

1953

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Recommended Citation

Donald J. Letizia, *Inherent Power of the President to Seize Property*, 3 Cath. U. L. Rev. 27 (1953).
Available at: <https://scholarship.law.edu/lawreview/vol3/iss1/4>

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COMMENTS

Inherent Power of the President to Seize Property

"Steel Seizure Cases"

The ill-fated attempt by the Government to seize the Steel Mills on April 9, 1952, was notable in one respect: it brought forth a headline-catching assertion that the President had no inherent power to seize such property. The circumstances were these: In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long continued conferences failed to resolve the dispute. On December 18, 1951, the employees' representative, the United Steelworkers of America, CIO, gave notice of an intention to strike when the existing bargaining agreements expired on December 31. Thereupon the Federal Mediation and Conciliation Service intervened in an effort to get labor and management to agree. This failing, the President on December 22, 1952, referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. The board's report and recommendations were acceptable to the Union but not to the steel companies. On April 4, 1952, the union gave notice of a nation-wide strike called to begin at 12:01 A.M. April 9, 1952.

On the evening of April 8, 1952, the President of the United States issued an Executive Order directing the Secretary of Commerce to take possession of such plants as he should deem necessary in the interest of national defense, to operate or to arrange for the operation thereof, and to do all things necessary for or incident to such operation.¹ Acting pursuant to the Executive Order, Secretary Charles Sawyer issued his own possessory orders, stating that he deemed it necessary in the interest of national defense to take possession of certain plants, and that by virtue of said order he did therewith take possession of such plants.

The President based his authority for such seizure, not on any specific enactment by the Congress, nor on any enumerated or implied grant of power contained in the Constitution of the United States, but on the inherent power assertedly contained in the Constitution, and redounding to the President in such situation. The Secretary of Commerce took possession of the plants of certain steel companies. On April 9, Judge Holtzoff, in the United States District Court for the District of Columbia, denied an application by the steel companies for a temporary restraining order. On April 29, 1952, the steel companies were granted preliminary injunctions restraining the Secretary of Commerce from seizing their plants.² However, on May 2, 1952, the injunction order was stayed, pending a review of the case, and the Supreme Court of the

¹ Exec. Order No. 10340, 17 Fed. Reg. 3139 (1952).

² *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D. D. C. 1952).

United States granted certiorari.³ The Supreme Court held invalid the Executive Order.⁴ It was the opinion of the court that the order was neither a proper exercise of the President's power as Commander-in-Chief of the armed forces nor an exercise of the President's power to see that the laws are faithfully executed. The court further opined that the founders of the nation had entrusted law making to the Congress alone "in both good and bad time."

The question to be discussed is whether our Federal Government, being a government of enumerated powers,⁵ possesses any inherent powers which gives it authority to seize private property in the absence of express delegation by the Constitution or statutory authority by Congress.

While the scope of legislative and judicial powers has come to be fairly well defined, the extent of executive power has been subject to controversy since the days of the Constitutional Convention. Under Section I of Article II of the Constitution, the executive power of the United States is vested in the President. Sections 2 and 3 of that article stipulate that he shall be the Commander-in-Chief of the armed forces, shall have power to make treaties subject to approval by two-thirds vote of the Senate, shall make certain appointments, shall keep Congress informed of the State of the Nation, and shall "take care that the laws be faithfully executed." These powers, together with the right to convene and, in certain instances, to adjourn the Congress, constitute the full power of our Chief Executive. It is granted that these words have received a broad interpretation, but they are not unlimited except by the "ballot box . . . impeachment" as claimed by the government lawyers.⁶ Congress is the branch of the government upon whom the right to make laws has devolved; the President can only execute them.⁷

Many broad assertions of "inherent powers" have been made at various times. Hamilton thought the Constitution vested the executive power in its entirety in the President, "subject only to the exceptions and qualifications which are expressed in the instrument."⁸ Jackson's followers in Congress contended that "whatever power is neither legislative nor judiciary is, of course, executive, and as such belongs to the President under the Constitution."⁹

As early as 1794, Congress authorized the President to lay an embargo on all ships and vessels in the harbors of the United States, including those of

³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 937 (1952).

⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

⁵ *Marbury v. Madison*, 1 Cranch 137 (1803); *McCulloch v. Maryland*, 4 Wheat. 316 (1817).

⁶ Argument by Holmes Baldrige, Asst. Atty. Gen. at hearing in case of *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C. 1952), hereinafter referred to as the *Steel Cases*.

⁷ U. S. Const. Art. I, § 1.

⁸ 4 Works of Alexander Hamilton 139 (1895).

⁹ Upshur, A Brief Inquiry Into the True Nature and Character of Our Federal Government (1840).

foreign nations wherever, in his opinion, the public safety shall so require.¹⁰ The President acting pursuant to this act declared an embargo. Here there was no actual seizure of property, but the use of the property was severely restrained.

A classic example of the proper exercise of the war powers vested in Congress by the Constitution is a law passed by Congress and executed by the President. A more recent example may be found in the War Labor Disputes Act of 1942.¹¹ The foregoing examples seem to support the conclusion of Mr. Justice Black in the *Steel Cases* that "the President's power to issue the order must stem either from an Act of Congress or from the Constitution itself."¹² Diligent research has shown no legislation on this point until the War Between the States, at which time the Railroad and Telegraph Act of 1862 was passed by Congress.¹³ This statute gave the President authority to "take possession of" telegraph lines and railroads; prescribe rules for their operation; and place all officers and employees thereof under military control. Its duration was to be for a term "no longer than is necessary for the suppression of the rebellion."

No action of this type was needed thereafter until the advent of World War I. The first statute passed for the support of World War I was contained in the Army Appropriations Act of 1916 and empowered the President in time of war to take possession of and utilize any system of transportation.¹⁴ The President did seize the railroads and operate them for two years.¹⁵ Altogether six such acts were passed during World War I, and the President executed twelve seizures under them.¹⁶

During the period between World Wars I and II Congress passed two seizure measures. Section 16 of the Federal Water Power Act of 1920 gave the President the right to take possession of certain water power projects being operated under a federal license.¹⁷ Section 606 of the Communication Act of 1934 gave the President the right to seize radio stations during war, threat of war, state of public peril, or national emergency.¹⁸ From the start of World War II to its end, Congress passed five acts authorizing seizure of facilities by the President. Under these acts the President executed fifty seizures because of labor disputes.

It should be noted that in many instances, these and similar statutes were requested by the President because he was doubtful of his authority to act without them. For example, President Wilson asked Congress to authorize his arming

¹⁰ 1 Stat. at L. 372 (1794).

¹¹ 57 Stat. 164 (1943), 50 U. S. C. § 1501-11 (1946).

¹² See note 4, *supra*.

¹³ 12 Stat. 334 (1862), 10 U. S. C. § 1363 (1946).

¹⁴ 39 Stat. 645 (1916), 10 U. S. C. § 1361 (1946).

¹⁵ 40 Stat. 1733 (1917).

¹⁶ See note 11, *supra*; 39 Stat. 1168 (1917); 40 Stat. 182 (1917); 40 Stat. 276 (1917); 40 Stat. 904 (1917); 140 Stat. 535 (1918).

¹⁷ 41 Stat. 1072 (1920), 16 U. S. C. § 809 (1946).

¹⁸ 48 Stat. 1104 (1934), 47 U. S. C. § 606 (1946).

of merchant ships in 1916,¹⁹ and President Franklin Roosevelt would not even presume to seize Nazi shipping in our harbors without first asking Congress for such authorization.²⁰ These seizures were made pursuant to authority conferred upon the President by the Congress acting pursuant to its power to support a war effort.

The *Steel Cases* present a clear test in the courts of a situation where the President has made a seizure of property, outside a theatre of military operations, without the authority to support his move. This was not a case where the President had any excuse to invoke an authority not specifically granted by the Constitution or by the Congress, because here was a case where the President had been granted specific authority to act by Congress, namely the Labor-Management Relations Act of 1947, which he refused to exercise.²¹ The failure of the President to execute the law made by Congress, and his attempt to substitute a law made by himself through an executive order, presented to the court a clear example of law-making which was described in Justice Black's opinion:²²

The President's order does not direct a Congressional policy be executed in a manner prescribed by Congress—it directs that a Presidential policy be executed in a manner prescribed by the President . . . the power of Congress to adopt such public policies as those proclaimed by this order is beyond question. It can authorize the taking of private property for public use, it can regulate the relationships between employers and employees, prescribing the rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution did not subject the law-making power of Congress to Presidential or military supervision or control.

The procedure adopted by the President was entirely inconsistent with the Taft-Hartley Act. The provisions of the Taft-Hartley Act were specifically designed to maintain collective bargaining and to bring about a voluntary settlement of a labor dispute. The board of inquiry provided for in the Taft-Hartley Act was required to make a factual report without recommendations.²³ The Act further provided that, if negotiations were unsuccessful, the final offer of the employers for a settlement could not be acted upon summarily by the top union officials, but must be submitted to a secret ballot by the employees concerned.²⁴ Therefore, it was the clear intent of the Taft-Hartley Act to prevent union officials from using their authority unwisely, thereby precipitating a strike which would be undesirable to a majority of the employees. Furthermore, the Taft-Hartley Act specifically provides that if the President perceives a threat to our national welfare he must, before acting arbitrarily, make a factual report to Congress of the events that show a threat to our national welfare and the needs

¹⁹ Richardson, *Messages and Papers of the Presidents* 314.

²⁰ 87 Cong. Rec. 3072.

²¹ 61 Stat. 136 (1947), 29 U. S. C. 141 et seq. (1946).

²² See note 4, *supra*.

²³ See note 21, *supra*.

²⁴ *Ibid.*

of further enactments by Congress giving the President power to seize lawfully and not under the color of *inherent power*.²⁵

Congress had adopted a policy of avoiding coercive action by the Government, reserving to itself the right to take any needed in an emergency. The course followed by the President was directly contrary to that adopted by Congress.

One of the greatest seizures of property made by the United States during war time was the Emancipation Proclamation of Abraham Lincoln. The government's case relied strongly on this seizure to support President Truman's seizure of the steel mills. On September 22, 1862, the President issued the Emancipation Proclamation, an executive order unsupported by Congressional enactment, by the terms of which, slaves of those in rebellion against the authority and government of the United States were set free.²⁶ This move was purely a war measure, applied by the President of the United States against an enemy.²⁷ Here we have a perfect example of all the factors present to permit seizure of property without Congressional authority: a war measure, actual hostilities, a move which was a blow to the enemy, and the confiscation taking place only in the actual theatre of operations.

CONCLUSION

The President's power must come from either the Constitution or Congressional enactment. Congress considered but refused to grant him seizure power in labor disputes under the Taft-Hartley Act.²⁸ The labor dispute under discussion is one covered by that act. Therefore, if the President has power to seize it must be found in the Constitution since it is not found in an act of Congress. There is no express power granted in the Constitution to make such seizures.

Is there an implied power? If there is, it must arise from the President's power as Commander-in-Chief,²⁹ his power to execute the laws,³⁰ or from the fact that the "executive power shall be vested in a President."³¹ But by the exercise of one or all of these powers the President cannot and does not make law. By President Truman's seizure of the steel mills, he in effect enacted new legislation. The lack of implied powers of the President withhold from him this privilege.

At this stage of history, when thoughtful men distinguish between the free world and the slave world, it is imperative that we jealously guard the rights and liberties protected by the Constitution of the United States. "Today a kindly

²⁵ *Ibid.*

²⁶ 12 Stat. 1268 (1863).

²⁷ Brief of Steel Companies in *Steel Cases*, p. 65.

²⁸ See note 20, *supra*.

²⁹ U. S. Const. Art. II, § 2.

³⁰ U. S. Const. Art. II, § 3.

³¹ U. S. Const. Art. II, § 1.

President uses the seizure power to effect a wage increase, and to keep the furnaces in operation. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure."⁸²

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⁸² See note 4, *supra*, p. 633.