

## Appendix 2

### Excerpts from *Youngstown and Reich*

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

Justice Black's decision joined by Justices Burton, Clark, Douglas, Frankfurter and Jackson

Chief Justice Vinson's dissent joined by Justices Reed and Minton

Justice Black, decision of the court:

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. [Ibid. at 582.]

**The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.** [The authors have added boldface to certain passages for emphasis.] There is no statute that expressly authorizes the President to take possession of

property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. **There are two statutes which do authorize the President to take both personal and real property under certain conditions.** However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes (' 201 [b] of the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, **Congress had refused to adopt that method** of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. [Ibid. at 585–86.]

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that **express** constitutional language grants this power to the President. The contention is that presidential power should be **implied** from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . .";

that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States." [Ibid. at 587.]

Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. **In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.** The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. **The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."** After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of

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

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

**The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.** It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. [Ibid. at 587–89.]

Justice Frankfurter, concurrence:

The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for

effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end they rested the structure of our central government on the system of checks and balances. **For them the doctrine of separation of powers was not mere theory; it was a felt necessity.** Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. **The accretion of dangerous power does not come in a day.** It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority. [Ibid. at 593–94.]

When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Apart from his vast share of responsibility for the conduct of our foreign relations, the embracing function of the President is that "he shall take Care that the Laws be faithfully executed . . . ." Art. II, ' 3. The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. **"The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress**

**sees fit to leave within his power."** *Myers v. United States*, 272 U.S. 52, 177. The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government. [Ibid. at 609–10.]

**Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation,** but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by ' 1 of Art. II. [Ibid. at 610–11.]

Thus the list of executive assertions of the power of seizure in circumstances comparable to the present reduces to three in the six-month period from June to December of 1941. We need not split hairs in comparing those actions to the one before us, though much might be said by way of differentiation. Without passing on their validity, as we are not called upon to do, it suffices to say that these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution revealed in the *Midwest Oil* case. Nor do they come to us sanctioned by long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice Brandeis:

**"The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 240, 293.**

It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world. [Ibid.

at 613–14.]

Justice Douglas, concurrence:

There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act. [Ibid. at 629.]

We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution. That in turn requires an analysis of the conditions giving rise to the seizure and of the seizure itself. [Ibid. at 630.]

The method by which industrial peace is achieved is of vital importance not only to the parties but to society as well. A determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power. In some nations that power is entrusted to the executive branch as a matter of course or in case of emergencies. We chose another course. We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not some legislative power in the Congress; Article I, Section 1 says "All legislative Powers herein granted shall be vested in a

Congress of the United States, which shall consist of a Senate and House of Representatives."

[Ibid.]

The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected. That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment. It squares with the theory of checks and balances expounded by MR. JUSTICE BLACK in the opinion of the Court in which I join.

If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency. Article II which vests the "executive Power" in the President defines that power with particularity. Article II, Section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs. Article II, Section 3 provides that the President shall "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, Section 3 also provides that the President "shall take Care that the Laws be faithfully executed." But, as MR.

JUSTICE BLACK and MR. JUSTICE FRANKFURTER point out, the power to execute the laws starts and ends with the laws Congress has enacted.

The great office of President is not a weak and powerless one. The President represents the people and is their spokesman in domestic and foreign affairs. The office is respected more than any other in the land. It gives a position of leadership that is unique. The power to formulate policies and mold opinion inheres in the Presidency and conditions our national life. The impact of the man and the philosophy he represents may at times be thwarted by the Congress.

Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers. The tragedy of such stalemates might be avoided by allowing the

President the use of some legislative authority. **The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political**

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

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

been regimented by this seizure. [Ibid. at 631–34.]

Justice Jackson, concurrence:

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them. The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic. [Ibid. at 634.]

Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

**1. When the President acts pursuant to an express or implied authorization of**

**Congress, his authority is at its maximum**, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. **When the President acts in absence of either a congressional grant or denial of authority**, he can only rely upon his own independent powers, but there is a **zone of twilight** in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. **When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb**, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [Ibid. at 635–38.]

In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

**The Solicitor General** seeks the power of seizure in three clauses of the Executive Article, the first reading, "The executive Power shall be vested in a President of the United States of America." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon

it: **"In our view, this clause constitutes a grant of all the executive powers of which the Government is capable."** If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated. [Ibid. at 639–41.]

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military

commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. . . ." Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress. [Ibid. at 643–45.]

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. **They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.** We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work,

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

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg **Hindenburg? Please check original** .to suspend all such rights, and they were never restored. [Ibid. at 649–51.]

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. In 1939, upon congressional request, the Attorney General listed ninety-nine such separate statutory grants by Congress of emergency or wartime executive powers. They were invoked from time to time as need appeared. Under this procedure we retain Government by law—special, temporary law, perhaps, but law nonetheless. The public may

know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties. [Ibid. at 652-53.]

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

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered

no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. [Ibid. at 654–55.]

***Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996)**

Silberman, Sentelle, and Randolph, Circuit Judges

The government, for its part, claims that a cause of action under the APA is not available, even were appellants to rely on it, because a challenge to the regulation should be regarded as nothing more than a challenge to the legality of the President's Executive Order and therefore not reviewable. It would seem that the government's position is somewhat in tension with its previous claim that the Secretary's regulations were necessary to "flesh out" the Executive Order. And we doubt the validity of its unsupported interpretation of the APA; that the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question. See *Public Citizen v. United States Trade Representative*, 303 U.S. App. D.C. 297, 5 F.3d 549, 552 (D.C. Cir. 1993) ("Franklin[']s denial of judicial review of presidential action] is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."), cert. denied, *126 L. Ed. 2d 652*, *114 S. Ct. 685* (1994) (emphasis added). Still, recognizing the anomalous situation in which we find ourselves—not able to base judicial review on what appears to us to be an available statutory cause of action—we go on to the issue of whether appellants are entitled to

bring a non-statutory cause of action questioning the legality of the Executive Order. [Ibid. at 1326–27.]

The message of this line of cases is clear enough: courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986). [Ibid. at 1328.]

Since "the [Secretary of Labor's] powers are [allegedly] limited by [the NLRA], his actions beyond those limitations [viz., enforcing the Executive Order] are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do . . ." *Larson*, 337 U.S. at 689. So, there is no sovereign immunity to waive—it never attached in the first place.

**Although the government's brief advanced a breathtakingly broad claim of non-reviewability of presidential actions**, the government does not seriously press its argument that we may not exercise jurisdiction over appellants' claim because they lack a cause of action or cannot point to a waiver of sovereign immunity. **At oral argument counsel relied instead on the more limited notion, also advanced in the brief, that the Procurement Act delegated wide discretion** to the President and we were **not authorized to review** his exercise of that discretion so long as he did not violate a direct prohibition of another statute (or the Constitution). [Ibid. at 1329, parentheses in original.]

**In sum, we think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions,** so long as the President claims that he is acting pursuant to the Procurement Act in the pursuit of governmental savings. Yet this is what the government would have us do. **Its position would permit the President to bypass scores of statutory limitations on governmental authority, and we therefore reject it.** [Ibid. at 1332.]

It does not seem to us possible to deny that the President's Executive Order seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers. The President has, of course, acted to set procurement policy rather than labor policy. But the former is quite explicitly based—and would have to be based—on his views of the latter. For the premise of the Executive Order is the proposition that the permanent replacement of strikers unduly prolongs and widens strikes and disrupts the proper "balance" between employers and employees. Whether that proposition is correct, or whether the prospect of permanent replacements deters strikes, and therefore an employer's right to permanently replace strikers is simply one element in the relative bargaining power of management and organized labor, is beside the point. Whatever one's views on the issue, it surely goes to the heart of United States labor relations policy. [Ibid. at 1337.]

No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be.

If the government were correct, it follows, as the government apparently conceded, that another President could not only revoke the Executive Order, but could issue a new order that actually required government contractors to permanently replace strikers, premised on a finding that this would minimize unions' bargaining power and thereby reduce procurement costs. Perhaps even more confusing, under the government's theory, the states would be permitted to adopt procurement laws or regulations that in effect choose sides on this issue, which would result in a further balkanization of federal labor policy. Yet the whole basis of the Supreme Court's NLRA pre-emption doctrine has from the outset been the Court's perception that Congress wished the "'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 30 L. Ed. 2d 328, 92 S. Ct. 373 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490, 98 L. Ed. 228, 74 S. Ct. 161 (1953)).

The government insists that the President's intervention into the area of labor relations is quite narrow. In contrast to the Wisconsin debarment scheme in *Gould*, the Executive Order does not provide for automatic contract termination or debarment of contractors. The government emphasizes the discretion that the Secretary and contracting agencies have in deciding whether to impose the Executive Order's penalties on contractors who hire permanent replacements. The Secretary may terminate a contract if a contractor has permanently replaced strikers and only if the agency head does not object. The Secretary is also given discretion as to whether to debar a contractor and cannot debar a contractor if an agency head concludes that there is a compelling

reason not to do so. The Executive Order's flexibility is said to ensure that intervention into labor relations only occurs to the extent necessary to guarantee efficient and economical procurement.

We do not think the scope of the President's intervention into and adjustment of labor relations policy is determinative, but despite the government's protestations, the impact of the Executive Order is quite far-reaching. It applies to all contracts over \$100,000, and federal government purchases totaled \$437 billion in 1994, constituting approximately 6.5% of the gross domestic product. STATISTICAL ABSTRACT OF THE UNITED STATES 451 (1995). Federal contractors and subcontractors employ 26 million workers, 22% of the labor force. GAO REPORT. The Executive Order's sanctions for hiring permanent replacements, contract debarment and termination, applies to the organizational unit of the federal contractor who has hired permanent replacements. The organizational unit includes "any other affiliate of the person that could provide the goods or services required to be provided under the contract." *60 Fed. Reg. at 27,861* (emphasis added). If a local unit of Exxon had a contract to deliver \$100,001 worth of gas to a federal agency, the organizational unit would include all the other affiliates of Exxon that could have provided the gas; no doubt a significant portion of the Exxon corporation. The broad definition of "organizational unit" will have the effect of forcing corporations wishing to do business with the federal government not to hire permanent replacements even if the strikers are not the employees who provide the goods or services to the government. Indeed, corporations who even hope to obtain a government contract will think twice before hiring permanent replacements during a strike. It will be recalled that in *Kahn*, 618 F.2d at 792–93, the government itself asserted that controls imposed on government contractors—given the size of that portion of the economy—would alter the behavior of non-government contractors.

Not only do the Executive Order and the Secretary's regulations have a substantial impact on American corporations, it appears that the Secretary's regulations promise a direct conflict with the NLRA, thus running afoul not only of Machinists but the earlier Garmon pre-emption doctrine. Under the regulations, the Secretary assumes responsibility for determining when a "labor dispute" ends, thereby permitting an employer who is debarred because he used permanent replacements to be declared eligible. But the regulations contemplate that the Secretary will not declare the "labor dispute" over without the striking union's approval (which enables either strikers to return to work thus ousting the replacements or a collective bargaining agreement to be reached, both of which are factors listed in the regulations for supporting the conclusion that a "labor dispute" has ended. See 60 *Fed. Reg.* at 27,862). Under the NLRA, however, an employer's duty to bargain with a striking union after the strikers have been replaced ends if a year has passed since certification and he has a good faith doubt as to the union's majority status, or the union does not in fact have majority status. See *Curtin Matheson*, 494 U.S. at 778. If after a union lost majority status an employer were to continue to recognize the union as the exclusive representative—the recognition of which the Secretary's regulations would seem to induce—the employer would be committing an unfair labor practice. See *International Ladies' Garment Workers' v. NLRB*, 366 U.S. 731, 6 L. Ed. 2d 762, 81 S. Ct. 1603 (1961).

**We, therefore, conclude that the Executive Order is regulatory in nature and is pre-empted by the NLRA which guarantees the right to hire permanent replacements. The district court is hereby reversed. [Ibid. at 1337–39.]**