States Steel to withdraw its request for limited relief and request the same injunction issued as to the other plaintiffs. On the morning of Wednesday, April 30, the court signed the injunction, as to all plaintiffs, and denied the government’s request for a stay pending appeal.

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<sup>70</sup> *Id.* at 376-78.

<sup>71</sup> See Letter of April 27, 1952, from President Truman to C.S. Jones at 3, reprinted in *The Constitutional Crisis over President Truman’s Seizure of the Steel Industry in 1952*, 30 Documentary History of the Truman Presidency 190, 192 (Dennis Merrill, ed.) (2001) (“The powers of the President are derived from the Constitution, and they are limited, of course, by the provisions of the Constitution . . . .”); Joseph A. Loftus, *Truman Quoted as Resting Powers Issue With Courts*, N.Y. Times, Apr. 29, 1952, at 1.

<sup>72</sup> Supplemental Memorandum of Defendant at 1, *Youngstown Sheet & Tube v. Sawyer*, No. 1550-52, Box. No. 1160; Civil Action Files; D.D.C.; RG21; NAB.

<sup>73</sup> 103 F. Supp. 569, 573 (D.D.C. 1952).

<sup>74</sup> *Id.* at 575.

<sup>75</sup> *Id.* at 576.

<sup>76</sup> *Id.* at 577.

### *The Supreme Court Proceedings*

The government proceeded immediately to the U.S. Court of Appeals for the D.C. Circuit and secured a stay enabling it to seek a writ of certiorari in the Supreme Court prior to judgment in the court of appeals. The following day, the steel companies asked the D.C. Circuit to condition the stay on the government not altering the prevailing terms of employment. After hearing oral argument en banc, the court denied the steel companies' application; four judges who had opposed the stay dissented. In releasing its opinion on May 2, the D.C. Circuit indicated that it had "at least a serious question as to the correctness of the view of the District Court."<sup>77</sup>

Because the statute governing petitions for writs of certiorari permits any party to a case, not merely the losing party, to seek a writ of certiorari,<sup>78</sup> both the government and the steel companies filed petitions, with the steel companies filing their petition first. The Supreme Court took up the petitions at its conference on Saturday, May 3.<sup>79</sup> Six of the Justices favored granting the writ. Justice Jackson abstained from voting,<sup>80</sup> while Justice Frankfurter and Justice Burton both opposed bypassing the court of appeals. Despite a written plea from Justice Reed that "if you could bring yourself to go with the [Court] on cert it would be most helpful,"<sup>81</sup> Justice Burton filed a dissenting opinion that he had prepared before the conference, which Justice Frankfurter joined. Because the D.C. Circuit had set its stay to expire upon the Court's granting of a writ of certiorari, the Court then had to consider whether to grant a stay of the district court's injunction. As in the D.C. Circuit, the steel companies' response to the government's petition requested that the Court condition any stay on the government not altering the terms of employment. The Justices voted in favor of a stay and conditioned it on the government not changing the terms and conditions of employment; Justice Jackson apparently abstained again.<sup>82</sup>

The Court's decision to condition the stay on the government maintaining the status quo had a devastating effect on ongoing negotiations. Shortly after the D.C. Circuit had granted a stay, the President had asked union leaders to meet with the presidents of six steel companies at the White House on Saturday, May 3. The threat that the government would increase wages while the appeal was pending brought the steel companies back to the bargaining table. In the midst of those negotiations, however, the participants received word that the Supreme Court had conditioned the stay on the government maintaining the status quo.<sup>83</sup> That news removed the

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<sup>77</sup> *Youngstown Sheet & Tube v. Sawyer*, 197 F.2d 582 (D.C. Cir. 1952).

<sup>78</sup> 28 U.S.C. § 1254(1).

<sup>79</sup> Justice Burton's papers contain the only detailed account of the conference. Notes on 744-745, Container 211, Harold H. Burton Papers, Manuscript Division, Library of Congress, Washington, D.C.

<sup>80</sup> *Id.*

<sup>81</sup> Note from SR, Container 211, Harold H. Burton Papers, Manuscript Division, Library of Congress, Washington, D.C.

<sup>82</sup> Justice Burton's notes regarding Justice Jackson's position on the stay are illegible, but his conference sheet records Justice Jackson as having passed. Conference Sheet on 744-745, Container 208, Papers of Harold H. Burton, Manuscript Division, Library of Congress, Washington, D.C.

<sup>83</sup> Marcus, *supra* note 1, at 143-48.

steel companies' incentive to settle, and the negotiations—which by some accounts had proceeded to the point where the parties were actually drafting an agreement—collapsed.<sup>84</sup>

All parties filed their briefs on May 10, and the Supreme Court heard oral argument on May 12 and 13. The briefs and oral arguments focused on three broad themes.<sup>85</sup> First, the parties considered the significance of the *statutory landscape* as it related to the present dispute—that is, whether Congress could be said to have spoken to the issue through specific statutes or otherwise. Second, the parties looked to past and present *legislative approaches* to seizures during national emergencies as a barometer of Congress's views about the scope of the President's constitutional powers. Finally, the parties considered whether past *executive practice* should have any bearing on a Court's interpretation of the President's constitutional powers.

*The Statutory Landscape.* On the question of how Congress had spoken to the present dispute, the government essentially conceded that no statute specifically authorized the President's action. Former Solicitor General John W. Davis, however, arguing the case on behalf of the steel companies,<sup>86</sup> sought to make more of the Taft-Hartley Act than simply observing that it did not authorize the President's action. The Taft-Hartley Act, Davis argued, specifically precluded the President from seizing property to avoid a strike, because it provided an alternative remedy for the precise type of emergency that a potential steel strike would have created: an 80-day injunction against a strike. In other words, if the President wished to prevent a strike that would threaten the national interest, he could do so by following the Taft-Hartley procedures.<sup>87</sup> The steel companies also noted that the House had rejected a proposed amendment to the Taft-Hartley Act that would have provided for governmental seizure in the event of emergency.<sup>88</sup>

Arguing on behalf of the United States, Philip Perlman, the Solicitor General and the Acting Attorney General, advanced a much different view of the relevance of Taft-Hartley. He claimed that although the President might have followed its procedures in December of 1951, in response to the union's initial threat to strike, those procedures were not mandatory. Having chosen instead to refer the dispute to the Wage Stabilization Board, the President could not now invoke Taft-Hartley's injunctive remedy. As of the time of the seizure on April 8, the union had already delayed its strike by 99 days—longer than the Taft-Hartley Act contemplated. Following the procedures of Taft-Hartley thus would have accomplished nothing that the course chosen by

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<sup>84</sup> *Id.* at 147-48; David A. Feller, *Thoughts About the Steel Seizure Case*, 41 Duq. L. Rev. 735, 740 (2003) (noting that Arthur Goldberg, counsel for the union, had instructed his associates to draft settlement documents before the Supreme Court conditioned the stay).

<sup>85</sup> The briefs and transcript of argument are reprinted in volume 48 of *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (1975).

<sup>86</sup> At the time, the Supreme Court's rules provided that when cross-petitions were filed, the plaintiff in the court below had the right to open and close oral argument. Because the steel companies had filed their own petition, over the objection of the government the Court permitted the steel companies to argue first.

<sup>87</sup> Transcript of Oral Argument, reprinted in 48 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 887-88 (1975) [hereinafter *Transcript of Oral Argument*].

<sup>88</sup> Brief for Plaintiff Companies at 22, reprinted in 48 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 441 (1975) [hereinafter *Plaintiffs' Brief*].

the President did not achieve. As Perlman put it, the President had already complied with the spirit of the Taft-Hartley Act.<sup>89</sup>

In addition to disputing the availability of the Taft-Hartley procedures on April 8, the parties took different views of Congress's failure to act in response to the President's Executive Order. A day after the President issued the order, he reported his action in a message to Congress and indicated that if Congress favored a different course he would abide by its wishes. Congress, however, had not acted. The parties vigorously debated what to make of this legislative inaction. The steel companies noted that members of Congress had taken to the floor to denounce the President's actions and that the Senate had proposed an amendment to an appropriations bill providing that no funds could be expended to carry out the seizure.<sup>90</sup> The government seized upon the fact that this bill never became law, and that Congress had not passed a statute directing the President to relinquish the mills or to take any other steps, as evidence that Congress did not disagree with the President's action.<sup>91</sup> At oral argument, at least some of the Justices expressed skepticism that anything could be made out of Congress's failure to respond to the President's message: Justice Burton, echoed by Justice Jackson, suggested that Congress simply might be waiting for the courts to resolve the pending lawsuits.<sup>92</sup>

*Legislative Practice as Evidence of the President's Constitutional Powers.* Both parties also relied on congressional action (and inaction) as a barometer of Congress's views of the scope of the President's *constitutional* powers rather than as an indication of what Congress had, in the exercise of its own constitutional powers, authorized the President to do. For the steel companies, the fact that Congress had passed specific statutes authorizing presidential seizures indicated that Congress understood the power to seize as one given by Congress rather than inhering in the presidency. Moreover, the steel companies argued that Congress perceived that the power should be granted, if at all, only sparingly, for specific reasons, for limited purposes, and with appropriate safeguards.<sup>93</sup> The government presented past statutes authorizing seizure in a different light: rather than demonstrating that Congress understood the power to be exclusively legislative, the statutes merely confirmed, simplified, or supplemented a power that Congress understood to inhere in the President. The government focused in particular on Congress's responses to President Roosevelt's pre-war and wartime seizures.<sup>94</sup>

*Executive Practice as Evidence of Executive Power.* Finally, the third broad theme involved whether past executive practice could shed any light on the President's constitutional power. The government, of course, had repudiated Baldrige's broad assertions in district court that the President possessed all of the powers of which he was capable, subject only to the checks of impeachment or the ballot box. The government's claim, however, remained a nontextual one: the government sought to rely on the aggregate of the enumerated powers to support its action and buttressed its position with arguments about past executive practice. Judge Pine had found such practice to be irrelevant if a court had not passed upon its legality. Although the

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<sup>89</sup> Transcript of Oral Argument, *supra* note 87, at 937-38.

<sup>90</sup> Plaintiffs' Brief, *supra* note 88, at 48.

<sup>91</sup> Transcript of Oral Argument, *supra* note 87, at 905-06.

<sup>92</sup> *Id.* at 906, 936.

<sup>93</sup> *Id.* at 887.

<sup>94</sup> *Id.* at 927-28.

Court seemed more willing to consider the relevance of executive practice than Judge Pine had been, the Justices closely questioned Perlman on whether all of the examples were as relevant as he suggested. Particularly sensitive for Justice Jackson was the government's reliance on the North American Aviation strike.<sup>95</sup> From the bench, Justice Jackson catalogued the factual differences between the North American Aviation seizure and the steel seizure, and in particular the fact that the NAA plant had contracts with the government and that the owners of the plant acquiesced in the seizure. "I looked it up because I wondered how much of this was laid at my door."<sup>96</sup> When the Solicitor General emphasized that Jackson's legal opinion did not turn on these facts, Jackson replied that "I claimed everything, of course, like every other Attorney General does. It was a custom that did not leave the Department of Justice when I did."<sup>97</sup>

### *The Court's Decision*

On May 16, the Court met in conference for nearly four hours to discuss the case.<sup>98</sup> The Justices spoke in order of seniority. As it happened, however, the first two to speak—Chief Justice Vinson and Justice Black—staked out the opposing poles, with the remaining Justices positioning themselves in the vast middle ground between them.

The Chief Justice began with a lengthy defense of the President's conduct. While acknowledging that the President's powers are not unlimited, the Chief Justice argued that the President acted in good faith and with humility in the face of a real emergency. President Truman, he claimed, would have been thought "derelict" in his duty had he not seized the mills.<sup>99</sup> Also of particular importance for the Chief Justice was the fact that the President had informed Congress almost immediately of his action and had invited congressional correction, and "Congress [had] done nothing."<sup>100</sup> As for the broader legislative landscape, the Chief Justice urged that the Court had to consider not only the Taft-Hartley Act, but also the wide range of congressional authorizations and appropriations for augmenting the armed forces. Congress had

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<sup>95</sup> See *supra* notes 17-20 and accompanying text.

<sup>96</sup> Transcript of Oral Argument, *supra* note 87, at 920.

<sup>97</sup> *Id.*

<sup>98</sup> Justice Burton noted the length of the conference in his diary. Diary Entry for May 16, 1952, Container 2, Papers of Harold H. Burton, Manuscript Division, Library of Congress, Washington, D.C.

There are four sets of conference notes available: those of Justice Burton, Container 211, Papers of Harold H. Burton, Manuscript Division, Library of Congress, Washington, D.C. (hereinafter Burton Conference Notes); those of Justice Douglas, Container 221, Papers of William O. Douglas, Manuscript Division, Library of Congress, Washington, D.C. (hereinafter Douglas Conference Notes); those of Justice Frankfurter, Reel 60, The Felix Frankfurter Papers, Part I: Supreme Court of the United States Case Files of Opinions and Memoranda, October Terms, 1938-1952, Manuscript Division, Library of Congress, Washington, D.C. (hereinafter Frankfurter Conference Notes); and those of Justice Jackson, Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C. (hereinafter Jackson Conference Notes).

Existing accounts of the conference tend to rely exclusively on the notes of Justice Douglas. See, e.g., Howard Ball & Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* 132-33 & 342 nn. 152-154 (1992); Howard Ball, *Hugo L. Black: Cold Steel Warrior* 179-81 & 279-80 nn. 56-59 (1996). Because of discrepancies among the notes, unless otherwise indicated I use quotation marks only for those phrases that appear in more than one set of notes.

<sup>99</sup> Burton Conference Notes; Douglas Conference Notes; Jackson Conference Notes.

<sup>100</sup> Burton Conference Notes; Douglas Conference Notes; Frankfurter Conference Notes; Jackson Conference Notes.

placed new responsibilities on the President and the President was doing no more than carrying out his obligations to execute the laws. Indeed, the Chief Justice argued, the United States' military commitments were heavier and more definite than those during World War II,<sup>101</sup> when President Roosevelt had seized property on a number of occasions.

Justice Black immediately dismissed most of the Chief Justice's discussion as "irrelevant."<sup>102</sup> A decision to seize constituted exercise of a lawmaking function, and the lawmaking function is committed to Congress. For Justice Black, past seizures had no bearing on the constitutional question: If President Roosevelt had seized property without statutory authority, Justice Black claimed, he would have held that President Roosevelt acted without authority. Although most of Justice Black's discussion focused on the legal authority question, according to Justice Douglas's notes his comments also betrayed some doubt as to whether the emergency President Truman faced was real: "This is not a case of the President tearing down a house in order to stop the fire—conditions are not that serious."<sup>103</sup>

Only Justice Reed, speaking third, and Justice Minton, speaking last, sided with the Chief Justice in defending the seizure. Justice Reed suggested that the practice of Presidents and the assent of the people shape constitutional law;<sup>104</sup> the President was not limited to seizing property only when statutory authorization existed. Justice Minton argued that the President has implied power to act in an emergency to defend the United States. Both emphasized that the emergency President Truman faced was real.<sup>105</sup> Justice Minton—pounding the table, according to Justice Douglas—argued that the nation was in its "extremity"<sup>106</sup> and that the President had no choice but to defend the nation in a "day of peril."<sup>107</sup>

The remaining Justices voted to affirm, but some offered different rationales than Justice Black had. Justice Douglas's brief comments placed him closest to Justice Black in the view that the power to seize is a legislative function.<sup>108</sup> Like Justice Black, Justice Frankfurter seemed to have doubts about the extent of the emergency President Truman faced: According to Justice Douglas's notes, "on the emergency of steel" Justice Frankfurter referred to the "release of steel to civilian use."<sup>109</sup> On the legal question, however, Justice Frankfurter, unlike Justice Black, said that he would not conclude that in every case the President lacks the power to seize private property in an emergency. If no statutes concerning seizure existed, he claimed, the President might have been able to seize the steel mills temporarily so as to permit Congress to legislate. Justice Frankfurter also offered a fuller account of the legislative landscape and past executive practice than had other Justices. First, he emphasized that past congressional action demonstrated that when Congress passed statutes containing seizure authority, it perceived itself to be granting power rather than recognizing a preexisting power. Echoing Davis's comments at

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<sup>101</sup> Burton Conference Notes; Douglas Conference Notes.

<sup>102</sup> Burton Conference Notes; Douglas Conference Notes; Jackson Conference Notes.

<sup>103</sup> Douglas Conference Notes; *see also* Jackson Conference Notes.

<sup>104</sup> Douglas Conference Notes; Jackson Conference Notes.

<sup>105</sup> On Justice Reed, *see* Burton Conference Notes; Douglas Conference Notes.

<sup>106</sup> Burton Conference Notes; Douglas Conference Notes.

<sup>107</sup> Douglas Conference Notes.

<sup>108</sup> Burton Conference Notes; Jackson Conference Notes.

<sup>109</sup> Douglas Conference Notes. For further discussion of the adequacy of the steel supply and the release of steel for civilian use, *see* Marcus, *supra* note 1, at 225-26.

oral argument, he observed that between 1862 and 1916 there were no statutes dealing with seizure. Seizure statutes since 1916 were detailed in the findings they required, the conditions they imposed, and the compensation they required. Second, in reviewing past executive conduct—particularly seizures undertaken during the Roosevelt administration—Justice Frankfurter noted that most relied on statutory authorities. As for those that did not, Justice Frankfurter found them unimportant: general conditions, he argued, not exceptions, were most significant.<sup>110</sup>

Justice Jackson, by his own account, thought that the Court should affirm while “doing [as] little damage as possible.”<sup>111</sup> He emphasized that the Court should not pass on the factual question of whether an emergency existed. Rather, the Court should accept the fact of the emergency and ask what the President could do in this emergency. On that question, he found the President’s position “untenable.”<sup>112</sup> According to Justice Douglas’s account, Justice Jackson despaired that “the Department of Justice has been demoralized. The crowd that wants to claim everything has taken over.”<sup>113</sup>

Justice Burton’s vote to affirm was the fifth and decisive. Like Justices Black and Douglas, he observed that the power to seize rests with Congress, but he also believed that the Taft-Hartley Act itself foreclosed the President’s conduct.<sup>114</sup> The President was not compelled to invoke the Taft-Hartley procedures, but the decision to use the Wage Stabilization Board could not put the President in a better position than use of Taft-Hartley would have.<sup>115</sup> Justice Clark’s views echoed Justice Jackson’s. He emphasized that the Court should not pass on whether an emergency existed and should limit its decision to this particular case.<sup>116</sup>

As the most senior Justice in the majority, Justice Black assigned the opinion to himself. It is often the case that Justices’ views evolve after the Court’s conference; the task of drafting, circulating, and revising opinions is the task of building an institutional consensus regarding the rationale for a decision. In the *Steel Seizure* case, however, no such institutional consensus appears to have been possible. At the conference, Justice Frankfurter apparently observed that he hoped all nine Justices would write in the case.<sup>117</sup> The Court also recognized that it had to release its decision quickly. Others were at work on their own writings before the conference vote, and after Justice Black circulated his opinion on May 28, a flurry of concurring opinions followed. All of the opinions had been circulated by May 30.

On June 2, 1952, less than three weeks after hearing oral argument, the Court announced its decision. What is striking about the opinions is how closely those in the majority hewed to their comments at conference. Justice Black wrote for himself and four others—Justice

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<sup>110</sup> Burton Conference Notes; Douglas Conference Notes.

<sup>111</sup> Jackson Conference Notes.

<sup>112</sup> Burton Conference Notes; Douglas Conference Notes.

<sup>113</sup> Douglas Conference Notes.

<sup>114</sup> Douglas Conference Notes; Jackson Conference Notes.

<sup>115</sup> Douglas Conference Notes.

<sup>116</sup> Douglas Conference Notes; *see also* Burton Conference Notes, Jackson Conference Notes.

<sup>117</sup> Burton Conference Notes; Douglas Conference Notes.

Frankfurter, Justice Douglas, Justice Jackson, and Justice Burton. Justice Clark provided the sixth vote to affirm the district court's judgment but did not join Justice Black's opinion.

Justice Black's opinion devoted a mere three-and-a-half pages to resolving the constitutional question.<sup>118</sup> He reasoned that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."<sup>119</sup> Because he found no statute that authorized the President to take possession of the steel mills nor any express constitutional language granting the power, Justice Black turned to the claim that "presidential power should be implied from the aggregate of . . . powers under the Constitution."<sup>120</sup> Justice Black declined to sustain the Executive Order under this theory. He viewed the power to dictate the terms under which the government could take possession of private property as a "lawmaking" power—as resting within Congress's "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution" in the federal government.<sup>121</sup> Because the seizure of property was "a job for the Nation's lawmakers, not for its military authorities," the designation of the President as Commander in Chief could not justify the action.<sup>122</sup> And the provisions granting the President the executive power and requiring that he take care that the laws be faithfully executed "refute[] the idea that he is to be a lawmaker."<sup>123</sup> Justice Black acknowledged the government's argument that "other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes"; even if this were true, "Congress has not thereby lost its exclusive constitutional authority" to make laws.<sup>124</sup>

Justice Black's opinion for the Court thus reads much like a toned-down version of Judge Pine's opinion at the district court level. Predictably, however, the four Justices who joined Justice Black's majority opinion wrote separately, and all but Justice Douglas highlighted significant disagreement with Justice Black's rationale.<sup>125</sup> Indeed, in an unusual separate statement appended to the Court's opinion, Justice Frankfurter noted the importance of "[i]ndividual expression of views in reaching a common result," because "differences in attitude toward [the] principle [of separation of powers] . . . can hardly be reflected by a single opinion for the Court."<sup>126</sup> When the Justices announced and read their opinions from the bench, Justice Jackson described Justice Black's approach as the "least common denominator" with which those joining the opinion could agree.<sup>127</sup>

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<sup>118</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952).

<sup>119</sup> *Id.* at 585.

<sup>120</sup> *Id.* at 587.

<sup>121</sup> *Id.* at 588-89.

<sup>122</sup> *Id.* at 587.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 588.

<sup>125</sup> See *id.* at 593 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 634 (Jackson, J., concurring); *id.* at 655 (Burton, J., concurring).

<sup>126</sup> *Id.* at 589 (separate statement of Frankfurter, J.).

<sup>127</sup> John P. Frank, *The United States Supreme Court: 1951-52*, 20 U. Chi. L. Rev. 1, 12 (1952).

Contemporaneous newspaper accounts do not report this statement, but the "least common denominator" phrase is penciled in on the copy of the concurrence that appears in Justice Jackson's files. At least one source attributes this

Only Justice Douglas explicitly embraced Justice Black’s characterization of the President’s action as “legislative” in nature.<sup>128</sup> For the other three Justices who joined Black’s opinion—Justices Frankfurter, Jackson, and Burton—and for Justice Clark, who concurred only in the judgment,<sup>129</sup> the case turned not on the characterization of the seizure as a “lawmaking” act or on a narrow construction of enumerated executive powers, but on the perception that the President’s action in seizing the steel mills conflicted with the authorities Congress had provided the President to deal with potential industrial disruptions. In a now famous passage of his opinion, Justice Jackson suggested that presidential powers “are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>130</sup> He offered the following grouping of presidential actions and their legal consequences:

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. . . .

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.<sup>131</sup>

Justice Jackson viewed President Truman’s action as falling within the third category, as a measure “incompatible with the expressed or implied will of Congress.”<sup>132</sup> Justices Frankfurter and Burton agreed, as did Justice Clark. More specifically, the President’s seizure was inconsistent with the three mechanisms that Congress had provided the President for responding to threatened industrial disruptions—the Taft-Hartley Act, which provided for injunctive relief rather than presidential seizure;<sup>133</sup> the Selective Service Act’s provisions permitting seizure to

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comment to Justice Frankfurter, in erroneous reliance on the Frank article cited above. See Roger K. Newman, *Hugo Black: A Biography* 417, 687 n.5 (1997).

<sup>128</sup> *Youngstown*, 343 U.S. at 630 (Douglas, J., concurring).

<sup>129</sup> *Id.* at 660 (Clark, J., concurring in judgment).

<sup>130</sup> *Id.* at 635 (Jackson, J., concurring).

<sup>131</sup> *Id.* at 635-38 (footnotes omitted).

<sup>132</sup> *Id.* at 637.

<sup>133</sup> *Id.* at 599-600 (Frankfurter, J., concurring) (“Authorization for seizure as an available remedy for potential dangers was unequivocally put aside.”); *id.* at 639 (Jackson, J., concurring) (noting that the President did not invoke the Taft-Hartley Act); *id.* at 656, 658 (Burton, J., concurring) (“The accuracy with which Congress [in the Taft-Hartley Act] describes the present emergency demonstrates [the Act’s] applicability. . . . The President, however,

ensure that government orders would be fulfilled;<sup>134</sup> and the Defense Production Act's condemnation procedures.<sup>135</sup>

Having established that the President's action was inconsistent with the mechanisms Congress provided, each of the Justices went on to discuss whether the President's action could nevertheless be sustained as an incident of the President's constitutional authority. Here again, the concurring opinions were in tension with Justice Black's majority opinion. None of the concurring Justices articulated a conception of presidential power as narrow and rigid as that found in Justice Black's opinion for the majority.

First, Justice Frankfurter rejected Justice Black's suggestion that past executive practice is irrelevant to an assessment of the President's constitutional authority:

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. . . . 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.<sup>136</sup>

Justice Frankfurter concluded, however, that the past seizures the government identified did not amount "in number, scope, duration or contemporaneous legal justification" to the kind of unquestioned executive practice that could be viewed as a gloss on executive power.<sup>137</sup> Similarly, Justice Jackson argued that it was important to "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."<sup>138</sup> But he too rejected the notion that the historical precedents the government cited provided "color of legality" for President Truman's actions.<sup>139</sup>

Second, on the broader question of what power the President might have to act without congressional authorization in responding to a national emergency—a power that Justice Black's opinion seemed to reject—the concurring opinions broke with the majority and either implicitly or explicitly suggested that such a power may exist in some cases. Justice Frankfurter thought it unnecessary to pass on the scope of the President's powers:

chose not to use the Taft-Hartley procedure."); *id.* at 663 (Clark, J., concurring in judgment) (noting that the President did not invoke the Taft-Hartley Act).

<sup>134</sup> *Id.* at 608 n.16 (Frankfurter, J., concurring) (noting that President had not used his authority to seize plants under the Selective Service Act); *id.* at 665-66 (Clark, J., concurring in judgment) ("[T]he Government made no effort to comply with the procedures established by the Selective Service Act of 1948 . . .").

<sup>135</sup> *Id.* at 658 & nn.5, 6 (Burton, J., concurring) (noting that President referred controversy to the Wage Stabilization Board under the Defense Production Act, but had not invoked the separate provisions of the Defense Production Act allowing condemnation); *id.* at 663 (Clark, J., concurring in judgment) ("The Defense Production Act . . . grants the President no power to seize real property except through ordinary condemnation proceedings, which were not used here . . .").

<sup>136</sup> *Id.* at 610-11 (Frankfurter, J., concurring).

<sup>137</sup> *Id.* at 613.

<sup>138</sup> *Id.* at 640 (Jackson, J., concurring).

<sup>139</sup> *Id.* at 648.

The issue before us can be met, and therefore should be, without attempting to define the President's powers comprehensively. . . . We must . . . 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 . . . .<sup>140</sup>

Justice Burton likewise distinguished President Truman's action from steps taken when "Congress takes no action and outlines no governmental policy."<sup>141</sup> Justice Burton acknowledged the possibility that nontextual powers to act in an emergency exist, but found them unavailable to the President in the situation he faced, which was "not comparable to that of an imminent invasion or threatened attack."<sup>142</sup> Justice Clark explicitly embraced the concept of such powers: "In my view . . . the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself."<sup>143</sup>

Justice Jackson's position on the subject was perhaps the most ambiguous, but even his opinion can be read as accepting that the President possesses at least some powers to act in response to a national emergency. He rejected the notion that the Court could declare the existence of inherent presidential powers as broad as necessary to meet *any* emergency or that the executive would have unreviewable discretion to determine that an emergency existed. On the other hand, Justice Jackson's recognition of a "zone of twilight" in which the President and Congress "may have concurrent authority, or in which its distribution is uncertain," presupposes that the President can act in the absence of specific authority—and, in Justice Jackson's view, the evaluation of such action will likely depend "on the imperatives of events" rather than "abstract theories of law."<sup>144</sup> In addition, Justice Jackson declared himself unwilling "to circumscribe, much less to contract, the lawful role of the President as Commander in Chief,"<sup>145</sup> suggesting that the President should have latitude to respond to foreign threats to the nation's security.

In sum, although Justices Frankfurter, Jackson, and Burton joined Justice Black's opinion for the Court purporting to reject the existence of a presidential power to respond to a national emergency in the absence of congressional action, their concurrences do not reject the existence of such a power. And, of course, the three dissenting Justices were prepared to recognize such a power as well.<sup>146</sup> The district court, with its narrow construction of presidential powers and its explicit rejection of executive practice as an indicator of the scope of constitutional power, had resisted the notion that such a power existed. But only Justice Black and Justice Douglas agreed. The remaining Justices did not rule out the possibility that courts should construe the President's enumerated powers more broadly than Justice Black had construed them or that the President could claim powers based on the structure that the words of the Constitution ordain rather than

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<sup>140</sup> *Id.* at 597 (Frankfurter, J., concurring).

<sup>141</sup> *Id.* at 659 (Burton, J., concurring).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 662 (Clark, J., concurring in judgment).

<sup>144</sup> *Id.* at 637.

<sup>145</sup> *Id.* at 645.

<sup>146</sup> The dissenting Justices argued that the relevant statutes did not prohibit the seizure. *Id.* at 704-07 (Vinson, C.J., dissenting). But they also emphasized that the President should be able to take action in an emergency to preserve Congress's legislative prerogatives. *See id.* at 701.

the words themselves. For the concurring Justices, the case was not about the scope of the President's constitutional power in the face of congressional silence, but about whether the President could take certain action when Congress had foreclosed it.

### *The Impact of the Steel Seizure Case*

The public reacted positively to the Supreme Court's decision in the *Steel Seizure* case.<sup>147</sup> For legal commentators, however, the case was more complicated. As one commentator put it, "[w]e can hardly expect that the lasting outgrowth of the steel controversy will be the *Youngstown* case."<sup>148</sup> For Professor Edward S. Corwin, the decision was "a judicial brick without straw"—the opinion of the Court resting on a "purely arbitrary construct,"<sup>149</sup> Justice Jackson's "rather desultory" concurring opinion containing "little that is of direct pertinence to the constitutional issue,"<sup>150</sup> and the other concurring opinions contributing nothing "to the decision's claim to be regarded seriously as a doctrine of constitutional law."<sup>151</sup> Political scientist Glendon Schubert pronounced the decision "destined to be ignored."<sup>152</sup>

Those predictions may seem naïve in light of the prominence of the *Steel Seizure* case in the constitutional law canon. In evaluating the impact of the *Steel Seizure* case, however, it is important to distinguish the case's symbolic or rhetorical significance from its doctrinal significance. The former may not have been apparent to contemporary commentators, while the tension between Justice Black's majority opinion and the accompanying concurrences detracted from the latter.

For courts and commentators, Justice Jackson's opinion has now emerged as the most authoritative among the various *Steel Seizure* opinions. Although that opinion is often thought to provide concrete guidance on how to resolve presidential power claims, particularly with respect to foreign affairs, it leaves many questions unanswered. As I will argue, however, the strength of the Jackson opinion lies less in its doctrinal categories than in its critique, explicit and implicit, of the decision-making in the political branches that gave rise to the *Steel Seizure* case.

### *The Steel Seizure Case in the Courts*

Measuring the influence of any separation-of-powers case is difficult. Separation-of-powers controversies arrive infrequently in court and the facts of the disputes tend to be highly individual. Indeed, if one were to assess the influence of the *Steel Seizure* case based on citation frequency alone, one would reach the ironic conclusion that the case is most influential in supplying courts with an avenue to *avoid* finding a violation of separation-of-powers principles.<sup>153</sup> Courts most often cite the case for the same unremarkable reason that it is typically placed first in a Constitutional Law casebook's separation-of-powers chapter: that

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<sup>147</sup> Marcus, *supra* note 1, at 212.

<sup>148</sup> Jerre Williams, *The Steel Seizure: A Legal Analysis of a Political Controversy*, 2 J. Pub. L. 29, 34 (1953).

<sup>149</sup> Edward S. Corwin, 53 Colum. L. Rev. 53, 64 (1953).

<sup>150</sup> *Id.* at 63.

<sup>151</sup> *Id.* at 65.

<sup>152</sup> Glendon A. Schubert, Jr., *The Steel Case: Presidential Responsibility and Judicial Irresponsibility*, 6 W. Pol. Q. 61, 65 (1953).

<sup>153</sup> See Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 Const. Comm. 87, 108-09 (2002).

Justice Frankfurter's opinion and Justice Jackson's opinion, in contradistinction to Justice Black's, illustrate the "functional" approach to resolving separation-of-powers questions.<sup>154</sup>

Less frequently but more significantly, courts also use the *Steel Seizure* case to affirm their powers to invalidate the acts of a coordinate branch of government. Historian Maeva Marcus's seminal book on the *Steel Seizure* case, written on the heels of the Nixon presidency, views the case as launching a trend of judicial intervention in politically charged cases. She sees the imprint of the *Steel Seizure* case in the school desegregation cases<sup>155</sup> as well as in the Court's involvement in reapportionment disputes.<sup>156</sup> Although at least one scholar suggests that Marcus overstates the *Steel Seizure* case's influence in those contexts,<sup>157</sup> the influence of the *Steel Seizure* case on Nixon-era separation-of-powers disputes is unmistakable. The *Steel Seizure* case provided the courts with an important precedent for rejecting former President Nixon's claims that certain actions of the Executive Branch were not subject to review by the judiciary.<sup>158</sup> In *United States v. Nixon*,<sup>159</sup> for example, the Court cited the *Steel Seizure* case as one instance of the judiciary invalidating another branch's exercise of power,<sup>160</sup> and the precedent allowed the Court to resist Nixon's claim of absolute privilege in certain presidential communications, subject to no judicial review.<sup>161</sup> The lower courts made similar use of the case in rejecting Nixon's assertions of privilege as well as his claim that the courts would lack authority to enforce any adverse ruling on the privilege issue.<sup>162</sup>

A more recent Clinton-era decision illustrates a similar use of the *Steel Seizure* case to establish a court's authority to act in the face of perceived abuses of power. In *Clinton v. Jones*,<sup>163</sup> the Court rejected President Clinton's claim that separation-of-powers principles required a district court to postpone, until the end of his presidency, civil proceedings in a dispute arising out of unofficial conduct that occurred prior to his time in office. The President argued that permitting the proceedings to go forward would cause undue judicial interference with the "effective performance of his office."<sup>164</sup> The Court rejected this argument, concluding that the fact that a court's exercise of jurisdiction may burden the time and attention of the President "is not sufficient to establish a violation of the Constitution."<sup>165</sup> The Court cited the *Steel Seizure* case as "the most dramatic" example of a case in which the judiciary had, in effect, imposed a burden on the President by virtue of its authority to determine "whether [the

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<sup>154</sup> *Id.* at 109.

<sup>155</sup> See Marcus, *supra* note 1, at 229 (calling the desegregation cases "the most spectacular example of the Court's new willingness to face basic constitutional questions")

<sup>156</sup> *Id.* at 229-30 (arguing that the *Steel Seizure* case helped the Court to explain in *Baker v. Carr*, 369 U.S. 186 (1962), why the Court could intervene in reapportionment disputes).

<sup>157</sup> William H. Harbaugh, *The Steel Seizure Case Reconsidered*, 87 Yale L.J. 1272, 1281-83 (1978).

<sup>158</sup> See Marcus, *supra* note 1, at 240-48.

<sup>159</sup> 418 U.S. 683 (1974). For discussion of the *Nixon* case, see Christopher H. Schroeder, *The Court and the Nixon Tapes: The Story of United States v. Nixon*, in *Presidential Power Stories* (Christopher H. Schroeder & Curtis A. Bradley eds.) (2009).

<sup>160</sup> *Id.* at 703.

<sup>161</sup> *Id.* at 707.

<sup>162</sup> See Marcus, *supra* note 1, at 240-45.

<sup>163</sup> 520 U.S. 681 (1997).

<sup>164</sup> *Id.* at 702.

<sup>165</sup> *Id.* at 703.

President] has acted within the law.”<sup>166</sup> The Court’s use of the *Steel Seizure* case there, and elsewhere in the opinion,<sup>167</sup> is surprising because the case is so far off point. Any burden that the President’s involvement in the *Steel Seizure* case created arose out of his official duties, and it is therefore difficult to view a requirement that he respond to legal process as an interference in any way analogous to that which President Clinton had claimed.<sup>168</sup> In invoking the case throughout its opinion, and in emphasizing the case as a precedent for courts’ authority to determine whether the President has acted within the law, the Court seemed to rely on the decision more as an illustration that the President is not above the law than for the case’s doctrinal relevance to the dispute at hand.

These cases suggest, as Marcus has put it, that much of the significance of the *Steel Seizure* case “lies in the fact that it was made.”<sup>169</sup> When the courts police the domain of a coordinate branch of government or seek to combat perceived abuse of power, even on questions unrelated to those the Court considered in connection with President Truman’s seizure of the steel mills, it is the *Steel Seizure* case that lends the legal if not moral weight.<sup>170</sup>

Also beginning with the Nixon era, however, the *Steel Seizure* case began to have important ramifications in disputes with facts more closely patterned on those in the *Steel Seizure* case—when the President claimed a power to take certain actions in a time of crisis. Two cases decided in the early 1970s are illustrative. The *Steel Seizure* case was decisive in neither, but it arguably framed the issues in both. First, in the *Pentagon Papers* case,<sup>171</sup> the government requested an injunction against continued publication of a classified Defense Department history of the United States’ political and military involvement in the Vietnam War. The government claimed that the executive branch had unreviewable discretion to determine whether national security required suppressing the study. Just as the concurring Justices in the *Steel Seizure* case rested their decision on the fact that the legislative landscape was inconsistent with President Truman’s conduct, three concurring Justices in the *Pentagon Papers* case rested their rejection of the government’s request on the ground that Congress, in enacting statutes to protect national security information, had declined to authorize the President to seek injunctive relief.<sup>172</sup> Second,

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<sup>166</sup> *Id.* (“Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills in order to avert a national catastrophe.”).

<sup>167</sup> *See id.* at 696 (quoting Justice Jackson’s observation that historical and scholarly materials concerning the Framers’ intent with respect to separation of powers point in different directions); *id.* at 699 (quoting Justice Jackson’s description of the power in the Presidency); *id.* at 701 & n.35 (relying on the *Steel Seizure* case, among other cases, for the proposition that “the lines between the powers of the three branches are not always neatly defined”).

<sup>168</sup> *Cf. id.* at 718 (Breyer, J., concurring in judgment) (stating that the *Steel Seizure* precedent “does not seem relevant in this case”).

<sup>169</sup> Marcus, *supra* note 1, at 228.

<sup>170</sup> *See Bellia, supra* note 153, at 110-13.

<sup>171</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>172</sup> *Id.* at 740 (White, J., joined by Stewart, J., concurring) (“Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. It has not, however, authorized the injunctive remedy against threatened publication.”) (internal citations omitted); *id.* at 743 (Marshall, J., concurring) (“Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States.”).

in the *Keith* case,<sup>173</sup> the Court considered whether the Executive could intercept communications without judicial authorization when facing an alleged domestic threat to national security. The Court's decision rested on Fourth Amendment grounds: The Court concluded that the Fourth Amendment required the government to seek judicial authorization for the surveillance.<sup>174</sup> But the case was similar to the *Steel Seizure* case in that the executive branch essentially claimed that it had the power to protect national security in the absence of an authorizing statute, and indeed in the face of a federal statute that did not specifically authorize the executive branch to carry out the surveillance.<sup>175</sup> The Court did not directly confront the presidential power issue, assuming that the President had constitutional authority to protect the United States "against those who would subvert or overthrow it by unlawful means."<sup>176</sup> The court below had specifically considered the presidential power issue,<sup>177</sup> however, and the influence of that issue is apparent both in the Supreme Court's discussion of past executive practice of engaging in surveillance in domestic security cases<sup>178</sup> and in the Court's premise that Congress could adopt procedures for domestic security surveillance that did not precisely track those that the Fourth Amendment was thought to require for surveillance in criminal investigations.<sup>179</sup> The *Steel Seizure* case was not decisive in *Keith*, but it surely influenced the premises from which the Court operated.

### *The Jackson Concurrence in the Courts*

A third case involving presidential power in times of crisis marked a decisive shift in courts' reliance on the *Steel Seizure* case. In *Dames & Moore v. Regan*,<sup>180</sup> the Supreme Court confronted whether the President could suspend the claims of U.S. citizens against Iran and its nationals. The case involved an Executive Order implementing the executive agreement by which the United States secured the release of the U.S. hostages from Iran. The opinion for the Court by then-Justice Rehnquist—one of Justice Jackson's law clerks when the Court heard the *Steel Seizure* case—characterized Justice Jackson's opinion as bringing together "as much combination of analysis and common sense as there is in this area."<sup>181</sup> The Court analyzed the Executive Order through the lens of Justice Jackson's three categories, concluding that Congress had implicitly approved the President's conduct.<sup>182</sup>

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<sup>173</sup> *United States v. U.S. District Court for the Eastern District of Michigan (Keith)*, 407 U.S. 297 (1972). For discussion of the *Keith* case, see Trevor W. Morrison, *The Story of United States v. United States District Court (Keith): The Surveillance Power*, in *Presidential Power Stories* (Christopher H. Schroeder & Curtis A. Bradley eds.) (2009).

<sup>174</sup> *Keith*, 407 U.S. at 317.

<sup>175</sup> *See id.* at 299-308 (concluding that federal wiretap statute neither authorized Executive to conduct surveillance in domestic security matters without prior judicial approval nor recognized an existing constitutional authority to conduct such surveillance).

<sup>176</sup> *Id.* at 310.

<sup>177</sup> 444 F.2d 651, 660-61 (6th Cir. 1971).

<sup>178</sup> *Keith*, 407 U.S. at 310-11.

<sup>179</sup> *Id.* at 322-23.

<sup>180</sup> 453 U.S. 654 (1981). *See* Harold H. Bruff, *The Story of Dames & Moore: Resolution of an International Crisis by Executive Agreement*, in *Presidential Power Stories* (Christopher H. Schroeder & Curtis A. Bradley eds.) (2009)

<sup>181</sup> *Dames & Moore*, 453 U.S. at 661.

<sup>182</sup> *Id.* at 680.

Justice Jackson's concurrence continues to predominate in presidential power cases touching on foreign affairs. Even when the Court itself does not explicitly apply Justice Jackson's categories, those categories can frame the parties' arguments. In *Hamdi v. Rumsfeld*,<sup>183</sup> for example, the Court considered whether the President could order the detention of citizens whom the government believes are "enemy combatants." The government claimed both that the President had constitutional power to detain enemy combatants and that Congress had, in the Authorization for the Use of Military Force (AUMF) adopted shortly after the September 11 attacks, authorized such detention.<sup>184</sup> A plurality of the Court adopted the latter argument,<sup>185</sup> with Justice Thomas providing a fifth vote on this point.<sup>186</sup> Two years later, in *Hamdan v. Rumsfeld*,<sup>187</sup> the Court examined whether the President could establish military commissions to try enemy combatants. Again Justice Jackson's framework structured the arguments and some of the opinions, with the government arguing both that the AUMF authorized the President to establish military commissions and that the President had inherent authority to do so.<sup>188</sup> The Court rejected these claims and concluded that the Uniform Code of Military Justice limited the circumstances in which the President could authorize military commissions. Although Justice Stevens mentioned the *Steel Seizure* case only in passing,<sup>189</sup> Justice Kennedy's concurrence invoked and applied Justice Jackson's framework in reaching the conclusion that the UCMJ limits the President's use of military commissions.<sup>190</sup> Most recently, in *Medellín v. Texas*,<sup>191</sup> Justice Jackson's concurrence framed the Court's consideration, and ultimately its rejection, of the claim that the President could direct state courts to provide review of criminal convictions in accordance with the terms of an International Court of Justice decision and without regard for state procedural default rules.<sup>192</sup>

At least since *Dames & Moore*, then, courts have viewed Justice Jackson's opinion as providing the "accepted framework"<sup>193</sup> for evaluating presidential power claims. But some scholars argue that Justice Jackson's framework does more work than that: that the framework embodies a *normative* commitment to congressional "primacy" in foreign affairs. Congressional primacy scholars read the Constitution to lodge most foreign affairs powers with Congress, and take Justice Jackson's concurrence to instruct courts to resolve most foreign affairs disputes in favor of Congress.<sup>194</sup>

The claim that Justice Jackson's concurrence embodies a normative commitment to congressional primacy in foreign affairs proves problematic, however, both in theory and in practice. To be sure, Justice Jackson's central premise is that how, if at all, Congress has acted

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<sup>183</sup> 542 U.S. 507 (2004).

<sup>184</sup> Brief for Respondent at 21, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), No. 03-6696 (filed Mar. 29, 2004).

<sup>185</sup> *Hamdi*, 542 U.S. at 517 (plurality opinion).

<sup>186</sup> *Id.* at 587 (Thomas, J., dissenting).

<sup>187</sup> 126 S. Ct. 2749. See Dawn Johnsen, *The Story of Hamdan v. Rumsfeld*, in *Presidential Power Stories* (Christopher H. Schroeder & Curtis A. Bradley, eds.) (2009).

<sup>188</sup> Brief for Respondent at 16, 20, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, No. 05-184 (filed Feb. 23, 2006).

<sup>189</sup> *Hamdan*, 126 S. Ct. at 2774 n.23.

<sup>190</sup> *Id.* at 2800-02 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>191</sup> 128 S. Ct. 1346 (2008).

<sup>192</sup> *Id.* at 1368-71.

<sup>193</sup> *Id.* at 1368.

<sup>194</sup> For a discussion of the strands of congressional primacy claims, see Bellia, *supra* note 153, at 117-21.

should influence how presidential conduct is evaluated. In at least some “category three” cases, as in the *Steel Seizure* case, how Congress has acted will be decisive, by foreclosing presidential conduct inconsistent with Congress’s action. To suggest that presidential power is at its “lowest ebb” when it conflicts with congressional policy, however, is not to suggest that presidential conduct in conflict with congressional power is always unconstitutional.<sup>195</sup>

Moreover, the congressional primacy view depends not only on the conclusion that the President’s choice of policy must yield to Congress’s, but also on two further claims: first, that courts must narrowly construe statutes by which Congress authorizes presidential conduct;<sup>196</sup> and second, that courts must narrowly construe the foreign affairs powers that the Constitution does expressly grant to the Executive (such as the power to serve as Commander in Chief and the power to receive ambassadors). But Justice Jackson’s concurrence gives relatively little guidance to courts on how to determine when congressional authorization exists and how to assess the scope of executive power in its absence. As to congressional authorization, Justice Jackson’s opinion refers to the “express *or implied*” authorization of Congress. The opinion thus presupposes that it is possible to infer congressional approval of a particular executive practice even in the absence of a specific statute. In the *Steel Seizure* case itself, of course, several Justices inferred congressional *disapproval* of executive action. Their conclusions that the President’s action was inconsistent with the course prescribed by Congress were based not on a specific statute barring seizure but on the fact that the House had rejected a seizure option in its consideration of the Taft-Hartley Act and that Congress had effectively occupied the field. If such inferences from the legislative landscape are fair game in an assessment of Congress’s implied *opposition* to executive conduct, it is unclear why such inferences would not also be in an assessment of Congress’s implied *approval* of presidential conduct.

Quite apart from how to construe legislative will in the absence of a specific statute, Justice Jackson’s concurrence provides limited guidance on how courts should construe specific statutes. In a case raising such an issue, a substantive question is intertwined with an institutional one. The substantive question is whether the statute authorizes the challenged conduct, and the institutional question relates to who is in the best position—courts or the Executive—to interpret the statute, or, put another way, whether the courts owe the Executive’s interpretation of the statute any deference. Here, of course, foreign affairs law intersects with a well developed body of administrative law dealing with deference to the Executive in its interpretation of ambiguous statutes.<sup>197</sup> Congressional primacy scholars imply that courts should

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<sup>195</sup> Cf. David A. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 1099 (2008) (discussing mistaken view that constitutional history establishes a Commander in Chief power that is preclusive of congressional control; but acknowledging that this alone does not explain what should happen at the “lowest ebb”).

<sup>196</sup> See, e.g., David Gray Adler, *Court, Constitution, and Foreign Affairs* in David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* 19, 32-35 (U. Press of Kansas, 1996) (criticizing the Supreme Court’s treatment of congressional delegation to Secretary of State of power to issue passports); Harold Hongju Koh, *The National Security Constitution* 146 (Yale U. Press, 1990) (“[T]he Supreme Court’s reading of these statutes has enhanced presidential power by encouraging lawyers throughout the executive branch to construe their agency’s authorizing statutes to permit executive initiatives extending far beyond the intended scope of those statutes.”).

<sup>197</sup> See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649, 663 (2000); Bellia, *supra* note 153, at 126-39.

construe congressional delegations in the foreign affairs context more narrowly than other congressional delegations. That approach necessarily depends on the premise that only a narrow construction of a delegation will preserve congressional prerogatives in foreign affairs. Whether or not that view is correct, Justice Jackson concurrence simply does not speak to it.

Perhaps even more problematic is the congressional primacy view that Justice Jackson's opinion should be read to instruct courts to narrowly construe the President's *constitutional* powers. Justice Jackson's opinion states that "because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction."<sup>198</sup> Justice Jackson also notes that in any event courts are likely to have a limited role in policing presidential conduct when Congress is silent: "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."<sup>199</sup> The point seems predictive rather than normative, but it supplies the basis for two normative arguments for why a court should avoid construing the President's constitutional powers when Congress is silent—first, that the political branches are more likely to arrive at a narrow resolution that will preserve government flexibility in later, unforeseen circumstances, and that a court should therefore stay its hand,<sup>200</sup> and second, that because the Constitution confers authority over foreign affairs and national security to the political branches, there is a "risk that judicial intervention will itself be a serious violation of separation of powers."<sup>201</sup>

These conceptual problems with overreading Justice Jackson's concurrence manifest themselves in cases in which courts attempt to apply Justice Jackson's framework. Critics of the Supreme Court's decision in *Dames & Moore*, for example, suggest that the Court failed to adhere in that case to the boundaries between Justice Jackson's three categories—that the Court has too-broadly construed particular legislative action to constitute "authorization," thus transforming congressional silence or congressional opposition into congressional approval.<sup>202</sup>

<sup>198</sup> 343 U.S. at 640 (Jackson, J., concurring).

<sup>199</sup> *Id.* at 637.

<sup>200</sup> This view seemed to animate Justice Powell's concurrence in the Supreme Court's decision to deny review in *Goldwater v. Carter*, 444 U.S. 996 (1979), a dispute over President Carter's termination of the United States' mutual defense treaty with Taiwan. Justice Powell argued that judicial intervention was inappropriate because Congress and the President had not yet reached a "constitutional impasse." *Id.* at 997 (Powell, J., concurring in judgment). The Senate had considered a resolution declaring that Senate approval is necessary for termination of a treaty but had taken no final action. *Id.* at 998. Justice Powell suggested that "[i]t cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so." *Id.*

<sup>201</sup> H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo. Wash. L. Rev.* 527, 537 (1999). Under this theory, judicial intervention would be inappropriate where Congress is silent, and may not even be appropriate when there is a conflict between congressional and presidential will. Four of the Justices who concurred in the decision not to grant review in *Goldwater* took this view. Because the Justices found no constitutional provision expressly governing the termination of treaties, the dispute presented a political question. 444 U.S. at 1003 (Rehnquist, J., concurring in judgment). The concurring Justices observed that a court's resolution of a political question can create "disruption among the three coequal branches of Government." *Id.* at 1005-06.

<sup>202</sup> See, e.g., Koh, *supra* note 196, at 142 (discussing cases, including *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *INS v. Chadha*, 462 U.S. 919 (1983), that "dramatically alter the application of Justice Jackson's tripartite *Youngstown* analysis in cases on foreign affairs"); Gordon Silverstein, *Imbalance of Powers* at 11-12 (Oxford U. Press, 1997) (arguing that courts "began to soften the barriers" between Justice Jackson's categories in

Justice Jackson’s concurrence, however, seems to leave that avenue open. The *Medellín* case arguably illustrates the opposite phenomenon, with the Court concluding that the Senate’s ratification of a treaty lacking provisions “clearly” according the treaty domestic effect constituted an implicit *prohibition* on the President’s implementation of the treaty.<sup>203</sup>

In addition to raising questions about how to measure Congress’s “express” or “implied” will, these cases demonstrate a reluctance to explore the President’s *constitutional* powers in any detail. I have discussed elsewhere the costs to our constitutional system of courts’ reluctance to explore the scope of the President’s constitutional foreign affairs powers.<sup>204</sup> The seeds of the political question doctrine—arguably planted in Justice Jackson’s concurrence—tend to sprout into executive power. In addition, courts’ reluctance to explore questions about the constitutional powers of the President deprives the Executive Branch of authoritative guidance, developed in the crucible of contested cases and controversies, about its own conduct, thus compromising one of the most effective restraints on Executive Branch conduct—the Executive Branch itself.

#### *The Jackson Concurrence in the Political Branches*

The discussion above suggests that, in the courts, Justice Jackson’s opinion does far less to restrain presidential conduct than congressional primacy scholars think it should. That observation, however, should not detract from the opinion, for the opinion is directed as much if not more toward the political branches than it is to the courts.

To Congress, Justice Jackson’s message was that congressional inertia would expand presidential power and that courts could do little to stop it. In describing his second grouping of presidential action—action in the absence of a congressional grant or denial of authority—Justice Jackson noted that “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”<sup>205</sup> Justice Jackson later observed that he had “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. . . . 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.”<sup>206</sup>

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the decades following the *Steel Seizure* decision, thus lending “legitimacy to the emerging executive claim to prerogative powers in foreign policy”).

<sup>203</sup> The *Medellín* case is particularly interesting for its re-envisioning of *Dames & Moore*: In *Medellín*, the Court rejected the argument that congressional acquiescence in a course of presidential conduct could be taken as a sign of congressional *authorization* in category one; the Court deemed congressional acquiescence to be relevant only to the question of the President’s *constitutional* power in category two. *Medellín*, 128 S. Ct. at 1370. Although the *Medellín* Court’s approach appears to be more faithful to Justice Jackson’s approach in the *Steel Seizure* case than *Dames & Moore* was, it seems to narrow *Dames & Moore* while purporting to apply it. Interestingly, Chief Justice Roberts, who wrote the opinion in *Medellín*, served as a law clerk to then-Justice Rehnquist when *Dames & Moore* was decided.

<sup>204</sup> Bellia, *supra* note 153, at 145-54.

<sup>205</sup> 343 U.S. at 637 (Jackson, J., concurring).

<sup>206</sup> *Id.* at 654.

To the executive branch, Justice Jackson spoke as legal-adviser-turned-judge. The message was clear: that the advice that President Truman had legal authority to seize the mills never would have been given or followed in President Roosevelt's time. Although Justice Jackson's three-part framework is the most famous part of his opinion, the opinion also contains several direct comments on executive decision-making both before and during the *Steel Seizure* litigation. The opinion condemns the government's district court claims, stating that "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."<sup>207</sup> Similarly, the Solicitor General's argument before the Court concerning the Commander in Chief Clause provoked Justice Jackson to comment that presidential advisers "would not waive or narrow [the clause] by nonassertion yet cannot say where it begins or ends."<sup>208</sup> He continued that although advisers often make broad claims under the rubric of this clause, "advice to the President in specific matters usually has carried overtones that powers, even under this head," are much narrower; and "[e]ven then, heed has been taken of any efforts of Congress to negative [the President's] authority."<sup>209</sup> Echoing a comment he made at conference to the effect that "[w]isdom in [the Executive's] use of the power in the past has been in keeping it out of the courts,"<sup>210</sup> Justice Jackson suggested that "prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test."<sup>211</sup> In the accompanying footnote, Justice Jackson went so far as to draw a parallel to the Tudors' use of the power of legislation by proclamation, quoting Holdsworth as saying that the legal question regarding the extent of their use "was never finally settled . . . because the Tudors made so tactful a use of their powers that no demand for the settlement of this question was raised."<sup>212</sup>

This pointed critique of executive branch decision-making may be lost on modern constitutional law students, for casebooks, while including Justice Jackson's rebuttal of the Solicitor General's understanding of executive power, omit much of the language quoted above.<sup>213</sup> Even a reader of the full opinion might miss the extent to which Justice Jackson's critique is truly an *intra*-executive branch critique rather than a judicial critique, pitting the claims of current advisors to President Truman against the narrower claims of advisors past. Justice Jackson's involvement in the North American Aviation seizure made a discussion of that episode necessary, and in that discussion Justice Jackson twice distinguished between his role as adviser and his role as judge.<sup>214</sup> Elsewhere in the opinion, however, Justice Jackson relied squarely but silently on his own advice to President Roosevelt to show the error of the government's position. In claiming that, in the past, "heed has been taken of any efforts of Congress to negative" the President's authority as Commander in Chief, Justice Jackson cited

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<sup>207</sup> *Id.* at 640.

<sup>208</sup> *Id.* at 641.

<sup>209</sup> *Id.* at 645.

<sup>210</sup> Douglas Conference Notes.

<sup>211</sup> *Youngstown*, 343 U.S.647 (Jackson, J., concurring).

<sup>212</sup> *Id.* at 648 n.16.

<sup>213</sup> See, e.g., Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 348-49 (15th ed.) (omitting all but the fourth of the five quotations above).

<sup>214</sup> *Youngstown*, 343 U.S. at 647 (Jackson, J., concurring) ("[A] judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."); *id.* at 649 n.17 ("I do not regard [the North American seizure] as a precedent for this, but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy.").

legal advice to President Roosevelt concerning a proposed transfer of vessels to Great Britain. The Justice Department had advised President Roosevelt that he could not transfer certain so-called “mosquito boats” because doing so would violate a statute.<sup>215</sup> The advice was Justice Jackson’s,<sup>216</sup> as was the advice in a second opinion cited on the same point.<sup>217</sup> Justice Jackson also quietly defended Justice Clark, whose claim that the President’s “inherent power to deal with emergencies” was “exceedingly great” had been taken to support the seizure of the steel mills.<sup>218</sup> Justice Jackson contended that the citations following the Attorney General’s reference to “inherent power” identified instances of congressional authorization, and that the “specific advice” given by the Attorney General had ample basis in the President’s duty to see that the laws are faithfully executed.<sup>219</sup>

In the final opinion, then, Justice Jackson’s critique of executive branch decision-making seems to be offered at arms’ length, deemphasizing his own role in shaping executive branch precedents. The availability of earlier drafts of the opinion, however, shows that the opinion began as an *insider’s* critique of the government’s position and that Justice Jackson gradually—but never completely—de-personalized the opinion. Justice Jackson’s papers include notes and multiple draft opinions from the case.<sup>220</sup> As early as May 7, three days before the Court received the briefs in the case and five days before it heard oral argument, Justice Jackson had begun drafting segments of material that he would eventually incorporate into his concurrence.<sup>221</sup>

The segments dealing head-on with Justice Jackson’s personal involvement as an advisor to President Roosevelt provide a useful starting point. The initial May 7 segment on Justice Jackson’s personal involvement in providing advice to President Roosevelt on presidential power questions is essentially a justification of his decision to participate in the *Steel Seizure* case at all. Justice Jackson wrote that “[c]andor requires me to state that I have considered whether I should sit in this case.”<sup>222</sup> He concluded that “my experience is too remote to carry any insurmountable predilections [that] warrant withdrawal” and that “practical experience with the problems of this case may contribute” something to the presidential powers debate.<sup>223</sup> A revised version of this segment placed more emphasis on the unique vantage point that Jackson’s position as Attorney General provided and less on the possibility of recusal: “Few experiences could make one more aware of the magnitude, advantages and dangers of the forces controlled by a dynamic Executive

<sup>215</sup> See Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers, 39 Op. Atty. Gen. 484.

<sup>216</sup> *Id.*

<sup>217</sup> See Training of British Flying Students in the United States, 40 Op. Atty. Gen. 58.

<sup>218</sup> See *supra* note 39 and accompanying text.

<sup>219</sup> *Youngstown*, 343 U.S. at 649-50 n. 17.

<sup>220</sup> Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C.

<sup>221</sup> The May 7 segments cover a range of topics and reflect extensive edits in Justice Jackson’s hand; there are also cleaner versions dated May 8. The small opinion segments are separately paginated, making it difficult to provide unique citations. Below I cite the May 7 and May 8 opinion segments with descriptive titles that do not appear on the opinions themselves. (All drafts are located in Container 176 of Justice Jackson’s papers.) By May 22, the small opinion segments had been merged into a complete opinion, also reflecting extensive edits in Justice Jackson’s hand. The concurring opinion had taken substantially final shape by May 29, within four days of the Court’s June 2 announcement of its decision.

For another account of the evolution of Justice Jackson’s opinion, see Adam J. White, *Justice Jackson’s Draft Opinions in the Steel Seizure Cases*, 69 Alb. L. Rev. 1107 (2006).

<sup>222</sup> Roosevelt Involvement Segment, May 7, at 1.

<sup>223</sup> *Id.*

through the combination of law and leadership than to have served as legal advisor to a resourceful President in time of crisis. As Attorney General, it was my duty to advise President Roosevelt in urgent matters which raised sharp issues of presidential power that are cited as precedents here.”<sup>224</sup> These highly personal comments on Justice Jackson’s “duty” in advising President Roosevelt as to matters cited as precedent for the steel seizure were largely depersonalized in later drafts. In his final opinion, Justice Jackson opened by alluding to his experience: “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.”<sup>225</sup> In doing so, however, he eliminated any specific reference to President Roosevelt and to the government’s reliance on his own legal advice as precedent.

Justice Jackson’s efforts to grapple with and distinguish the Roosevelt-era precedents in which he played a role reflect a similar evolution. Indeed, one might go so far as to say that Justice Jackson’s famous three-part framework initially developed not as an abstract tool for resolving presidential power disputes, but as a tool for contextualizing Justice Jackson’s own advice to President Roosevelt and distinguishing it from the advice upon which President Truman acted. Of particular interest is *how* one can determine whether presidential action falls into Justice Jackson’s first category—that involving congressional authorization. The first opinion segment setting up the three-part framework, likely prepared on May 7, contemplated that executive action could be classified as “in accordance with congressional authority,” “contrary to the enacted policy of Congress,” and where there is “no rule or policy of Congress.”<sup>226</sup> These formulations left open the question of how one should discern what is “in accordance with congressional authority.” The next draft referred to an “express Act or *general policy* of Congress,”<sup>227</sup> wording that survived in later versions before eventually giving way in a May 22 draft to the “express or *implied* authorization” wording that appears in the final opinion.<sup>228</sup>

The recognition that one could discern congressional approval from a general policy or by implication was important for purposes of classifying the most obvious Roosevelt-era precedent—that involving the seizure, on then-Attorney General Jackson’s advice, of the North American Aviation plant.<sup>229</sup> Justice Jackson’s first draft of a discussion of the North American

<sup>224</sup> Roosevelt Involvement Segment, May 8, at 1.

<sup>225</sup> *Youngstown*, 343 U.S. 634 (Jackson, J., concurring).

<sup>226</sup> This segment, although dated May 8, appears to be the first segment discussing the framework for evaluating executive action. Justice Jackson’s undated handwritten notes on the case contain an early outline of the three categories of executive action Justice Jackson presents in his final opinion. Undated Handwritten Notes, Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C. Although undated, it is almost certain that these notes pre-dated the earliest typed opinion segments, which expand upon the central points in the notes. The segment described in the text most closely matches Justice Jackson’s handwritten notes. Other versions dated May 7 and May 8 expand upon it. Adam White reaches a similar conclusion about the misdating of this segment in his analysis of the draft opinions. See White, *supra* note 221, at 1114 n.37.

<sup>227</sup> Classification Segment, May 7, at 1.

<sup>228</sup> May 22 Draft at 2; *Youngstown*, 343 U.S. at 635.

<sup>229</sup> Justice Jackson’s undated handwritten notes, like the early opinion segments, tend to support the view that the three-part framework developed in part to distinguish and justify President Roosevelt’s conduct. Undated Handwritten Notes, Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C. The outline of the framework and notes on its application to the steel seizure are immediately

Aviation seizure characterized that seizure as “rest[ing] upon the provisions of two statutes.”<sup>230</sup> A memo from Justice Jackson’s law clerk noted that the stated justification for the NAA neither invoked nor was consistent with the “only relevant statute,” the Selective Service Act of 1940.<sup>231</sup> In the next version, after recounting differences between the North American Aviation seizure and the steel seizure, Justice Jackson categorized the North American Aviation seizure, without elaboration, as being “in accordance with the policy of Congress.”<sup>232</sup>

Although the May 7 segments on the Roosevelt-era precedents discussed only the North American Aviation seizure, Justice Jackson soon supplemented that example with other specific instances of his advice to President Roosevelt. As with the North American Aviation example, Justice Jackson dealt head-on with the fact that he was President Roosevelt’s advisor on such matters. For example, a May 8 segment cited an instance during Justice Jackson’s time as Attorney General in which the President sought congressional authorization to seize foreign merchant vessels lying immobilized in United States waters. Justice Jackson pointed out that the seizure could have been justified as within the power of the Commander in Chief “far better than the seizure now before us,” and yet President Roosevelt had sought statutory authority for his action.<sup>233</sup> Justice Jackson defended another of his opinions as Attorney General—one that he said had “been frequently criticized as pushing powers of the President to the extreme limit.”<sup>234</sup> That opinion—relating to the transfer of overage destroyers—relied upon the specific authorization of Congress to dispose of the destroyers in question. As noted earlier, however, the same opinion also advised that certain so-called “mosquito boats” could not be transferred because doing so would violate a statute.<sup>235</sup>

In short, early segments of Justice Jackson’s opinions reflect not only the development of the three-part framework included in his final opinion, but also an effort to situate his own advice to President Roosevelt within that framework. As with his more general comments on his involvement in the Roosevelt administration, however, Justice Jackson sought to depersonalize these segments. The Roosevelt-era examples developed in the May 7 and May 8 segments were demoted to footnotes, stripped of any reference to the fact that they involved advice given by Jackson himself, and placed alongside practices of other Presidents.<sup>236</sup> Only in connection

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followed by a catalog of the differences between President Roosevelt’s seizure of the North American Aviation plant and President Truman’s seizure of the steel mills. See Undated Handwritten Notes, Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C.

<sup>230</sup> Roosevelt Precedent Segment, May 7, at 2.

<sup>231</sup> See Memorandum from CGN, Presidential Seizure Power, May 8, 1952, at 2, Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C. (noting that reliance on the Selective Service Act seems not to have been contemplated at the time, and that “the press reports say nothing of it, except to indicate through reports of suggested amendatory legislation that the 1940 Act played no part in the seizure”).

<sup>232</sup> Roosevelt Precedent Segment, May 8, at 1.

<sup>233</sup> *Id.* at 2.

<sup>234</sup> *Id.*

<sup>235</sup> See Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers, 39 Op. Atty. Gen. 484.

<sup>236</sup> As noted earlier, the final opinion still contains an account of Jackson’s advice to President Roosevelt concerning the transfer of the overage destroyers, but without an indication that the advice was Jackson’s, as well as a citation to another of Justice Jackson’s opinions concerning U.S. training of British flying students. *Id.* at 645 (citing Training of British Flying Students in the United States, 40 Op. Atty. Gen. 58). The final version also

with the North American Aviation seizure did Justice Jackson allude to the extent to which his own past legal advice contributed to the breadth of the government's current claims about presidential power.<sup>237</sup>

Two other aspects of the opinion's depersonalization are notable as well. The first involved Justice Jackson's account of a disagreement he had with President Roosevelt over a presidential power issue—specifically, his advice to the President that the Lend-Lease Act did not encroach upon executive power merely because the act provided for its termination upon a joint resolution of Congress. Despite Jackson's advice, President Roosevelt maintained that the Act thereby unconstitutionally deprived the President of the power to exercise a veto on Congress's decision. Justice Jackson introduced this disagreement in a May 22 draft but removed it from a later version.<sup>238</sup> Finally, Justice Jackson's May 22 draft spoke rather forcefully to the role of a legal-advisor-turned-judge in a parallel to the English experience:

[I]t is the duty of the Court not to be the first but to be the last to give up our constitutional system of power only under law. We follow a judicial tradition instituted by one who had been a subservient, partisan Attorney General but who lives in history as an exemplary judge. On a memorable Sunday in 1612, King James took great offense at his defense of judicial independence and, in rage, declared: "Then I am to be *under* the law—which it is treason to affirm." . . . Chief Justice [Coke] replied to the King who had appointed him: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the Law.'"<sup>239</sup>

In handwritten edits to the May 22 draft, Justice Jackson excised the implicit parallel between his own role and that of Chief Justice Coke.<sup>240</sup> He then relegated the example to a footnote in the near-final copy edited version.<sup>241</sup>

The de-personalization of Justice Jackson's opinion, of course, was never complete. Justice Jackson still consciously spoke as legal-advisor-turned-judge. But if Justice Jackson's three-part framework emerged from, and as a way to justify the decisions he made in, his role as Attorney General, it is perhaps better understood as a guide for the executive branch to avoid separation-of-power disputes than as a prescription for courts to resolve them.

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includes a footnote that discusses President Roosevelt's request for congressional authorization to seize immobilized vessels in American harbors, placing that episode alongside those involving other Presidents. *Id.* at 647-48 n.16.

<sup>237</sup> See *supra* note 213.

<sup>238</sup> A year later, Justice Jackson revealed President Roosevelt's memorandum in an article in the Harvard Law Review. Robert H. Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353 (1953).

<sup>239</sup> Draft Opinion of May 22, at 30, Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C.

<sup>240</sup> *Id.*

<sup>241</sup> Undated Draft Opinion at 22, Container 176, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Washington, D.C.; see *Youngstown*, 353 U.S. at 655 n.27 ("We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: 'Then I am to be *under* the law—which it is treason to affirm.' Chief Justice Coke replied to his King: 'Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the Law.'").

How, then, does Justice Jackson’s opinion fare in the Executive Branch, if its message is one of prudence and stewardship in the exercise of power? In the final footnote of her book, Maeva Marcus quotes a deputy assistant attorney general in the Justice Department’s Office of Legal Counsel—the branch of the Justice Department charged with rendering advice on constitutional matters—as saying in a 1974 interview that “[a]ttorneys in the office do not often cite the [*Steel Seizure*] case, but it is always in the back of their minds.”<sup>242</sup> The statement is ambiguous, for it could mean either that the *Steel Seizure* case indirectly but firmly shapes OLC’s advice or that attorneys can simply set it aside. In a more recent reflection, almost thirty years after the interview, Marcus cast the observation in the more pessimistic light: “*Youngstown* rarely affects the advice the office gives the president on the legality of contemplated actions. They know the decision exists, but it is not dispositive.”<sup>243</sup>

But the heightened prominence of Justice Jackson’s opinion over the last quarter-century may well have changed the stakes of executive advice-giving. To be sure, citations to the *Steel Seizure* case in published OLC opinions are balanced by citations to an opinion whose broad view of executive power Justice Jackson sought to rebut—*United States v. Curtiss-Wright Export Corp.*<sup>244</sup> One could argue, however, that the shadow the *Steel Seizure* case casts on executive decision-making in foreign affairs cases is so long that the executive branch can only avoid the case’s implications by refusing to acknowledge it at all.<sup>245</sup> And although Justice Jackson’s framework can be as fluid in the hands of the executive branch as it may seem in the hands of courts,<sup>246</sup> the *Steel Seizure* case teaches that imprudent executive branch advice risks

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<sup>242</sup> Marcus, *supra* note 1, at 358 n.31 (quoting Leon Ulman).

<sup>243</sup> Maeva Marcus, *Will Youngstown Survive?*, 41 Duq. L. Rev. 725, 732 (2003).

<sup>244</sup> 299 U.S. 304 (1936).

<sup>245</sup> Many critics of the rescinded Torture Memo have noted that OLC’s analysis of the federal anti-torture statute omitted any citation to the *Steel Seizure* case. See, e.g., Neil Kinkopf, *The Statutory Commander in Chief*, 81 Ind. L.J. 1169, 1171 (2006) (“[OLC] failed even to cite to Justice Jackson’s seminal opinion from *Youngstown*.”); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 Ind. L.J. 1297, 1304-05 (2006) (“[T]he Torture Memo’s sweeping commander-in-chief analysis . . . glaringly omitted even mere mention of the paradigmatic *Steel Seizure* case.”); Lawyers’ Statement on Bush Administration’s Torture Memo, Aug. 7, 2004, at 2, available at <http://www.hrw.org/pub/2004/lawyers-statement.pdf> (“One of the surprising features of these legal memoranda is their failure to acknowledge the numerous sources of law that contradict their own positions, such as the *Steel Seizure* Case.”). The portion of the Torture Memo addressing the President’s Commander in Chief power suggests that Congress is powerless to limit the executive’s interrogation of enemy combatants. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002, at 31. Professor Neil Kinkopf argues that the failure to cite Justice Jackson’s opinion “is no mere violation of citation etiquette, for it led OLC to fail to acknowledge that Congress has any relevant authority whatsoever.” Kinkopf, *supra*, at 1171.

<sup>246</sup> The Justice Department’s “White Paper” on the National Security Agency’s terrorist surveillance program provides a case in point. Legal Authorities Supporting the Activities of the National Security Agency Described by the President, Jan. 19, 2006. The opinion acknowledged the centrality of the *Steel Seizure* framework. But it characterized the NSA program as a “category one” event—as being supported by an express or implied congressional authorization. More specifically, the opinion concluded that the Authorization for the Use of Military Force (AUMF), which permits the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001, placed the President’s authority to conduct surveillance at its zenith. *Id.* at 2, 11. Surveillance to gather foreign intelligence information is extensively regulated by the Foreign Intelligence Surveillance Act, 50 U.S.C. at § 1801 *et seq.*, and that statute deems its procedures the “exclusive means” by which electronic surveillance to gather foreign intelligence information can occur. 18 U.S.C. § 2511(2)(f). The exclusivity provision suggests that the NSA surveillance would constitute a “category three” event. The White Paper sidestepped the difficulties created by

prompting judicial intervention to re-set the balance between the President and Congress.<sup>247</sup> The case thus counsels wise stewardship of executive power but serves a democracy-forcing function—requiring the cooperation of the political branches—when that fails.<sup>248</sup>

### *Conclusion*

We can confidently say that the Supreme Court’s decision in the *Steel Seizure* case was never “destined to be ignored.”<sup>249</sup> What is surprising about the story of the case is how, at so many turns, the Court’s final resolution of the dispute might have been avoided. Once the dispute reached the district court, most observers perceived the chances to be in the President’s favor—to the point where the steel companies’ attorneys thought their best strategy was to steer the district court toward a middle course of protecting the companies’ interests without ruling against the government on the ultimate question of the seizure’s legality. The Justice Department, meanwhile, not only opened the door for the district court’s resolution of this ultimate question but also staked its defense of the seizure on an unreasonably broad theory of presidential power. Once the district court ruled, the Supreme Court unwittingly played into the steel companies’ hands by staying the terms and conditions of employment and thereby dooming the ongoing negotiations.

Before the Supreme Court, the government moderated its claims. In siding with the steel companies, the Court rejected any sort of middle course by which it might have upheld the government’s conduct on the facts presented without broadly considering the scope of any inherent or residual power the President might have to act in an emergency. The importance of the *Steel Seizure* case thus stems in part from the weight it lends to claims that it is a court’s duty to combat abuses of power by a coordinate branch of government. It also stems in part from Justice Jackson’s concurrence, which courts and commentators treat as the most authoritative opinion in the case. As a matter of judicial doctrine, the concurrence does less to constrain presidential power claims that we might expect, for it both recognizes the importance of limiting presidential conduct and provides courts with ready avenues for upholding questionable presidential conduct. The opinion, however, is as much a primer on how to avoid courts’ intervention in presidential power disputes as it is a guide for courts to resolve those disputes.

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the exclusivity provision in part by suggesting that interpreting FISA to preclude the surveillance would create a conflict between FISA and the President’s power as Commander in Chief, and that the constitutional avoidance canon therefore counseled in favor of interpreting it otherwise. See Legal Authorities Supporting the Activities of the National Security Agency Described by the President, Jan. 19, 2006, at 28.

<sup>247</sup> The Court’s decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), interpreting the AUMF in the context of the President’s claim of authority to set up military tribunals to try enemy combatants, essentially forecloses the White Paper’s construction of the AUMF.

<sup>248</sup> See *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (“Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine through democratic means how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.”).

<sup>249</sup> See *supra* note 152.