

THE THIRTEENTH AMENDMENT IN NATIONAL EMERGENCIES

1

**COMPULSORY LABOR IN A NATIONAL EMERGENCY:
PUBLIC SERVICE OR INVOLUNTARY SERVITUDE?
THE CASE OF CRIPPLED PORTS**

MICHAEL H. LEROY

PROFESSOR

**INSTITUTE OF LABOR AND INDUSTRIAL RELATIONS, AND COLLEGE OF LAW
UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN**

504 E. ARMORY

CHAMPAIGN, IL 61820

(217) 244-4092 OR (217) 398-1840

e-mail: m-leroy@uiuc.edu

The author gratefully acknowledges substantive contributions during a presentation of this paper in the “Fresh Ideas” speaker series at the University of Michigan, and also thanks Prof. Stephen Darwall and Prof. Joel Cutcher-Gershenfeld for helpful insights.

Word Count (Footnotes Included): 21,362

FALL 2006

SUMMARY

The 13th Amendment ban on involuntary servitude has new relevance as the U.S. grapples with national emergencies such as catastrophic hurricanes, flu pandemics, and terrorism. This Article considers work refusal and coerced work performance in life-threatening employment contexts. Overwhelmed by fear, hundreds of police officers and health care workers abandoned their jobs during Hurricane Katrina. Postal clerks worked against their will without masks in facilities with anthrax. A report by Congress worries that avian flu will cause sick and frightened medical personnel to stay away from work, thus jeopardizing a coherent response to a crisis.

How far can the U.S. go in forcing reluctant civilians to perform essential jobs during a national emergency? I explore solutions to this question by hypothesizing a large release of radiation— whether by terror attack, or catastrophic accident, or major earthquake— in a vital Pacific port. These ports have a history of work stoppages that disrupt the nation’s economy. I examine federal government responses if dock workers refused assignments until conditions were safe: (1) The President could declare a national emergency labor dispute under the Taft-Hartley Act, and seek an 80-day back-to-work injunction. (2) Congress could re-enact Section 8 of the War Labor Disputes Act, making it unlawful for dock workers to discontinue production for 30 days and subjecting violators to coercive damages. (3) The president could issue strong executive orders, backed by imprisonment, that regulate employment in ports.

At the heart of my analysis, I ask: Would any of these responses violate the Thirteenth Amendment ban on involuntary servitude? Congress and the judiciary have broadened this law, and its enforcement counterpart in 18 U.S.C. § 1584, beyond the abolition of African slave-holding. The Supreme Court in *Kozminski* defined involuntary servitude as forcing a person to work by physical or legal coercion.

But the Supreme Court created 13th Amendment exceptions for transportation work. *Robertson* upholds a law that bars merchant seamen from quitting work, and imprisons deserters. *Butler* permits states to conscript citizens to work on highways, on pain of imprisonment. Dock work is similar because ports integrate ships and trucks in a transportation hub. Courts now apply these precedents to new compulsory activities, such as mandatory public service for graduation. Moreover, *Kozminski* reaffirmed *Robertson* and *Butler* as precedents.

Thus, the Constitution would be unlikely to shield dock workers from involuntary labor. This has troubling implications for employees who have recently worked in national emergencies, and may do so again. Employees who work to alleviate avian flu or other catastrophic health threats are also at risk for compulsory labor that exposes them to extraordinary hazards.

I conclude with a legislative proposal to strengthen individual rights. As my research shows, courts that are presented with national emergency disputes rarely side with the individual who stands in the way of the public’s welfare. Without a more balanced labor policy to address emerging crises, the nation may realize belatedly “that when we allow fundamental freedoms to be sacrificed in the name of real or perceived emergency, we invariably come to regret it.”¹

¹ *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 635 (1989) (J. Brennan, dissenting).

TABLE OF CONTENTS

I. INTRODUCTION 1

 A. How Far Can the U.S. Go in Forcing Unwilling Civilians
 To Perform Essential Jobs in a National Emergency? 1

 B. The Setting: Radiation Exposure at a Pacific Port 2

 C. Overview 4

II. A VITAL PACIFIC PORT IS CRIPPLED BY RADIATION EXPOSURE:
 THE COURTS, CONGRESS, AND PRESIDENT RESPOND. 7

 A. The First 80 Days of a National Emergency Work Stoppage:
 Injunctions under the Taft-Hartley Act 8

 B. The Next 30 Days of a National Emergency Work Stoppage:
 Re-Enactment of Section 8 of the War Labor Disputes Act. 16

 C. Executive Order Policy Options 21

III. COMPULSORY WORK AND THE EVOLVING MEANING
 OF “INVOLUNTARY SERVITUDE” 30

 A. Beyond the Original Purpose of the Thirteenth Amendment:
 From Slavery to “Situations Involving Physical or Legal Coercion” 30

 B. The Public Service Exception to the Thirteenth Amendment. 27

 C. The Maritime Duty Exception to the Thirteenth Amendment. 39

IV. COMPULSORY LABOR IN A NATIONAL EMERGENCY?
 A THIRTEENTH AMENDMENT ANALYSIS 41

V. CONCLUSIONS: BEYOND EMERGENCY WORK IN CRIPPLED PORTS 45

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.²

I. INTRODUCTION

A. How Far Can The U.S. Go In Forcing Reluctant Civilians To Perform Essential Jobs In A National Emergency?

Our nation has recently experienced national emergencies. Some were man-made— for example, 9/11 and the anthrax attacks of 2001— while another, Hurricane Katrina, was a natural disaster. Others are chilling possibilities, such as an avian flu pandemic. Whether past or potential, man-made or natural, each emergency enlarges government power at the expense of individual liberties.

Our society's need for order and security, balanced by a constitutional tradition that values individual liberty, sets the stage for my research question. I re-contextualize these fundamental interests in a novel, though important setting: the civilian workplace in an extreme catastrophe, disaster, or attack that frightens employees to the point of refusing to work. Suppose that these workers perform a public service that is so vital that their duties cannot be interrupted, not even briefly.

My Article asks: Can the government force these civilians to work against their will? Would a compulsory work law violate the 13th Amendment ban on involuntary servitude? While work refusal in national emergencies is extremely rare, we have witnessed it on TV, simulated it in disaster drills, and learned about it in congressional hearings. At the height of Katrina's anarchy, 200 New Orleans police officers abandoned their jobs while on duty.³ Health care workers, fearful of drowning in the rising torrent,

² Amendment XIII, Section 1. Section 2 of the Amendment states: "Congress shall have the power to enforce this article by appropriate legislation." In this vein, see 18 U.S.C. § 1584, *infra* note 139.

³ Timothy Appleby, *Storm's Victims Still Seek Blame As Katrina's Toll Grows Higher*, GLOBE &

abandoned nursing home patients and residents.⁴ The future portends similar forms of worker flight. Just months before 9/11, *Dark Winter* simulated a smallpox attack in the U.S.⁵ In the exercise, many unvaccinated emergency room personnel failed to show up for work after a smallpox outbreak was reported.⁶ More recently, a report by Congress on avian flu said that ill and frightened medical personnel would stay away from work, jeopardizing a coherent response to a national crisis.⁷

My Article hypothesizes that a natural disaster, catastrophic accident, or attack will pose a national emergency, but a sizeable number of workers will abandon their jobs— or refuse work orders— during this crisis. Their flight will harm the nation’s economy. I suggest that Congress and the president would take swift and decisive action to compel workers to stay on the job. But workers would continue to resist orders to return to their jobs. At that critical moment, how far could the government push these essential workers without violating a constitutional ban on involuntary servitude?

B. The Setting for this Analysis: Radiation Exposure at a Pacific Port

I explore solutions to the foregoing question by hypothesizing a large release of radiation in a vital Pacific port. Because they are key transportation hubs, ports are also choke points in the U.S. economy. The Los Angeles and Long Beach ports handle 60% of

MAIL (Toronto Can.), Sept. 5, 2006, at A8 (more than 200 of New Orleans’ 1,500 police officers abandoned their jobs in response to extraordinary stress and personal risks).

⁴ Also see Robert Davis & Kevin Johnson, *Hospital Workers Subpoenaed in Post-Katrina Deaths*, USA TODAY (Oct. 27, 2005), at 01A (investigators are reviewing whether patients and residents at nearly two dozen facilities were abandoned).

⁵ JOHNS HOPKINS CENTER FOR CIVILIAN BIODEFENSE, ET AL., DARK WINTER (June 22-23, 2001), available at <http://www.hopkins-biodefense.org/DARK%20WINTER.pdf>.

⁶ *Id.* at 24, stating: “many hospital employees are not showing up for work for fear of contagion.” During the exercise the Director of FEMA (Federal Emergency Management Agency) worried that “most U.S. hospitals don’t have the staff to care for extra patients even in normal times. *Now, with so many hospital workers afraid to come to work, staff shortages are even worse, making it impossible for NDMS (National Disaster Medical System) hospitals to accept patients (emphasis added).*” *Id.* at 33.

⁷ CONGRESSIONAL BUDGET OFFICE, A POTENTIAL INFLUENZA PANDEMIC: POSSIBLE MACROECONOMIC EFFECTS AND POLICY ISSUES (December 8, 2005), at 9.

the nation's imports from Asia.⁸ Recently enacted port legislation reflects the realism of this hypothetical scenario.⁹

I suppose that dock workers would stop working until the radiation hazard subsided. Experts advise that radioactive exposure from a dirty bomb would not pose a direct threat to human life—fear would outweigh any tangible harm.¹⁰ A radiation exposure event need not be large to wreak economic havoc. This implicates federal labor policy. The National Labor Relations Act (NLRA) broadly grants employees a right to strike,¹¹ while an NLRA amendment grants protection to individuals who quit working when they are exposed to abnormal dangers.¹² Nevertheless, the Supreme Court has narrowly interpreted the meaning of abnormally dangerous conditions of work, thus

⁸ Daniel Machalaba, *Tiny British Columbia Port Aims to Be New Venue for China Trade*, WALL ST. J. (Aug. 8, 2006), at A1.

⁹ Coast Guard and Maritime Transportation Act, P.L. 108-293, 108th Cong., 2nd Sess., H.R. Conf. Rep. 108-617, July 20, 2004, 2004 U.S.C.C.A.N. 936, 2004 WL 1640167 (Leg.Hist.). In Section 805, Congress has directed the Coast Guard to “conduct a vulnerability assessment . . . of the waters under the jurisdiction of the United States that are adjacent to nuclear facilities that may be damaged by a transportation security incident.” *Id.* at Section 805(1). Section 808 directs the Secretary of Transportation to “conduct investigations, fund pilot programs, and award grants . . . to detect accurately nuclear or radiological materials.” *Id.* at Section 808(a)(i)(1)(C) (investigations). In addition, this section orders the Secretary to improve tags and seals on shipping containers to track the transportation of the merchandise in these enclosed spaces, “including sensors that are able to track a container throughout its entire supply chain, detect hazardous and radioactive materials within that container, and transmit that information to the appropriate law enforcement authorities.” *Id.* at Section 808(a)(i)(1)(D) (investigations).

¹⁰ Dr. Philip Anderson, Center for Strategic and International Studies, RADIOLOGICAL DISPERSAL DEVICES: THE DIRTY BOMB CHALLENGE (hereafter, RADIOLOGICAL DISPERSAL DEVICES), available at http://csis.org/isp/homeland_rdd.pdf. In this report, CSIS stated that it “assembled a team of security professionals to develop a realistic crisis scenario and planning exercise” based on “a credible scenario of a terrorist attack involving a ‘dirty bomb’ on downtown Washington, D.C.” *Id.* at 4. In “most cases the radiation will not cause any casualties,” but the CSIS Report observed that the psychological impact of such an attack would be enormous “[d]ue to the public’s inherent fear of radiation.” *Id.* at 3.

¹¹ National Labor Relations Act, § 13, 49 Stat at 457, codified as amended at 29 U.S.C. § 163 (2004), stating: “Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”

¹² Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 502, 61 Stat. 136, 141-42, reprinted in 1 LAB. MGMT. RELATIONS ACT LEGISLATIVE HISTORY [hereinafter, LMRA LEG. HIST.]. The law is commonly called the Taft-Hartley Act in recognition of its principal architects, Sen. Robert Taft and Rep. Fred Hartley.

limiting this privilege.¹³ Also, Congress has authorized federal courts to enjoin work stoppages that harm the nation's welfare.¹⁴

Briefly, I address the rationale for inventing this constitutional labor crisis. Traditional legal scholarship looks back in time by focusing on a critical development—a court ruling, a new law or regulation, an emerging trend. Although my approach departs from this practice, it simply adds to an emerging genre of simulated constitutional crises. Scholars are plowing this furrow,¹⁵ but not because they are fiction writers. They believe that “constitutional thought has no choice but to develop through its own distinctive rhythms. Now is the moment to toss the ball onto the field of legal speculation and invite others to play the game.”¹⁶

C. Overview

Part II researches policy options to the hypothetical port work stoppage.¹⁷ Table 1 summarizes these policy dimensions: (a) feasibility, (b) duration of a compulsory work order, and (c) government coercion of individual workers. Part II.A explores an existing policy response, a Taft-Hartley injunction that would last the statutory maximum of 80

¹³ See Gateway Coal, *infra* notes 57 - 60, and related text.

¹⁴ See *infra* notes 38 - 40, and related text.

¹⁵ E.g., Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV L. REV. 2673, (2005) (hypothesizing a mass detention of Arab-American males in a New York metropolitan sports arena). Other futuristic paradigms appear in Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F.L. REV. 67, 111 (2000) (using a popular movie, *The Siege*, as a hypothetical that posits aerosol release of smallpox by terrorists in busy airports); Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 485 (2006) (distinguishing between forensic history and deliberative history, in which the latter views “history not as an authoritative oracle but as a source of relevant human experience, one that present-day decision-makers can use as a resource to help choose a future course”); and ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 158-63 (2002) (discussing a proposal for sanctioned torture based on a set of hypothetical assumptions).

¹⁶ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1091 (2004).

¹⁷ *Infra* notes 36 – 125.

days.¹⁸ This section includes analysis of the workers' claim that their walkout is privileged under Section 502 of the Taft-Hartley Act due to abnormally dangerous work conditions.¹⁹ Part II.B examines a dormant but once effective policy for keeping workers on the job during a national crisis— Section 8 of the War Labor Disputes Act (WLDA), a law that prohibited workers from discontinuing production for 30 days.²⁰ Part III.C surveys executive orders that could be used as future models to compel dock workers to return to their jobs for 30 more days a Taft-Hartley injunction expires.²¹

My focus shifts in Part III to the Thirteenth Amendment and its evolution since it outlawed slavery.²² Part III.A traces the Amendment's expansion to its present point of prohibiting labor that results from physical or legal coercion²³ — though notably, this seemingly expansive doctrine has been narrowed by the Supreme Court.²⁴ Furthermore, as Part III.B shows,²⁵ the Amendment has been significantly limited by judicial embrace of the ancient doctrine, *trinoda necessitis*, a principle that compels individuals to perform public service. Part III.C examines the maritime duty exception to the Thirteenth Amendment that has been applied to anchored ships in U.S. ports.²⁶

Part IV is the heart of my analysis, and explores whether the Thirteenth Amendment would prevent the government from ordering dock workers back on the job at a radioactive port.²⁷ A court would likely rule that the Amendment does not bar

¹⁸ *Infra* notes 36 - 69.

¹⁹ *Infra* notes 52 - 64.

²⁰ *Infra* notes 70 - 92.

²¹ *Infra* notes 92 - 125.

²² *Infra* notes 126 - 205.

²³ *Infra* notes 126 - 176.

²⁴ *Infra* notes 164 - 176.

²⁵ *Infra* notes 177 - 193.

²⁶ *Infra* notes 194 - 205.

²⁷ *Infra* notes 206 - 227.

compulsion of dock work for up to 110 days,²⁸ but I also consider grounds for a court ruling that construes the Amendment so as to bar these mandatory orders.²⁹

Part V extrapolates from the foregoing analysis by considering a spectrum of national emergency threats that could engender a crippling work stoppage.³⁰ Table 3 organizes this discussion by providing a template of the legal landscape for national emergencies that have already affected, or are predicted to affect, key occupations (in 9/11, fire fighters, police, utility technicians, construction tradesmen, and sanitation workers; in Hurricane Katrina, police and health care workers; in anthrax attacks, postal workers; and in case of avian flu or other catastrophic health threat, pharmaceutical factory workers, physicians, and nurses).

Conclusion No. 1 finds that a Taft-Hartley injunction would be the most potent back-to-work policy for essential private sector jobs performed in pharmaceutical plants, and basic infrastructure such as telecommunications, gas, and electric.³¹ Conclusion No. 2 notes, however, that this type of injunction is not available for key public sector occupations such fire fighters, police, and public health care workers— a fact that could complicate a federal response to a national emergency work stoppage.³² Conclusion No. 3 postulates that the strength of employee protection under the 13th Amendment depends on two factors that vary by national emergency— the scope of *trinoda necessitas* as it bears on specific types of work, and the imminent threat to an individual's life by working amid extreme danger.³³ Thus, while a court would likely order dock workers back on the

²⁸ *Infra* notes 206 - 214.

²⁹ *Infra* notes 215 - 227.

³⁰ *Infra* notes 228 - 254.

³¹ *Infra* notes 236 - 237.

³² *Infra* notes 238 - 241.

³³ *Infra* notes 242 - 249.

job, the same court would be unlikely to compel flu-stricken pharmaceutical workers back to a manufacturing plant, even during a deadly pandemic when medical supplies are scarce.³⁴ Conclusion No. 4 suggests that more balance is needed in these crises to weigh individual safety interests, and proposes a limit on Taft-Hartley injunctions.³⁵

II. A VITAL PACIFIC PORT IS CRIPPLED BY RADIATION EXPOSURE: THE COURTS, CONGRESS, AND PRESIDENT RESPOND

Suppose that a vital Pacific port has a radiation release and dock workers refuse to do their jobs until the hazard is mitigated. Table 1 summarizes federal policy response options: (a) a Taft-Hartley injunction to order workers back to their jobs in this national emergency, (b) a War Labor Disputes Act ban on discontinuing work, and (c) executive orders that compel work performance.

Here in Part II, I explain how these government actions return employees involuntarily back to their work, and evaluate these actions by asking: (1) How feasible are these orders? (2) How long do the orders compel work by private employees? (3) How does the government enforce these orders by pressuring individual employees?

My answers are summarized in Table 1. Figure 1 appears immediately after this table, and closely examines the kind of pressure that the U.S. has applied in similar national emergencies involving workers. This information provides a critical link to my Thirteenth Amendment analysis in Part IV. Currently, the test for involuntary servitude is whether individuals are “forced to work . . . by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”³⁶ This legal standard is important to bear in mind because each government action aims to

³⁴ See main text that is associated with *infra* note 244.

³⁵ *Infra* notes 250 - 254.

³⁶ Kozminski, *infra* note 144, at 952.

return employees involuntarily to their work. The issue is whether these actions reach the legal threshold of coercion.

*A. The First 80 Days of a National Emergency Work Dispute:
Injunction under the Taft-Hartley Act*

Ports could not close for long without hurting the U.S. economy.³⁷ The President is empowered to order workers back on the job by declaring a national emergency under the Taft-Hartley Act when a threatened or actual work stoppage “imperil(s) the national health or safety.”³⁸ The Attorney General may petition a federal court for an injunction to halt this job action.³⁹ The law specifies conditions for courts to issue this emergency order.⁴⁰ As Table 1 reflects, this policy response is highly feasible.

³⁷ A quarter of the nation’s container cargo is handled by the ports of Los Angeles and Long Beach, and an estimated 400,000 people in Southern California are directly employed in the region’s international trade sector. See Larry Kanter, *Devastating Strike Feared*, LOS ANGELES BUS. J. (Dec. 7, 1998), at 1.

³⁸ Labor-Management Relations Act, codified at 29 U.S.C. § 176, LMRA LEG. HIST. at supra note 11 (authorizing the President to appoint a Board of Inquiry to determine if a work stoppage imperils the national health or safety, and further authorizing release of the fact findings to the public).

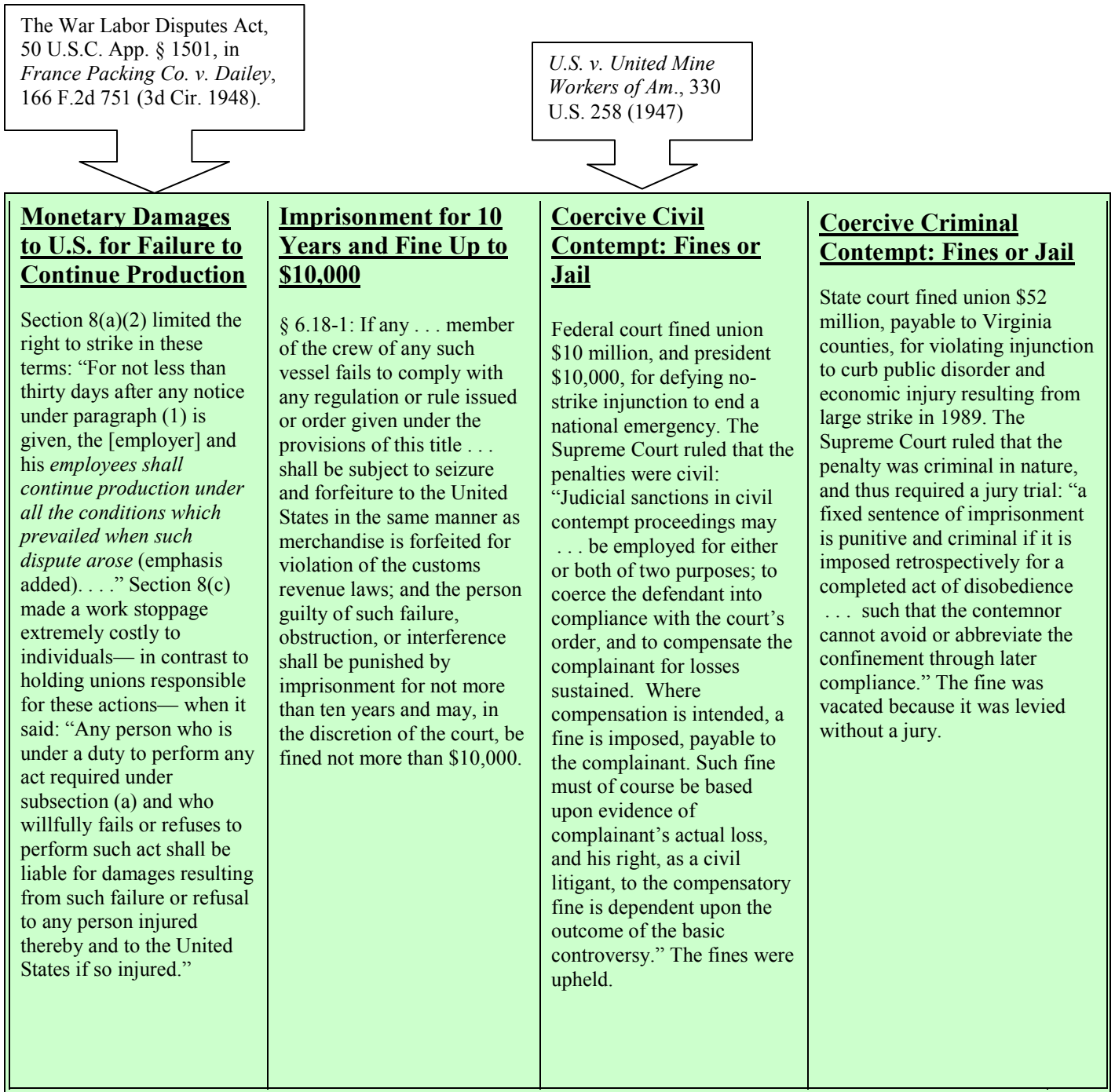
³⁹ *Id.* at 29 U.S.C. § 178.

⁴⁰ *Id.*, authorizing a court to issue an injunction if it finds that a threatened or actual work stoppage:

- (i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and
- (ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate.

Table 1			
Federal Authority to Compel Port Workers to Stay on the Job in a National Emergency			
Authority	Feasibility of Government Response	Length of Compulsory Work	Government Coercion of Individual to Work
<i>Taft-Hartley Injunction</i>	High	80 Days	Injunction and Contempt Powers
<i>War Labor Disputes Act (WLDA), § 8</i>	Moderate to High	30 Days	Damages Assessed Against Individual Employees
<p><i>Executive Order</i></p> <ul style="list-style-type: none"> • <i>Unilaterally Seize Port Modeled After Executive Order 9728</i> • <i>Order Workers Back on the Job Pursuant to FPASA Act of 1949 Modeled After Executive Order 13202</i> • <i>Order Coast Guard to Control Port Pursuant to 50 U.S.C. § 191, and Issue Employment Regulations for Merchant Marine and Employees at “Waterfront Facilities” Modeled After Executive Order 10173</i> 	<p>Zero</p> <p>Low</p> <p>Low to Moderate</p>	<p>Undetermined</p> <p>Undetermined</p> <p>No Specific Duration</p>	<p>Undetermined</p> <p>Undetermined</p> <p>Up to 10 Years Imprisonment, and \$10,000 Fine—Expressly Limited to Merchant Seamen</p>

Figure 1: Coercive Actions Against Labor Unions and Union Members in Work Stoppages That Cause Public Disorder and Economic Injury



In previous port disputes,⁴¹ presidents sought Taft-Hartley injunctions. Federal judges routinely granted these motions, and ordered dockworkers back on the job.⁴² This experience was repeated in 2002, when Pacific port workers engaged in a slowdown to protest unsafe working conditions.⁴³ They were represented by the International Longshore Workers Union (ILWU),⁴⁴ a spirited union with a tradition of solidarity.⁴⁵ Employer-members of the Pacific Maritime Association locked out workers and closed all West Coast ports after repeatedly warning the ILWU to end its safety slowdown tactics.⁴⁶ Invoking emergency powers under the Taft-Hartley Act, President Bush won a back-to-work order from a federal court.⁴⁷

The track record of Taft-Hartley injunctions makes future use of this power highly feasible. But this history is based on economic disputes. Already, the ILWU has stated its

⁴¹ See Executive Order 9964; Executive Order 9987; Executive Order 10490; Executive Order 10689; Executive Order 10842; Executive Order 10949; Executive Order 11013; Executive Order 11329; Executive Order 11431; Executive Order 11621; and Exec. Order 13275.

⁴² See *U.S. v. Int'l Longshoremen's Ass'n*, 78 F.Supp. 710 (N.D.Cal. 1948); *U.S. v. National Maritime Union*, 22 Lab. Rel. Rep. (BNA) 2275 (S.D.N.Y. June 14, 1948); *U.S. v. Int'l Longshoremen's Ass'n*, 116 F.Supp. 255 (S.D.N.Y. 1953); *U.S. v. Int'l Longshoremen's Ass'n*, 177 F.Supp. 621 (S.D.N.Y. 1959); *U.S. v. Nat'l Maritime Union*, 196 F.Supp. 374 (S.D.N.Y. 1961); *U.S. v. Int'l Longshoremen's Ass'n*, 293 F.Supp. 97 (S.D.N.Y. 1968); and *U.S. v. Int'l Longshoremen's Ass'n*, 337 F.Supp. 381 (S.D.N.Y. 1971). Also See U.S. DEP'T OF LABOR, NATIONAL EMERGENCY DISPUTES UNDER THE TAFT-HARTLEY ACT, 1947-1977, Report 542 (1978), App. A at 5, summarizing 32 occasions, from 1947-1978, when a president used this power.

⁴³ See George Raine, *Ports Accuse Dockworkers of Slowdown, Union Blames Productivity Dropoff on Safety Concerns*, S.F. CHRON. (Oct. 12, 2002), A3. But ILWU President James Spinosa replied that "in an 18-month time span during 2001-2002 we lost six of our brothers to fatal industrial accidents, by far the worse period in West Coast safety in recent history." *Safety is Job One*, THE DISPATCHER (Oct. 5, 2005), Vol. 63, No. 7, at 2.

⁴⁴ See *ILWU Longshore Division*, at <http://www.ilwu.org/longshore/index.cfm>.

⁴⁵ See *The ILWU Story, Origins*, <http://www.ilwu.org/history/ilwu-story/ilwu-story.cfm>.

Explaining its history, the ILWU notes that members have come "to understand the wisdom of the principles of worker unity, internal democracy, and international solidarity advocated by members of the militant Industrial Workers of the World (IWW)— principles summed up in the famous IWW slogan that the new union would adopt, 'An injury to one is an injury to all.'" *Id.*

⁴⁶ Karen Gaudette, *Dockworkers Expected Back Tonight*, AKRON BEACON J. (Oct. 9, 2002), at D1.

⁴⁷ Carolyn Lochhead, et al., *Bush Gets Court to Reopen Ports*, S.F. CHRON. (Oct. 9, 2002), at A1.

concerns about unsafe work conditions,⁴⁸ and more recently, port attacks.⁴⁹ A Section 502 walkout spurred by radiation exposure would have a different complexion than earlier Taft-Hartley disputes. This would present a court with an issue of first impression.

The ILWU would likely ask a court to apply Section 502 of the same law that provides injunctions for national emergency work interruptions. This section creates a countervailing worker right—a privilege for “the quitting of labor” when employees encounter “abnormally dangerous conditions for work.”⁵⁰ This law is a paradox because Section 502 was part of sweeping legislation—called the Labor-Management Relations Act (also called the Taft-Hartley Act)—that limited work stoppages.⁵¹ Section 502 protects a walkout that seems like a strike, but categorizes a work stoppage for compelling safety reasons as something other than a strike.⁵² The Republican sponsor of the bill proposed this distinction believing that “it would be very unfair and very unjust to

⁴⁸ *Safety Is Job One*, in *supra* note 43 reporting: “what you see is an impressive collection of giant, fast-moving machinery—cranes, straddle carriers, top handlers, side handlers and yard hustlers, each weighing many tons and all racing to get the job done. With those massive objects running at that speed, a simple slip of sequence can be catastrophic.” He added: “General Safety Training is offered to all ILWU workers, but only once every three years. In other industries workers undergo safety training annually, and in some cases, even monthly.”

⁴⁹ An accidental explosion of butane gas containers in a truck trailer parked at the Port of Los Angeles on April 28, 2004 raised serious concerns about readiness for an assault. Moreover, on March 14, 2004, armed extremists were shipped in a container to the Israeli port of Ashdod, and killed 10 dock workers. These port security concerns are detailed in the testimony of Michael Mitre, ILWU Director of Security, in *U.S. Representative Frank Lobiondo (R-NJ) Holds A Hearing on Maritime Transportation Security* (June 9, 2004), at 2004 WL 1283418 (F.D.C.H.).

⁵⁰ Labor-Management Relations (Taft-Hartley) Act of 1947, LMRA LEG. HIST., *supra* note 12.

⁵¹ For example, § 8(b)(4)(A)-(C) was enacted to prohibit a union that has no labor dispute from helping another union with a labor dispute by joining in various forms of secondary boycotts. Labor-Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, § 8(b)(4)(A)-(C), 61 Stat. 136, 141-42, in 1 LMRA Leg. Hist., *id.*, at 7. This provision diminished union power by reducing the amount of economic pressure they could exert against employers. *Id.*

⁵² The complete statement of Section 502 makes this clear:

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

Labor-Management Relations (Taft-Hartley) Act of 1947, LMRA LEG. HIST., *supra* note 12.

employees in any industry to penalize them, if, because of abnormal or unusually dangerous conditions, they should refrain from working.”⁵³

While Section 502 appears to block a Taft-Hartley injunction, a court would likely issue the national emergency restraining order. Case law under Section 502 is limited,⁵⁴ but so far has been mostly unfavorable to workers.⁵⁵ A key problem for employees is that courts tend to require objective, factual proof of abnormal danger to justify a Section 502 walkout.⁵⁶

This standard has led courts to rule against unions even when workers were subjected to unusual hazards and risks. Consider coal miners who walked off the job after air passages to their underground mine were obstructed and managers concealed the

⁵³ Speaking on the Senate floor on May 26, 1946, Sen. Revercomb explained:

I know that the Senate and the Congress of the United States do not want to put men under an obligation to work in an abnormally dangerous place. Of course there are classes of employment in connection with which there are innate dangers, such as bridge building, structural steel work, and coal mining, where an unusual condition of danger other than a normal condition of danger exists. Mr. President, no man should be required to go there, and if all of them stop work they should not be penalized for such stoppage. It is to meet that situation that the language was written into the amendment.

92 Cong. Rec. 5687 (May 25, 1946) (copy on file with the author).

⁵⁴ The cases, starting with the most recent, include: *TNS v. N.L.R.B.*, 296 F.3d 384 (6th Cir. 2002); *Goodyear Tire & Rubber Co. v. Cunningham*, 269 N.L.R.B. 881 (1984); *Daniel Constr. Co. v. Edwards*, 264 N.L.R.B. 770 (1982); *Baker Marine Corp. v. United Steelworkers of Am.*, 258 N.L.R.B. 680 (1981); *Long-Airdox Co. v. Int’l Union United Auto Workers*, 622 F.2d 70 (4th Cir. 1980); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153 (4th Cir. 1977); *Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975); *Plain Dealer Pub. Co. v. Cleveland Typographical Union No. 53*, 520 F.2d 1220 (6th Cir. 1975); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *Banyard v. N.L.R.B.*, 505 F.2d 342 (D.C. Cir. 1974); *Anaconda Aluminum Co.*, 197 N.L.R.B. 336 (1972); *Machaby v. N.L.R.B.*, 377 F.2d 59 (1st Cir. 1967); *Philadelphia Marine Trade Ass’n v. N.L.R.B.*, 330 F.2d 492 (3d Cir. 1964); *Redwing Carriers, Inc. v. N.L.R.B.* 1208 (1961); and *N.L.R.B. v. Knight-Morley Corp.*, 251 F.2d 753 (6th Cir. 1957).

⁵⁵ See *Goodyear Tire & Rubber*, *id.* at 881 (observing that “[i]t is well settled that Section 502 applies only where it has been objectively established that the working conditions are abnormally dangerous”); *Daniel Constr. Co. v. Edwards*, *id.* at 770 (affirming that an employee’s refusal to work in a radiation area was not protected under Section 502 because evidence established that radiation exposure was not unsafe); *Redwing Carriers, Inc.*, *id.* at 1209 (“What controls is not the state of mind of the employee . . . concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered ‘abnormally dangerous.’”).

⁵⁶ See *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885, 892 (8th Cir. 1964) (holding that employees may be discharged for stopping work because of dangerous conditions if “proof later of the physical facts fail to support their prior belief”).

problem. This occurred in *Gateway Coal Co. v. United Mine Workers of America*,⁵⁷ the Supreme Court's only Section 502 case. Although the Court did not rule directly on the standard for abnormally dangerous work conditions, it strongly suggested adoption of an objective test.⁵⁸ Considering the simulation for Washington D.C. that caused great fear but little or no physical harm,⁵⁹ the dictum in *Gateway Coal* means that worker perceptions of abnormal risks posed by radiation exposure would not be relevant.⁶⁰ Objective proof would be required to invoke the protection of this law.

A recent Section 502 decision, *TNS v. N.L.R.B.*,⁶¹ shows why a court would probably order dock workers back to a radioactive port. The *TNS* work stoppage occurred after employees in a uranium processing plant demanded that their employer protect them from a serious radiation exposure problem.⁶² The controversy was litigated more than 20 years after workers struck over unsafe conditions.⁶³ *TNS* shows that a gradual threat to

⁵⁷ 414 U.S. 368, 371 (1974).

⁵⁸ *Id.* at 376, expressing the majority's strong concern that "[a]ny employee who believes a supervisor or fellow worker incompetent and who honestly fears that at some future time he may commit some unspecified mistake creating a safety hazard could demand his colleague's discharge and walk off the job despite the contractual agreement not to do so."

⁵⁹ *Supra* note 10.

⁶⁰ *Gateway Coal*, *supra* note 57, at 371.

⁶¹ *Id.*

⁶² Unionized workers walked off their jobs, and were permanently replaced, at a Tennessee plant that made armor piercing bombs from depleted uranium. *Id.* at 387-88. The manufacturing process at TNS released uranium dust into the air. *Id.* This substance is potentially life threatening because it is a low level radioactive carcinogen, and its toxicity can harm the kidney. *Id.* The union repeatedly voiced concerns and made bargaining proposals about serious health risks posed by uranium dust. *Id.* at 387-88. Tests conducted by a state nuclear safety agency and federal counterpart found significant exposure problems, but none so severe as to clearly risk workers' lives. *Id.* at 402.

⁶³ *TNS, Inc.*, 288 N.L.R.B. 20 (1988), supplemented by *TNS, Inc.*, 309 N.L.R.B. 1348 (1992), remanded by *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82 (1995); *reh'g en banc denied* (1995), *cert. denied*, *TNS, Inc. v. Oil, Chem. & Atomic Workers Int'l Union*, 516 U.S. 821 (1995); *TNS, Inc. v. Oil, Chem. & Atomic Workers Int'l Union*, 329 N.L.R.B. 602 (1999); *vacated* by *TNS, Inc. v. NLRB*, 296 F.3d 384 (2002); *cert. denied*, *Paper, Allied-Industr., Chem. & Energy Workers Int'l Union v. TNS, Inc.*, 123 S.Ct. 872 (2003). Related litigation appears in *Oil, Chem., & Atomic Workers Int'l Union v. NLRB*, 806 F.2d 269 (1986).

worker health from radiation does not invoke the protections of Section 502.⁶⁴

How would a Taft-Hartley order force fearful workers back on the job? Taft-Hartley courts wield coercive power when they enjoin national emergency disputes.⁶⁵ Nonetheless, unions have never refused to comply with these orders, so there is no experience in worker disobedience under Taft-Hartley's national emergency conditions. But a useful analogy appears in *U.S. v. United Mine Workers of America*.⁶⁶ It shows that federal courts have broad contempt powers to enforce back-to-work orders.⁶⁷

Taft-Hartley limits injunctions to 80 days. This period might be too short for a work stoppage sparked by a release of radioactivity. The hazard would not likely abate in this time. If the port had to remain open for a longer period— for example, until other ports and logistics systems developed new capacity— Taft-Hartley would not provide an

⁶⁴ *Id.*

⁶⁵ 29 U.S.C. §163. The process for seeking an injunction begins when the President appoints a Board of Inquiry to determine whether a national emergency exists. 29 U.S.C. §176(a). Usually, the board takes only one or two days before reaching this finding. Next, the attorney general petitions a federal court for an injunction. 29 U.S.C. §178. This court proceeding occurs within hours. For example, *see United States v. International Longshoremen's Association*, 293 F.Supp. 97, 99-102 (S.D.N.Y. 1967), in which a court based its injunction on a series of affidavits which were not subjected to any cross-examination or other counter-balancing procedure. Usually, a court grants the government's motion for an injunction. A court's authority is provided by 29 U.S.C. § 178.

⁶⁶ 330 U.S. 258 (1947).

⁶⁷ Following World War II, a series of work stoppages in the spring of 1946 prompted President Truman to exercise his power under the War Labor Disputes Act to seize, possess, and run these private workplaces. *See* Exec. Order No. 9728, 11 Fed. Reg. 5593 (1946). As winter approached, John L. Lewis, the president of the United Mine Workers, announced his union's intention to terminate the national labor agreement, an action that was tantamount to ordering a strike that would crimp the nation's heating stock. *Id.* at 265. The U.S. government, now in possession of the mines, sued in federal district court under the Declaratory Judgment Act to prevent this action. *Id.* at 265-66. While the court considered the positions of the parties, it preserved the status quo by issuing a temporary restraining order against any work stoppage, but the union and its members ignored this order. *Id.* at 265-267.

After a quick trial on contempt charges against the union and its president, the judge found that the defendants had induced the work interruption. *Id.* at 267-68. The union and president were found guilty beyond reasonable doubt of both criminal and civil contempt. *Id.* at 269. The court fined Lewis \$10,000, and the defendant union \$3,500,000. Upholding the judge's punishments for contempt, the opinion concluded: "We will not reduce the practical value of the relief granted by limiting the United States, when the orders have been disobeyed, to a proceeding in criminal contempt, and by denying to the Government the civil remedies enjoyed by other litigants, concluding the opportunity to demonstrate that disobedience has occasioned loss." *Id.*

additional grant of judicial authority to renew the injunction. Its endpoint authorizes a president to return to Congress for a resolution.⁶⁸ Even short work stoppages—for example, the 11 day interruption of commerce at Pacific ports in 2002—cause serious economic effects for the nation.⁶⁹ So, the hypothetical scenario, with its likelihood for a prolonged work stoppage, would probably test Taft-Hartley’s fuzzy endpoint.

*B. The Next 30 Days of a National Emergency Work Dispute:
Re-Enactment of Section 8 of the War Labor Disputes Act*

I now consider the 81st day after a court issues a Taft-Hartley injunction. Port employees, still fearful of radiation exposure, decide to stay away from work until adequate protection is provided. Congress considered this issue when it fashioned an 80 day limit to Taft-Hartley injunctions.⁷⁰ The U.S. would face two stark choices: Acquiesce to the start of an indefinite work stoppage, or extend the prohibition against work refusal.

⁶⁸ Instead of authorizing long-term or indefinite seizures as a response to national emergency labor disputes, the Taft-Hartley Act directed the President, in the event a strike had not been settled during the 80-day injunction period, to submit to Congress “a full and comprehensive report . . . together with such recommendations as he may see fit to make for consideration and appropriate action.” 61 Stat. 156, 29 U.S.C. (Supp. IV) § 180.

⁶⁹ Each day of the work stoppage caused the rest of the nation \$2 billion. April Fulton, *Port Dispute May Help to Prompt Deal on Seaport Security Bill*, CONG. DAILY (Oct. 9, 2002), also available in 2002 WLNR 11725423. Pacific ports are so vital because the Panama Canal is too small to allow large container ships that are common in trans-Pacific service to pass. The alternative to ship from Asia to the East Coast is a route that goes through the Suez Canal—an alternative that is too costly for now. *See Cost Is King*, TRANSPORTATION & DISTRIBUTION (Dec. 1, 2002), at 25, also available in 2002 WLNR 10782669 (Dec. 1, 2002). By one estimate, a 10-day work stoppage in all Pacific ports would “lead to the loss of about 90,600 full-time-equivalent jobs (181.2 million hours) and nearly \$693 million in federal, state and local tax revenue.” Evelyn Iritani & Marla Dickerson, *The Port Settlement: Tallying Port Dispute’s Costs*, L.A. TIMES (Nov. 25, 2002), at 1, also available in 2002 WLNR 12416145. The costs of the work stoppage continued for two months because of a backlog effect. *See* Paul Nyhan, *Back to Normal? Not Right Away—Backlogs Will Take Months at Reopened Ports*, SEATTLE POST-INTELLIGENCER (Oct. 9, 2002), at E1, also available in Westlaw at 2002 WLNR 2129583 (“It will take 60 days, or perhaps longer, to unsnarl U.S. trade routes that jammed during the 11-day shutdown of West Coast ports. Trains are backed up to the Rocky Mountains, 25 container ships are stuck in Puget Sound and tens of thousands of tons of wheat and other foodstuffs are stored along the Columbia River.”).

⁷⁰ *E.g.*, S.Rep.No.105, 80th Cong., 1st Sess. 15; 93 Cong.Rec. 3835-3836; *id.*, at 4281. When it passed the Taft-Hartley Act, Congress believed the 80-day period would allow enough time to determine whether special legislation should be enacted to meet a unique emergency. *Also see* Senate Report No. 105, 80th Cong., 1st Sess. 15: “In most instances the force of public opinion should make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis.”

The ILWU labor dispute in 2002 clearly suggests that the U.S. would find a way to extend the dock workers' duty.⁷¹

The War Labor Disputes Act⁷² provides the best legislative solution for extending a Taft-Hartley injunction.⁷³ The WLDA established a complex dispute resolution system to keep workers on the job.⁷⁴ The president was given authority to seize and operate any business whose operation was hindered by a work interruption.⁷⁵ Given the fact that the WLDA has already addressed work interruptions in a national crisis, this policy option is feasible. But the scope of the WLDA as it was enacted in 1943 is inappropriately broad for a crippled port. The law came about after President Roosevelt unilaterally seized private factories without congressional authority.⁷⁶ Dire conditions during World War II fostered tacit approval of these extreme measures, until Congress enacted the WLDA as a complex seizure law to pressure unions and employers into settling their differences.⁷⁷

A work stoppage in a crippled port is an isolated crisis, rather than a long-running series of grave national threats. This type of work refusal also lacks the traditional

⁷¹ See Lochhead, *supra* note 47.

⁷² Section 1501, Act June 25, 1943, c. 144, § 1, 57 Stat. 163, The War Labor Disputes Act, 50 U.S.C. App. § 1501, repealed on Sept. 1, 1948, Section 38 of Act of June 25, 1948.

⁷³ See Section 3 of the War Labor Disputes Act, 57 Stat. 164, 50 U.S.C.App.Supp., providing a “power to take immediate possession of any [facility] equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort . . . whenever the President finds . . . and proclaims that there is an interruption of the operation of such . . . [facility] as a result of a strike or other labor disturbance . . . and that the exercise of such power and authority is necessary to insure the operation of such [facility] in the interest of the war effort.”

⁷⁴ The War Labor Disputes Act, 57 Stat. 163, 50 U.S.C. App. § 1501 (Section 1503 related to the power of the President to take possession of certain manufacturing facilities; Section 1504 related to terms of employment at government operated plants; Section 1505 related to applications to the War Labor Board for changes in the terms of employment at government operated plants; Section 1506 related to interference with government operation of plants; Section 1507 related to functions and duties of the National War Labor Board; and Section 1508 related to notice of threatened interruptions in war production.

⁷⁵ 29 U.S.C. §180 limits injunctions to 80 days.

⁷⁶ See Justice Frankfurter's concurring opinion in *Youngstown Sheet & Tube Co.*, *infra* note 114, at 612, reporting that President Roosevelt ordered seizures on twelve occasions prior to the enactment of the War Labor Disputes Act.

⁷⁷ 29 U.S.C. §180 limits injunctions to 80 days.

conflict over negotiating new labor agreements that plagued union-management relationships. Wholesale re-enactment of the WLDA is therefore pointless. But Congress would likely consider passage of Section 8. This established a formal mechanism for employees to voice their grievances to the government.⁷⁸ While it created a bargaining process between the executive branch and workers, Section 8 imposed an extraordinary constraint by compelling individuals to “continue production under all the conditions which prevailed when such dispute arose” for 30 days.⁷⁹

The WLDA expired shortly before Taft-Hartley was passed. Thus, its enforcement mechanism never co-existed with the national emergency injunction in Taft-Hartley. Although Section 8 was not enforceable by an injunction, it clearly had power to coerce workers to stay on the job. Congress held employees financially responsible for the costs of a premature work stoppage.⁸⁰

This coercion was challenged in two WLDA cases. In *France Packing Co. v. Dailey*,⁸¹ the Third Circuit Court of Appeals ruled that an employer could seek monetary damages from workers who walked off the job before the 30 day notice period expired.⁸²

⁷⁸ Section 8(a)(1) set up a de facto bargaining process between unions and the U.S. by providing: The representative of the employees . . . shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such [employer] and employees, together with a statement of the issues giving rise thereto.

⁷⁹ Section 8(a)(2) limited the right to strike in these terms: For not less than thirty days after any notice under paragraph (1) is given, the [employer] and his employees shall continue production under all the conditions which prevailed when such dispute arose. . . . , except as they may be modified by mutual agreement or by decision of the National War Labor Board.

⁸⁰ In a unique public policy, Section 8(c) made a work stoppage extremely costly to individual employees— in contrast to holding unions responsible for these actions— when it said:

(c) Any person who is under a duty to perform any act required under subsection (a) and who willfully fails or refuses to perform such act shall be liable for damages resulting from such failure or refusal to any person injured thereby and to the United States if so injured.

⁸¹ 166 F.2d 751 (3d Cir. 1948).

⁸² The court also made clear that the WLDA applied in this case “against three individuals and

France Packing strictly construed Section 8 of the WLDA as a “national security measure” that applied “to employers and employees alike in their fundamental obligation as citizens functioning in a wartime emergency.”⁸³

The Sixth Circuit Court of Appeals adopted similar reasoning in *Hamilton v. N.L.R.B.*⁸⁴ Employees who engaged in a sudden work stoppage violated the 30 day notice provision of the WLDA.⁸⁵ *Hamilton* strictly construed the law’s requirement that employees “continue production.”⁸⁶ This meant that “employees can not be permitted to discontinue work.”⁸⁷ The Sixth Circuit gave weight to the war background, stating that the “essential purpose of Section 8 is to prevent interruptions to war production; this purpose is defeated if the Act permitted employees to discontinue work during the cooling-off period.”⁸⁸ The *Hamilton* court specifically rejected a constitutional challenge, stating: “The construction which we give to the provisions of the Act that the employees shall continue production, namely, that employees are not permitted to cease work during the 30-day cooling-off period, does not violate any constitutional rights. . . .”⁸⁹

As Table 1 shows, I rate Section 8 moderately to highly feasible. Its durational limit on discontinuing work makes the law feasible. So do favorable rulings in *France Packing* and *Hamilton*. This assessment is tempered, however, by legislative ambiguity over an individual’s intent to quit a job. The sparse judicial history on Section 8 reveals this problem. The law’s ambiguity is highlighted in strong dissenting opinions.

not against the union of which they are officers,” adding the “statute, in terms, permits this, so that its propriety at this stage of the litigation cannot be gainsaid.” *Id.* at 756.

⁸³ *Id.* at 755.

⁸⁴ 160 F.2d 465 (6th Cir. 1947).

⁸⁵ *Id.* at 468.

⁸⁶ *Id.* at 470.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

Judge O’Connell’s dissent in *France Packing* concluded that the WLDA violated the constitutional ban on involuntary servitude. The judge emphasized that “Congress, constantly reminded of the ban on involuntary servitude and consistently voicing faith in the reasonableness and patriotism of the individual workingman, drafted Section 8 with a view to preventing interruptions to war production induced by restraint or coercion.”⁹⁰

It is also noteworthy that one district judge and three appellate judges ruled in *France Packing*, and were evenly split on the constitutionality of the WLDA. In addition to Judge O’Connell, the district judge in *France Packing* found that the WLDA violated the Thirteenth Amendment.⁹¹ *Hamilton* presented a similar pattern in which a lower ruling relied extensively on legislative history.⁹² Considering that Section 8 evenly split the judges and labor board members who adjudicated its constitutionality— with just enough votes to produce two rulings that upheld the law— I rate the law’s future feasibility in a range, from moderate to high.

C. Executive Order Policy Options

So far, my analysis has examined statutory responses to national emergency work crises— the Taft-Hartley Act, and Section 8 of the WLDA. I assess the former as highly feasible and the latter as more questionable, though still reasonably feasible. But even

⁹⁰ *France Packing*, *supra* note 81, at 758. His opinion drew from this critical passage in the Congressional Record:

Mr. Elmer: Could this House pass a measure that would compel me to work for some other man, if I did not want to work for him?

Mr. Harness: Why, certainly not. That is slave labor, and I will not even consider that as a possible necessity. American Labor is patriotic, and will cooperate with the Government in wartime. We will accomplish much more if we depend upon voluntary cooperation, rather than coercion.

Mr. Elmer: If you take away the right to strike, or if you delay the right to strike, then to that extent you have introduced involuntary servitude, have you not, and that is forbidden by the Constitution.

Mr. Harness: Of course.

⁹¹ *France Packing Co. v. Dailey*, 67 F.Supp. 841 (D.C. Pa. 1946).

⁹² *Western Tablet & Stationery Co.*, 66 N.L.R.B. 930, 949 (1946).

assuming that both policies were successfully implemented in consecutive 80 day and 30 day periods, they would fail to provide a long-term method to force dock workers back on the job. Unless a lasting solution was found— for example, sufficient quantity of protective work suits, or expanding capacity at unaffected ports— the nation would be vulnerable to a costly work stoppage. Critical deadlines would occur in Day 81 (expiry of a Taft-Hartley injunction), and Day 111 (expiry of a WLDA ban on quitting).

However, the federal government would not run out of policy options. A variety of executive orders could be used at any point in the crisis timeline. These directives are potent and far reaching. Courts have generally upheld executive orders that regulate private entities.⁹³ In a pertinent example, Congress has authorized presidents to approve contracts to sell port terminals.⁹⁴ This delegation became a point of contention when President Bush approved the sale of key U.S. ports to a Dubai entity.⁹⁵

Recently, Hurricane Katrina furnished an example of this concentrated power to regulate private employment. Soon after the storm decimated large parts of the Gulf Coast, President Bush suspended a law that requires payment of prevailing wages,⁹⁶ a

⁹³ *E.g.*, Building and Const. Trades Dept., *AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), upholding Executive Order 13202. Unions sued to block enforcement of the rule, naming as defendants a variety of government agency heads who administer federal construction contracts— including Joseph Allbaugh, the Director of the nation’s disaster relief agency, the Federal Emergency Management Agency (FEMA). This decree by President George W. Bush had an adverse impact on organized labor by reversing a requirement that government construction projects use only union labor. *Id.* at 31.

⁹⁴ For a lucid explanation of this complex operation, see *Statement of Daniella Markham, CFIUS Overhaul*, FED. DOC. CLEARING HOUSE (May 24, 2006), available in 2006 WL 1435307 (F.D.C.H.). Under the Exon-Florio amendment of section 837(a) of the National Defense Authorization Act for Fiscal Year 1993, the Committee on Foreign Investment in the United States (CFIUS) (a committee of twelve federal government agencies such as Treasury, Defense, Justice, Commerce, and Homeland Security) reviews acquisitions by foreign entities to consider whether these transactions threaten the national security of the United States. Exon-Florio is intended to “provide an objective, non-partisan mechanism to review and, if the President finds necessary, to restrict or prohibit foreign investment that may threaten America’s security.” The president acts on the advice of the CFIUS.

⁹⁵ *Rep. Garrett Writes President, Requesting Status of Transfer of American Ports By Dubai-Owned Company*, US FED. NEWS (Sept. 26, 2006), 2006 WLNR 16890180.

⁹⁶ Pres. Proc. No. 7924, 70 FR 54227 (Sept. 8, 2005). By proclamation, President Bush suspended

euphemism for union pay scale on public works projects. The agility of this executive power is demonstrated by congressional deliberations to amend an analogous minimum wage law in the Fair Labor Standards Act. Congress has stalled for years in amending that wage rate.⁹⁷ Executive orders bypass the legislative process. This power is particularly suited for running a crippled port.

Lincoln's Emancipation Proclamation and Roosevelt's executive orders demonstrate this sweep of this power to regulate private work. The Emancipation Proclamation abolished slavery.⁹⁸ However, this noble act usurped legislative powers. Congress was deadlocked for years over this matter.⁹⁹ Lincoln's fiat also violated the Constitution,¹⁰⁰ insofar as that document institutionalized slavery.¹⁰¹

subchapter IV of Chapter 31 of Title 40 of the U.S. Code—the law that sets wage rates for public works projects. The proclamation said: “An unprecedented amount of Federal assistance will be needed to restore the communities that have been ravaged by the hurricane. Accordingly, I find that the conditions caused by Hurricane Katrina constitute a national emergency.” It concluded that the “wage rates imposed by section 3142 of title 40, United States Code, increase the cost to the Federal Government of providing Federal assistance to these areas. Suspension of [this statute] . . . will result in greater assistance to these devastated communities and will permit the employment of thousands of additional individuals.”

⁹⁷ See *Minimum Wage: Reid Promises To Hold Up Pay Raises For Lawmakers Until Wage*, DAILY LAB. REP. (BNA) No. 124, at A-13 (June 28, 2006), reporting on a plan by Senate Minority Leader Harry Reid plan (D-Nev.) to halt pay raises for lawmakers from going into effect until Congress acts to increase the minimum wage. Sen. Reid noted that the minimum wage has not been raised since 1997, but during this time, lawmakers have raised their pay by \$31,600.

⁹⁸ See The Emancipation Proclamation, in the National Archives, at http://www.archives.gov/exhibits/american_originals_iv/sections/preliminary_emancipation_proclamation.html#.

⁹⁹ See DOCUMENTS OF AMERICAN HISTORY 319 (Henry Steele Commager & Milton Cantor eds., 1988) (discussing Sen. Henry Clay's resolution of Jan. 29, 1850, resulting in the Compromise of 1850, U.S. Senate Journal, 31st Cong., 1st Sess., p. 118 ff).

¹⁰⁰ See Mark E. Neely Jr., *Emancipation Proclamation*, in 2 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 551 (Leonard W. Levy & Louis Fisher eds., 1994) (stating: “The proclamation was a presidential order freeing the slaves in areas of rebellion against the United States.”). Ironically, Lincoln revoked General Fremont's freeing of slaves in Missouri in 1861, and remarked: “Can it be pretended that it is any longer the government of the U.S.— any government of Constitution and laws— wherein a General, or a President, may make permanent rules of property by proclamation?” *Id.* Also see the ironic resolution of the Illinois legislature, condemning the proclamation on constitutional grounds as a “gigantic usurpation.” Resolution of Illinois State Legislature, reported in ILLINOIS STATE REGISTER, Jan. 7, 1863, reprinted in DOCUMENTS OF AMERICAN HISTORY, *id.*, at 422.

¹⁰¹ U.S. Const. art I, § 2, cl. 3, amended by U.S. Const. amend XIV, § 2 basing representation and taxation “by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.”

President Roosevelt's regulation of private workplaces provides strong precedents to order port workers back on the job. Executive Order 8802 was a daring and undemocratic use of this power— requiring federal contractors who supplied the nation's World War II arsenal to end race discrimination at work.¹⁰² The order was intended to set a good example to confront Hitler's ideology of racial superiority.¹⁰³ Fundamentally, however, the order addressed a critical labor shortage after millions of Caucasian males entered the armed services, leaving behind factory jobs in segregationist communities.¹⁰⁴

Many orders addressed union-management conflicts with dispute resolution procedures.¹⁰⁵ These negotiation processes were backed by a controversial power. When a company and union reached impasse, the President issued orders to seize and operate private workplaces.¹⁰⁶ No port was affected by this power, but the U.S. seized and

¹⁰² Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) (Policy Preamble), wherein President Roosevelt stated: "I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin"

¹⁰³ See ALBERT R. BUCHANAN, *BLACK AMERICANS IN WORLD WAR II* 84-88, 98-99 (1977); RICHARD M. DALFUMI, *DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939-1953* (1969); NEIL A. WYNN, *THE AFRO-AMERICAN AND THE SECOND WORLD WAR* 24 (1976).

¹⁰⁴ Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) (Policy Preamble), citing "evidence that available and needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race, creed, color, or national origin, to the detriment of workers' morale and of national unity."

¹⁰⁵ Peaceful labor-management relations were deemed essential to win World War II. *E.g.*, Exec. Order 8716, whose Policy Preamble stated that "it is essential in the present emergency that employers and employees engaged in production or transportation of materials necessary to national defense shall exert every possible effort to assure that all work necessary for national defense shall proceed without interruption and with all possible speed" The order created the National Defense Mediation Board, and granted it jurisdiction to settle serious labor disputes by a variety of means. *Id.* §§ 1(a)-(b); and 2.

¹⁰⁶ In manufacturing alone, Roosevelt seized plants and facilities in: Exec. Order No. 8773, 6 Fed. Reg. 2777 (1941) (seizing North American Aviation), relinquished by Exec. Order No. 8814, 6 Fed. Reg. 3253 (1941); Exec. Order No. 8868, 6 Fed. Reg. 4349 (1941) (seizing Federal Shipbuilding and Drydock Co.), relinquished by Exec. Order No. 9012, 7 Fed. Reg. 145 (1942); Exec. Order No. 8928, 6 Fed. Reg. 5559 (1941) (seizing Air Associates, Inc.); Exec. Order No. 9225, 7 Fed. Reg. 6627 (1942) (seizing S.A. Woods Machine Co.); Exec. Order No. 9229, 7 Fed. Reg. 6630 (1942) (seizing General Cable Corp.); Exec. Order No. 9254, 7 Fed. Reg. 8333 (1942) (seizing Triumph Explosives, Inc.); Exec. Order No. 9351, 8 Fed. Reg. 8097 (1943) (seizing Howarth Pivoted Bearings Co.); Exec. Order No. 9375, 8 Fed. Reg. 12,253 (1943) (seizing Atlantic Basin Iron Works), relinquished by Exec. Order No. 9377, 8 Fed. Reg. 12,963 (1943); Exec. Order No. 9399, 8 Fed. Reg. 16,269 (1943) (seizing Remington-Rand Inc.); Exec.

operated railroads, an analogous transportation system.¹⁰⁷

These examples demonstrate that executive orders are a highly feasible response to a national emergency work stoppage. They also have potential to be coercive—for example, to order workers back on the job, much like a Taft-Hartley injunction. But President Roosevelt’s seizure orders were not as coercive as they appear in print. They were premised on an explicit consensus by labor and management leaders to forgo strikes and lockouts during World War II.¹⁰⁸ Eventually, Congress codified the president’s unilateral use of this extraordinary power when it passed the WLDA.¹⁰⁹ After World War II hostilities ended Congress repealed this seizure power.¹¹⁰ Thus, a legislative form of property seizure no longer exists. A crippled port, therefore, could not be seized and

Order No. 9395B, 8 Fed. Reg. 16,957 (1943) (seizing leather manufacturing plants in Massachusetts), relinquished by Exec. Order No. 9403, 8 Fed. Reg. 16,957 (1943); Exec. Order No. 9400, 8 Fed. Reg. 16,641 (1943) (seizing Los Angeles Shipbuilding and Dry Dock Corp.); Exec. Order No. 9416, 9 Fed. Reg. 936 (1944) (seizing York Safe & Lock Co.), relinquished by Exec. Order No. 9527, 10 Fed. Reg. 424 (1945); Exec. Order No. 9435, 9 Fed. Reg. 4063 (1944) (seizing Jenkins Bros.); Exec. Order 9436, 9 Fed. Reg. 4063 (1944) (seizing Ken-Rad Tube and Lamp Co. & Ken-Rad Transmitting Tube Corp.); Exec. Order No. 9438, 9 Fed. Reg. 4459 (1944) (seizing Montgomery Ward & Co.); Exec. Order No. 9443, 9 Fed. Reg. 5395 (1944) (seizing Hummer Mfg.); Exec. Order No. 9466, 9 Fed. Reg. 10,139 (1944) (seizing several machine shops); Exec. Order No. 9473, 9 Fed. Reg. 10,613 (1944) (seizing International Nickel Co.); Exec. Order No. 9475A, 9 Fed. Reg. 10,943 (1944) (seizing Hughes Tool Co.); Exec. Order No. 9477, 9 Fed. Reg. 10,941 (1944) (seizing Cleveland Graphite Bronze Co.); Exec. Order No. 9480, 9 Fed. Reg. 11,143 (1944) (seizing Twentieth Century Brass Works, Inc.); Exec. Order No. 9484, 9 Fed. Reg. 11,731 (1944) (seizing Farrell Check Steel Co.); Exec. Order No. 9508, 9 Fed. Reg. 15,079 (1944) (seizing Montgomery Ward & Co.); Exec. Order No. 9511, 10 Fed. Reg. 549 (1945) (seizing Cleveland Electric Illuminating Co.); Exec. Order No. 9523, 10 Fed. Reg. 2133 (1945) (seizing American Enka Corp.).

¹⁰⁷ Exec. Order No. 9108, 7 Fed. Reg. 2201 (1943) (seizing the Toledo, Peoria & Western Railroad Co.); Exec. Order No. 9341, 8 Fed. Reg. 6323 (1943) (seizing the American Railroad Co. of Puerto Rico); Exec. Order No. 9412, 8 Fed. Reg. 17,395 (1943) (authorizing seizure of all railroads threatened by a December 30 strike); Exec. Order No. 9516, 10 Fed. Reg. 1313 (1945) (seizing the Bingham & Garfield Railroad Co.).

¹⁰⁸ Exec. Order No. 9017, 7 Fed. Reg. 237 (1942), stating: “as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by . . . the peaceful adjustment of such disputes.”

¹⁰⁹ See Justice Frankfurter’s historical analysis in *Youngstown Sheet & Tube Co.*, *infra* note 114, at 612-13. President Roosevelt ordered twelve seizures prior to the enactment of the War Labor Disputes Act, of which only three were sanctioned by existing law. *Also see id.* at 606, n.11, for a precise explanation of how the WLDA authorized presidential seizure.

¹¹⁰ 57 Stat. 163 et seq., codified at 50 U.S.C.App. §§ 1501-1511 (War Labor Disputes Act expired on June 30, 1947).

operated like railroads during World War II.¹¹¹

Could a president seize and operate a port without congressional authority? No. In the Korean War, President Truman faced an imminent nationwide strike by the United Steelworkers of America. He feared this would weaken the U.S. in confronting communism. After exhausting voluntary efforts to settle a labor dispute between the union and leading manufacturers, President Truman seized steel factories and ordered them to continue production.¹¹² Unlike the World War II experience, unions did not acquiesce to this seizure order, a fact that highlights the involuntary nature of President Truman's back-to-work order.¹¹³ The order was not challenged, however, on Thirteenth Amendment grounds. Instead, a steel company persuaded the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* that the president lacked constitutional authority to seize private property.¹¹⁴

This national experience is reflected in Table 1, where I conclude that the executive power to unilaterally seize and operate a stricken port has zero feasibility. To be clear, port seizure is not completely precluded. Recall that Congress delegated this power to the president in the WLDA. Earlier, I explained that Section 8 is a policy option to keep a crippled port open for 30 days. Full-scale seizure and operation of a port is another policy option, but it requires coordination between the legislative and executive branches. This option is infeasible, however, without the same labor-management consensus behind the WLDA. The crippled port scenario lacks this key element.

¹¹¹ *Supra* note 107.

¹¹² See Exec. Order No. 10340, 17 Fed. Reg. 3139 (1952).

¹¹³ This point is made clear by Justice Frankfurter's historical analysis in *Youngstown Sheet & Tube Co., infra* note 114, at 602, n.5 (1952), quoting a key labor leader's opposition to extending strike controls in the War Labor Disputes Act after World War II.

¹¹⁴ 343 U.S. 579 (1952).

Still, the executive branch retains significant powers to address a national emergency by executive order. Congress has delegated extensive power under the Federal Property and Administrative Services Act of 1949 (FPASA).¹¹⁵ This grants a President wide authority to implement procurement policies that promote efficiency and economy.¹¹⁶ Executive Order 12092, issued by President Carter to moderate severe inflation, imposed stringent wage and price guidelines on the nation's private sector.¹¹⁷ This vast power was upheld by the D.C. Court of Appeals in *AFL-CIO v. Kahn*.¹¹⁸ Considering two key facts—the federal government relies on Pacific ports in the course of procuring goods for itself, and the precedent set in *Kahn*—a directive patterned after Executive Order 12092 would appear to be a highly feasible policy option.

However, Executive Order 12092 was enforceable by terminating government contracts of firms who exceeded voluntary wage and price guidelines.¹¹⁹ This has no relevance to port workers. They depend on employment with private companies rather than a government contract. For this reason alone, I conclude that this policy option has low feasibility.

¹¹⁵ Act, June 30, 1949, c. 288, § 1(a), 63 Stat. 377, amended Oct. 13, 1994, Pub.L. 103-355, Title X, § 10005(a)(2), 108 Stat. 3406, providing that “[t]his Act may be cited as the ‘Federal Property and Administrative Services Act of 1949,’ codified at 40 U.S.C. § 121(a)(Supp. 2002).

¹¹⁶ 40 U.S.C. § 121(a)(Supp. 2002) (“The President may prescribe policies and directives that the President considers necessary to carry out this subtitle.”).

¹¹⁷ Citing authority under the Federal Property and Administrative Services Act of 1949, Executive Order 12092 directed the Council on Wage and Price Stability Council to establish wage and price standards to combat double-digit annual inflation. The order imposed stringent limits on businesses and workers for price and wage increases. It was enforced by instructing the head of each federal agency and military department to require that all contractors certify that their compliance with the wage and price standards.

¹¹⁸ 618 F.2d 784 (D.C. Cir. 1979). The D.C. Circuit Court of Appeals upheld the massive intervention in the nation's economy by Executive Order 12092. The Court noted that Congress granted the President broad authority under the Federal Property and Administrative Services Act of 1949 (FPASA) to establish procurement policies. *Id.* at 788-89 (the language in FPASA “recognizes that the Government generally must have some flexibility to seek the greatest advantage in various situations”).

¹¹⁹ *Id.* at 786.

Without incorporating a coercive employment penalty, an executive order that draws on FPASA would be infeasible. But in the long record of presidential regulation of employment, two actions stand out as possible examples for synthesizing FPASA and a back-to-work order, though I rate each as improbable.

One option draws from President Reagan's firing of over 11,000 air traffic controllers who engaged in an illegal strike.¹²⁰ A future president might consider that precedent, reasoning that port workers are as essential to ground-based commerce as air transport depends on traffic controllers. But the right to strike is provided in the private sector, whereas the same right is expressly denied to federal employees.¹²¹ Moreover, President Reagan was the effective employer for federal air traffic controllers. But presidents do not have supervisory authority over dock workers. Then, there is the practical matter of finding replacement workers. This was not difficult for President Reagan, but why would potential replacements want to work in a radioactive port?

Another long shot possibility is based on Executive Order No. 10173. Congress authorized the president to issue rules and regulations to safeguard U.S. ports and waterfront facilities.¹²² President Truman's order set forth detailed employment

¹²⁰ On August 3, 1981, PATCO members commenced a nationwide strike against the federal government. *See* *Clarry v. U.S.*, 85 F.3d 1041, 1043 (2d Cir. 1996). President Reagan responded that day by issuing an ultimatum stating that the strikers must return to work within 48 hours or lose their jobs. *See id.* at 1044. When approximately 11,000 striking air traffic controllers failed to return to work by August 5, they were discharged. *See id.* When the strike began, the law prohibited strikes by federal employees (*see* 5 U.S.C. § 7311 (1994), providing that "an individual may not accept or hold a position in the Government of the United States. . . if . . . he . . . participates in a strike, or asserts the right to strike, against the Government of the United States"). *Id.* at 1046. Ruling that President Reagan had authority to ban the striker's re-employment by the federal government indefinitely, the Clarry court concluded: "As a consequence of the plaintiffs' participation in the strike against the United States, the plaintiffs forfeited not only their positions as federal air traffic controllers but also any right to federal employment." *Id.*

¹²¹ *Compare id.* (5 U.S.C. § 7311, which effectively denies federal employees a right to strike), and *supra* note 11 (NLRA grants private sector employees a broad right to strike).

¹²² Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220, 50 U.S.C. § 191.

regulations for dock workers and seafarers,¹²³ and applied a higher standard to seafarers by subjecting them to criminal penalties.¹²⁴ The order penalized dock workers to a lesser degree by providing for denial of access to ports. The Coast Guard was empowered consider the character of dock workers and seafarers¹²⁵—likely, a metaphor for Communist sympathies—in ruling on an individual’s eligibility to work in a port. While it would be unreasonable to equate work refusal at a radioactive port as a character flaw, Executive Order 10173 was also based on specious and vague reasoning over an individual’s politics. The order was never challenged on these grounds, so a facsimile based its logic cannot be ruled out. Still, I rate this policy response as highly infeasible.

III. COMPULSORY WORK AND THE EVOLVING MEANING OF “INVOLUNTARY SERVITUDE”

In Part II, I examined policy options to order civilian employees back to work at a radioactive port. Many individuals would not voluntarily return to work without significant safety precautions—and these safeguards require substantial time and money. While the nation’s trade would suffer, these workers would resist back-to-work directives. Part II anticipated this contumacy, and examined the government’s arsenal of counter-measures to induce compliance with a back-to-work order. This leads to the

¹²³ Section 6.10 expressly authorized the Coast Guard to regulate the employment of civilians who work at ports and on maritime vessels. *See* Section 6.10-5, providing: “Any person . . . seeking access to any vessel or any waterfront facility within the jurisdiction of the United States may be required to carry identification credentials issued by or otherwise satisfactory to the Commandant. The Commandant may define and designate those categories of vessels and areas of the waterfront wherein such credentials are required.” Section 6.10-7 granted authority to set forth identification credentials which were necessary for dock access.

¹²⁴ Subpart 6.18 authorized severe criminal penalties, however, the scope of this power only extended to persons aboard vessels (“any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel”). In Subpart 6.18(a), the order provided for punishment by imprisonment for not more than ten years and a fine, at the discretion of the court, up to \$10,000.

¹²⁵ In granting authority to set forth identification credentials which were necessary for dock access, Section 6.10-7 said that the “Commandant shall not issue a Coast Guard Port Security Card if he is satisfied that the character and habits of life of the applicant . . . within a waterfront facility would be inimical to the security of the United States.” Section 6.10-9 set forth an appeals process for persons who claimed a violation of rights under these employment regulation procedures.

research question in Part III: What is the legal standard for involuntary servitude? This inquiry is needed to analyze how federal courts would rule on Thirteenth Amendment challenges to the policy options that are set forth in Table 1.

*A. Beyond the Original Purpose of the Thirteenth Amendment:
From Slavery to “Situations Involving Physical or Legal Coercion”*

The Thirteenth Amendment resulted from President Lincoln’s Emancipation Declaration on September 22, 1862.¹²⁶ Delivered as a battlefield speech after a major Union victory,¹²⁷ the proclamation declared a radical policy to free all slaves.¹²⁸ In codifying this idea, the Thirteenth Amendment repeated key parts of the proclamation.¹²⁹

The Amendment quickly evolved from this original intent. *The Slaughter-House Cases*¹³⁰ set the course of this dynamic law. Justice Miller’s majority opinion spoke of the history “fresh within the memory of us all,”¹³¹ a clear reference to enslavement of Africans and their descendents.¹³² But this opinion extended the Amendment beyond “the negro(’s) color and his slavery” and “the grievances of that race.”¹³³ It reasoned: “We do not say that no one else but the negro can share in this protection. . . . If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race

¹²⁶ See *Objects of the War*, 1862 Pres. Proc. No. 16, 12 Stat. 1267 (1862).

¹²⁷ See *The Emancipation Proclamation*, in the National Archives, at http://www.archives.gov/exhibits/american_originals_iv/sections/preliminary_emancipation_proclamation.html#.

¹²⁸ *Id.*, stating: “That on the first day of January in the year of our Lord, one thousand eight hundred and sixty-three, all persons held as slaves within any State, . . . the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free. . . .”

¹²⁹ Amendment XIII, Section 1. The Amendment draws its conception of involuntary servitude from Sec. 9 in the Emancipation Proclamation (“and all slaves of such persons found on (or) being within any place occupied by rebel forces and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude and not again held as slaves.”).

¹³⁰ 16 Wall. 36 (1872).

¹³¹ *Id.* at 56.

¹³² *Id.* at 59.

¹³³ *Id.*

within our territory, this amendment may safely be trusted to make it void.”¹³⁴ *U.S. v. Harris*¹³⁵ reaffirmed this view of the Thirteenth Amendment, concluding that “besides abolishing slavery . . . [it] gives power to Congress to protect all persons . . . from being in any way subjected to slavery or involuntary servitude. . . .”¹³⁶

Congress also took a broader view in passing legislation to implement the Thirteenth Amendment.¹³⁷ Lawmakers in 1874 sought to eliminate other forms of involuntary servitude—specifically, a peculiar form of child exploitation known as the *Padrone* system.¹³⁸ That law, 18 U.S.C. § 1584, remains in effect and criminalizes a variety of exploitative work arrangements.¹³⁹

Recent federal courts have agreed that the Thirteenth Amendment and its § 1584 counterpart should not be construed too narrowly.¹⁴⁰ Since 1980, these laws have been

¹³⁴ *Id.*

¹³⁵ 106 U.S. 629 (1882).

¹³⁶ *Id.* at 639.

¹³⁷ Amendment XIII, Section 1. Section 2 of the Amendment states: “Congress shall have the power to enforce this article by appropriate legislation.” In this vein, *see* 18 U.S.C. § 1584, *infra* note 139.

¹³⁸ The law was originally enacted to “to prevent [this] practice of enslaving, buying, selling, or using Italian children.” 2 Cong. Rec. 4443 (1874) (Rep. Cessna).

¹³⁹ After recent amendments, 18 U.S.C. § 1584 now provides:

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

See 18 U.S.C.A § 1584, reporting amendments in 1948 (June 25, 1948, c. 645, 62 Stat. 773), 1994 (Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(K)), 1996 (Sept. 30, 1996, 108 Stat. 2147, Pub.L. 104-208, Div. C, Title II, § 218(a), 110 Stat. 3009-573; and 2000 (Oct. 28, 2000, Pub.L. 106-386, Div. A, § 112(a)(1), 114 Stat. 1486).

¹⁴⁰ State courts have reached similar results in refusing to enforce personal service contracts. In a bold decision that pre-dates the Emancipation Proclamation, an Indiana court refused to hold a “Woman of Color” to a contract that provided for indentured service, stating: “Deplorable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking.” *See* The Case of Mary Clark, A Woman of Color, 1 Blackf. 122 (Ind. 1812), also available in 1821 WL 974 (Ind.), and 12 Am.Dec. 213. More recently, claims of involuntary servitude have been raised when employees have refused to perform work that they promised under an individual employment contract or collective bargaining agreement, and employers have sought to restrain a work stoppage. In these rulings, courts have refused to hold these recalcitrant employees to the remedy of specific performance, but they have also ruled that back-to-work injunctions are valid. *E.g.*, *Pinellas County Classroom Teachers Ass’n v. Board of Public Instruction of Pinellas County*, 214 So.2d 34 (Fla.

invoked successfully to end abusive child labor,¹⁴¹ forcible employment of migrant farm hands,¹⁴² intimidation to remain in a religious sect,¹⁴³ threatening workers with involuntary commitment to a mental institution,¹⁴⁴ and forcible household labor by isolating immigrants.¹⁴⁵

In deciding these cases, federal courts have expanded the meaning of involuntary servitude. The Sixth Circuit in *U.S. v. Lewis* advised courts that apply the Thirteenth Amendment to “consider the realities of modern life.”¹⁴⁶ *Lewis* added: “No longer is the slave always black and the master white. And, while subtler forms of coercion have replaced the blatant methods of subjugation practiced in the ante-bellum South, these new practices are no less effective than their older counterparts.”¹⁴⁷ The Fourth Circuit in *U.S. v. Booker* observed that “[t]he amendment and the legislation were intended to eradicate not merely the formal system of slavery that existed in the southern states prior to the Civil War, but all forms of compulsory, involuntary service.”¹⁴⁸ Concurring in this view, the Ninth Circuit reasoned in *U.S. v. Mussry* that the “13th Amendment and its enforcing statutes are designed to apply to a variety of circumstances and conditions. Neither is limited to the classic form of slavery. Both apply to contemporary as well as to historic

1968) (injunction that prohibits a strike by teachers did not impose involuntary servitude); and in *re Block*, 50 N.J. 494, 499 (N.J. 1967), concluding: “There is no issue of involuntary servitude under the Thirteenth Amendment; the individual teachers were free to quit but they could not strike in concert.”

¹⁴¹ *U.S. v. King*, 840 F.2d 1276 (6th Cir. 1988).

¹⁴² *U.S. v. Warren*, 722 F.2d 827 (2d Cir. 1985).

¹⁴³ *U.S. v. Lewis*, 644 F.Supp. 1391 (W.D. Mi. 1984).

¹⁴⁴ *U.S. v. Kozminski*, 487 U.S. 931 (1988).

¹⁴⁵ *Manliguez v. Joseph*, 226 F.Supp.2d 377 (E.D.N.Y. 2002), and *U.S. v. Veerapol*, 312 F.3d 1128 (9th Cir. 2002).

¹⁴⁶ *Lewis*, *supra* note 143, at 1400.

¹⁴⁷ *Id.*

¹⁴⁸ 644 F.Supp. 1391 (W.D. Mi. 1986).

forms of involuntary servitude.”¹⁴⁹ The Eleventh Circuit agreed in *U.S. v. Warren*, emphasizing that “[v]arious forms of coercion may constitute a holding in involuntary servitude. The use, or threatened use, of physical force to create a climate of fear is the most grotesque example of such coercion.”¹⁵⁰

All of these cases involved extremes in the mistreatment of workers.¹⁵¹ However, there are current efforts to expand 18 U.S.C. § 1584 and the Thirteenth Amendment to mainstream settings. The most suggestive example is *Zavala v. Wal-Mart*,¹⁵² involving recent claims that the large retailer and its janitorial contractors locked illegal aliens in stores around the country at night to perform cleaning duties. While a federal district court found insufficient evidence to support this § 1584 allegation, a milestone was reached when the judge seriously considered this complaint against Wal-Mart.¹⁵³

The expanding definition of involuntary servitude has been tempered, however, by the Supreme Court’s rejection of psychological coercion as a legal standard. This jurisprudence traces to Judge Friendly’s stingy interpretation of involuntary servitude in *U.S. v. Shackney*.¹⁵⁴ Rabbi Shackney and his wife recruited and employed the Oros family from Mexico to work on their kosher chicken farm.¹⁵⁵ The workers lived in sub-standard housing.¹⁵⁶ They rarely left the farm,¹⁵⁷ and their children did not attend

¹⁴⁹ 726 F.2d 1448 (9th Cir. 1984).

¹⁵⁰ 772 F.2d 827, 833-34 (11th Cir. 1985).

¹⁵¹ *U.S. v. Kozminski*, 821 F.2d 1186, 1213 (6th Cir. 1986) (“involuntary servitude cases are few and far between”).

¹⁵² 393 F.Supp.2d 295 (D.N.J. 2005).

¹⁵³ *Id.* at 310-11.

¹⁵⁴ 333 F.2d 475 (2d Cir. 1964).

¹⁵⁵ *Id.* at 476-77.

¹⁵⁶ *Id.* at 478 (the walls were made of cardboard, the floor had holes, and the dwelling was heated by a wood-burning stove).

¹⁵⁷ *Id.* at 479.

school.¹⁵⁸ Key to the government’s prosecution, the Shackneys held the Oros family against their will by threatening them with deportation.¹⁵⁹

Nonetheless, Judge Friendly’s decision reversed the Shackneys’ § 1584 conviction.¹⁶⁰ Exploring the psychological dynamics of involuntary servitude, Judge Friendly believed that threats are endemic in a work relationship.¹⁶¹ Judge Friendly rejected the idea that the criminal sanctions of § 1584 come “into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful.”¹⁶² Thus, “a credible threat of deportation may come close to the line, (but) it still leaves the employee with a choice, and we do not see how we could fairly bring it within § 1584 without encompassing other types of threat.”¹⁶³

More recently, the Supreme Court approved Judge Friendly’s approach in *U.S. v. Kozminski*.¹⁶⁴ Like *Shackney*, this case involved a married couple who provided squalid housing to their farm hands.¹⁶⁵ Successfully prosecuting the Kozminskis under § 1584,¹⁶⁶

¹⁵⁸ *Id.* at 478.

¹⁵⁹ *Id.* at 479-80.

¹⁶⁰ *Id.* at 487.

¹⁶¹ *Id.* (“Friction over employment punctuated by hotheaded threats is well known and inevitable.”).

¹⁶² *Id.* at 486. A court must weigh the objective options that an employee has at the moment of the alleged coercion: “involuntary servitude means . . . action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement . . . not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad.” *Id.*

¹⁶³ *Id.*

¹⁶⁴ 487 U.S. 931 (1988). It is a crime under 18 U.S.C. § 1584 to hold another person to involuntary servitude.

¹⁶⁵ *Id.* at 934. While *Shackney* involved employer threats of deportation, the Kozminski family threatened the two workers— both of whom had IQ scores under 70— with institutionalization if they left the farm. *Id.*

¹⁶⁶ *Id.* at 937.

the U.S. theorized that the men were being held at work as “psychological hostages.”¹⁶⁷ Justice O’Connor’s opinion rejected this approach. Resolving a conflict among appellate courts,¹⁶⁸ the decision limited involuntary servitude to “situations involving physical or legal coercion.”¹⁶⁹ Providing guidance to future courts, the opinion used the padrone system as a definitional example. Those children were stranded in large cities in a foreign country, with no education or other means of self-support. Justice O’Connor concluded that “these children had no actual means of escaping the padrones’ service; they had no choice but to work for their masters or risk physical harm.”¹⁷⁰

Kozminski’s narrow construction of § 1584 is further revealed by the Court’s rejection of prosecutor analogies. U.S. attorneys argued that involuntary servitude prohibits the “compulsion of services by any means that, from the victim’s point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice.”¹⁷¹ *Kozminski* rejected this view because it “would appear to criminalize a broad range of day-to-day activity.”¹⁷² Involuntary servitude “would include compulsion through psychological coercion as well as almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work.”¹⁷³ Justice O’Connor believed that “the Government’s interpretation would

¹⁶⁷ *Id.* at 936.

¹⁶⁸ *Id.* at 939.

¹⁶⁹ *Id.* at 947. While these terms are vague, they were more clearly explained in terms of the historical context of the Thirteenth Amendment and § 1584. Justice O’Connor reasoned that Congress intended to outlaw the padrone system, and other forms of exploitation that take “advantage of the special vulnerabilities of their victims, placing them in situations where they were physically unable to leave.” *Id.* at 948.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 949.

¹⁷² *Id.*

¹⁷³ *Id.* This might criminalize a parent’s threat of “withdrawal of affection” as coercion to compel an adult son or daughter to work in the family business, or a political leader’s use of “charisma to induce others to work without pay or a religious leader who obtains personal services by means of religious

delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes.”¹⁷⁴ Her opinion lauded Judge Friendly’s narrow interpretation,¹⁷⁵ and notably, it upheld key exceptions to the Thirteenth Amendment.¹⁷⁶

B. The Public Service Exception to the 13th Amendment

While the 13th Amendment protects individuals from legal coercion, there remains an exception for public service compelled by a government body. The 13th Amendment does not prevent state or federal governments from using criminal sanctions to compel individuals to perform civic duties such as jury service¹⁷⁷ and military service.¹⁷⁸

Two longstanding Supreme Court precedents seem particularly relevant to order dock workers back to a crippled port. One permits local government to conscript citizens for road duty. *Butler v. Perry*¹⁷⁹ upheld a Florida law that required men to work without pay for six days every year on roads and bridges.¹⁸⁰ Failure to answer a road work summons was a criminal offense.¹⁸¹ J.W. Butler was jailed for 30 days after he ignored this duty and failed to make an alternate arrangement.¹⁸²

The Supreme Court rejected Mr. Butler’s 13th Amendment challenge. Justice McReynolds’ opinion recalled that text for the 13th Amendment came from the Ordinance

indoctrination.” *Id.*

¹⁷⁴ *Id.* She explained that “[b]y its terms the [Thirteenth] Amendment excludes involuntary servitude imposed as legal punishment for a crime.” *Id.*

¹⁷⁵ *Id.* at 950.

¹⁷⁶ *Id.* at 943-44, emphasizing that “the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.”

¹⁷⁷ *Hurtado v. U.S.*, 410 U.S. 578 (1973), at 589, n.11.

¹⁷⁸ *Selective Draft Law Cases*, 245 U.S. 366 (1918).

¹⁷⁹ 240 U.S. 328 (1916).

¹⁸⁰ *Id.* at 329.

¹⁸¹ *Id.*

¹⁸² *Id.* at 330.

of 1787,¹⁸³ which created the Northwest Territory. That area was conceived as a slave-free jurisdiction, but nevertheless the Territory approved the ancient tradition of conscripting men to build roads and bridges.¹⁸⁴ This duty traced to Roman law, which decreed that “with respect to the construction and repairing of ways and bridges no class of men of whatever rank or dignity should be exempted”¹⁸⁵ from conscription. Courts upheld state authority to compel this physical labor on pain of imprisonment.¹⁸⁶ Giving weight to this long history, the Court concluded that Congress did not abolish compulsory public service when it enacted the 13th Amendment.¹⁸⁷

Butler reflects judicial embrace of the ancient doctrine, *trinoda necessitis*, “meaning the threefold necessary public duties. . . : repairing bridges, maintaining castles or garrisons, and going on expeditions to repel invasions”¹⁸⁸ This doctrine of compulsory service appeared “as early as 1550, [when] the care of the public roads of England was first left to the male inhabitants of parishes.”¹⁸⁹ Blackstone’s *Commentaries* said: “Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair. . . . From this burden no man was exempt by our ancient laws,

¹⁸³ *Id.* at 332, quoting 1 Stat. at L.53, note (the government of the Northwest Territory provided that “[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 331.

¹⁸⁶ *Id.* citing in re Dassler, 35 Kan. 678 (1886); *State v. Wheeler*, 141 N.C. 773 (1906); *State v. Rayburn*, 101 Pac. 1029 (1909); *State v. Halifax*, 15 N.C. 345 (1883); and *Sawyer v. Alton*, 4 Ill. 127 (1841).

¹⁸⁷ *Id.* at 333. Conscripting of free men to perform road duty stretched from the Roman Empire to the Middle Ages, and continued into the 20th century. *Id.* at 331-32. Twenty-seven states in the U.S. had laws similar to the Florida statute. Justice McReynolds believed that the 13th Amendment “was adopted with reference to conditions existing since the foundation of our government, and the term ‘involuntary servitude’ was intended to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results.” *Id.* at 332. He noted, however, that the Amendment “introduced no novel doctrine with respect of services always treated as exceptional.” *Id.*

¹⁸⁸ *Galoway v. State*, 202 S.W. 76, 76 (1918), quoting Black, L. DICT. and 38 CYC. 1994 (on the burdens to which all owners of lands were held liable by the Saxon law). *Trinoda necessitas* is cited in *Butler*, *supra* note 179, at 331.

¹⁸⁹ *State v. Rayburn*, 101 P. 1029, 1031 (1909).

whatever other immunities he might enjoy; this being a part of the *trinoda necessitas*, to which every man's estate was subject."¹⁹⁰ Frequently, states imposed this doctrine on its citizens, requiring individuals to provide road, military, and jury duty.¹⁹¹

Current courts have breathed new life into this civic duty principle. They have upheld service requirements that were resisted by a conscientious objector who refused to perform charitable duties in lieu of military service,¹⁹² and high school students who resisted graduation requirements to work on community service projects.¹⁹³

C. The Maritime Duty Exception to the Thirteenth Amendment

The other longstanding Supreme Court precedent that creates an exception to the Thirteenth Amendment is *Robertson v. Baldwin*.¹⁹⁴ Mr. Robertson and other merchant seamen agreed to shipping articles in a contract for a lengthy voyage up and down the Pacific coast.¹⁹⁵ The men grew dissatisfied with their employment, and went AWOL in Astoria, Oregon. Police arrested them for maritime desertion, an offense punishable

¹⁹⁰ *Id.* at 1032, quoting 1 BLACKSTONE, COMMENTARIES, at 538.

¹⁹¹ *E.g.*, *Sawyer v. City of Alton*, 3 Scam. 127 (1841); *Town of Pleasant v. Kost*, 29 Ill. 490 (1863); *Fox v. City of Rockford*, 38 Ill. 451 (1865); and *Proffit v. Anderson, Deputy Sheriff*, 20 S.E. 887 (1894).

¹⁹² *Howze v. U.S.*, 272 F.2d 146 (9th Cir. 1959). Mr. Howze was ordered to report to the Los Angeles County Department of Charities for civilian work after being excused from military service as a conscientious objector. He reported to the building but refused to accept any duties. He was therefore indicted for failing to perform a duty required under the Universal Military Service and Training Act.

Rejecting Mr. Holze's claim that the law held him to a condition of involuntary servitude, the Ninth Circuit reasoned: "The power of Congress to raise armies, and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment, or the absence of a military emergency." *Id.* at 148.

¹⁹³ *Steirer by Steirer v. Bethlehem Area School Dist.*, 987 F.2d 989 (3d Cir. 1993); *Immediato by Immediato v. Rye Neck School Dist.*, 873 F.Supp. 846 (S.D.N.Y. 1995); and *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996). The vitality of *Butler* is revealed in this passage from *Steirer*, where the court saw no legal difference between a local government body requiring the performance of unpaid road work of all able men, and a school board that required students to perform 60 hours of voluntary community service as a condition to graduate from high school:

"Significantly, not even every situation in which an individual faces a choice between labor or legal sanction constitutes involuntary servitude. Governments may require individuals to perform certain well-established civic duties. . . ." *Id.* at 999. The court expressly affirmed *Butler* as authority. *Id.*

¹⁹⁴ 165 U.S. 275 (1897).

¹⁹⁵ *Id.* at 276. The contract was subject to a federal law that prohibits desertion and all other forms of work abandonment.

under federal law.¹⁹⁶ After being jailed for 16 days, the men were forcibly returned to the ship. They remained disobedient, causing the ship to discharge them in San Francisco to the custody of federal marshals.¹⁹⁷ Suing on a writ of habeas corpus, Mr. Robertson said that the federal law subjected him to involuntary servitude.

He lost his case before the Supreme Court. While his employment contract required a form of servitude to the ship, the agreement was voluntary.¹⁹⁸ Personal servitude contracts of this type, common in Great Britain, were also enforceable by criminal sanctions.¹⁹⁹ The majority opinion in *Robertson* conceded that the U.S. had more personal freedoms.²⁰⁰ Nevertheless, legal authorities approved forcible subjection of merchant seamen “900 years before the birth of Christ.”²⁰¹ As in the U.S., the Greek city-state of Rhodes required “payment of damages by seamen who absent themselves from their ships without leave, or for their imprisonment, or forcible conveyance on board.”²⁰²

Courts continue to recognize *Robertson* as a valid authority. In a decision steeped in maritime law and tradition, *N.L.R.B. v. Sea-Land Service, Inc.* reversed a labor board finding that a captain coercively interrogated a ship’s navigator about a message that he

¹⁹⁶ *Id.* at 276-77 (Act of July 20, 1790 provided that if any seaman who signed a contract to perform a voyage deserts or absents himself, “it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter.”).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 281.

²⁰⁰ *Id.* (“The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others; nor would public opinion tolerate a statute to that effect.”).

²⁰¹ The majority relied on a vast body of ancient precedent, beginning with regulations in the Greek state of Rhodes that restrained the personal freedom of seamen. *Id.* at 329. A severe decree by the Hanseatic League in 1597 allowed authorities to keep AWOL seamen in prison “upon bread and water for one year.” *Id.* at 330. More recently, the majority referred to an act of 1647, passed in Massachusetts, that treated a seaman who left his vessel before its voyage ended as “a runaway servant.” *Id.*

²⁰² *Id.* at 285. *Butler* also rejected the Thirteenth Amendment challenge because it saw no evidence that the Bill of Rights meant to abolish this restriction on the liberty of merchant seaman. Congress never intended that this maritime law against desertion and absence without leave, “which was in force in this country for more than 60 years before the thirteenth amendment was adopted,” could apply to the contracts of seamen. *Id.* at 287.

radioed to that federal agency.²⁰³ Courts have also broadened *Robertson* as a precedent, for example, by ordering an attorney against his will to represent a Title VII plaintiff,²⁰⁴ and ordering high school students to perform unpaid lunchroom duty.²⁰⁵

IV. COMPULSORY LABOR IN A NATIONAL EMERGENCY? A THIRTEENTH AMENDMENT ANALYSIS

Here, in Part IV, we arrive at the heart of my analysis: Would any of the feasible back-to-work orders violate the Thirteenth Amendment ban on involuntary servitude? On one hand, precedent and history would clearly be on the government's side. Also, courts are inclined to limit economic harm caused by a critical work stoppage. But how much weight would a court give to protecting workers from an extraordinary hazard? In sum, during a national emergency work stoppage, how would a court strike a balance between individual liberty interests and society's requirements for order, stability, and security?

A court would likely uphold the constitutionality of the feasible back-to-work orders in Part II. These orders provide only temporary authority to halt a work stoppage. Even in national emergency legislation, Congress avoided a public policy that compels workers to stay on the job indefinitely.²⁰⁶ My research suggests that the longest feasible

²⁰³ 837 F.2d 1387, 1394 (5th Cir. 1988) Examining *Robertson* at length, the Fifth Circuit came to the same conclusion as its 19th Century forbear:

Recognized as an anomaly in relations of master and servant is the maritime concept of the restricted freedom of a seaman which the Supreme Court acknowledged in *Robertson* (citation omitted). From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract.

Id. at 1397.

²⁰⁴ *Brooks v. Central Bank of Birmingham*, 1982 WL 365 (N.D.Ala. 1982).

²⁰⁵ *Bobilin v. Bd. of Ed., State of Hawaii*, 403 F.Supp. 1095 (D.C. Hawaii 1975).

²⁰⁶ *Accord*, *United Steelworkers of Am. v. U.S.*, 361 U.S. 39, 57 (1959), stating: "In the national emergency provisions of the Labor Management Relations Act, Congress has with particularity described the duration of the injunction to be granted." The Court added that "it is a primary purpose of the Act to stop the national emergency at least for eighty days, which would be defeated if a court were left with discretion to withhold an injunction and thereby permit continuation of an emergency it has found to exist."

period that workers could be ordered on the job is 110 days.²⁰⁷

Courts would likely reject a Thirteenth Amendment challenge to consecutive 80-day and 30-day work orders. These decrees suggest analogies to the facts, holding, and reasoning of *Butler*. Florida imposed a six day work requirement in *Butler* with no pay. Similarly, the duration of a Taft-Hartley injunction and WLDA order would be limited. While this mandatory work period is longer, it is tempered by the fact that neither Taft-Hartley nor the WLDA lowers a worker's pay. In contrast, *Butler* mandated unpaid work.

Butler's heavy reliance on *trinoda necessitas* would be pivotal in a Thirteenth Amendment challenge. This precept is central to the American legal conception of mandatory public service.²⁰⁸ *Butler* not only gave weight to an 11th century principle,²⁰⁹ but applied it to current realities.²¹⁰ *Trinoda necessitas* has endured for a millennium because of its vital social utility: Society requires infrastructure for transportation, and occasions arise when states must temporarily impose involuntary servitude on particular members. Just as *Butler* applied *trinoda necessitas* beyond its literal confines to include roads in the emergent automotive era, a court would likely expand *trinoda necessitas* to a crippled Pacific port that bridges trade between Asian and U.S. businesses.

²⁰⁷ I emphasize that 110 days seems to be the outer limit of a work-quitting restriction; and in the private sector, the federal government has never sequenced a strike or quit restriction in this fashion. Nevertheless, this period seems feasible because large Pacific ports are chokepoints in the nation's economy. Total closure of a crippled facility seems out of the question, and a 110 day work period would appear to grant time to muster protective equipment for workers at a crippled port, or develop new capacity at other U.S. ports.

²⁰⁸ See *Butler*, *supra* note 179, at 331, stating:

From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda neceesitas*, to which every man's estate was subject; viz., *expeditio contra hostem, arcium constructio, et pontium reparatio*. For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, with respect to the construction and repairing of ways and bridges no class of men of whatever rank or dignity should be exempted. The *trinoda neceesitas* was an obligation falling on all freemen, or at least on all free householders.

²⁰⁹ *Id.* citing VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY, p. 82.

²¹⁰ *Id.* at 331 ("For, though the reparation of bridges only is expressed, yet that of roads also must be understood.").

Table 2
Analysis of Dock Workers’ Claim that Back-to-Work Order
Violates the Thirteenth Amendment

More Likely Ruling:
Court Upholds Consecutive Back-to-Work Orders under Taft-Hartley (80 Days)
and Section 8 of a Re-Enacted War Labor Disputes Act (30 days)

Strongest Rationale	Alternative Rationale	Weakest Rationale
----------------------------	------------------------------	--------------------------

• *Butler v. Perry*, 240 U.S. 328, 331 (1916): *trinoda necessitis*—the public duty to repair bridges, maintain castles or garrisons, and go on expeditions to repel invasions has never been abolished, and over time has been extended to compulsory service in schools and charities. Ports are analogous to roads and bridges as essential arteries of commerce.

• *Kozminski v. Baldwin*, 487 U.S. 931, 943-44 (1988): Although a back-to-work order is enforced by legal coercion in the form of stiff fines and imprisonment, the Supreme Court “has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.”

• *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897): Congress never intended that maritime law against desertion, “which was in force in this country for more than 60 years before the thirteenth amendment was adopted,” be applied to the contracts of seamen. Dock work is analogous because it is inextricably linked to maritime commerce.

Less Likely Ruling:
Court Overturns Consecutive Back-to-Work Orders under Taft-Hartley (80 Days)
and Section 8 of a Re-Enacted War Labor Disputes Act (30 days)

Strongest Rationale	Alternative Rationale	Weakest Rationale
----------------------------	------------------------------	--------------------------

• *Kozminski v. Baldwin*, 487 U.S. 931 (1988): While the Supreme Court rejected psychological coercion as a 13th Amendment standard, it equated involuntary servitude to situations where workers have “no choice but to work for their masters or risk physical harm.”

• Exec. Order No. 10173, Subpt. 6.18, authorizing severe criminal penalties but only for a vessel’s owner, agent, master, officer, or person in charge, or any member of the crew”: In national emergency orders involving ports, the law has distinguished seamen and dock workers, subjecting the former to harsh penalties while penalizing dock workers by denying access to work.

• *Butler v. Perry*, 240 U.S. 328 (1916): *trinoda necessitis* has not traditionally created public service obligations that pose a direct threat to personal welfare and safety.

In addition, while the Supreme Court rarely examines involuntary servitude, it has cited *Butler* approvingly on every occasion. *Pollock v. Williams* struck down a state law that enforced peonage.²¹¹ Nevertheless, this important civil rights ruling carefully preserved the influence of *Butler*.²¹² When the Supreme Court most recently ruled on involuntary servitude in *Kozminski*, the majority opinion cited *Butler* on three different occasions.²¹³ This decision explicitly reaffirmed *Butler* as a precedent.²¹⁴

Less likely, courts would overturn mandatory port work orders on Thirteenth Amendment grounds. While *Butler* has been applied to contemporary forms of compulsory public service, *trinoda necessitas* has never been imposed when individuals face threats to health and safety. *Butler* approved a state imposed requirement of hard physical labor, but this fell short of exposing individuals to physical hazards. The law in *Butler* offered citizens an alternative to physical labor in the form of road taxes.

Thus, a court could distinguish *Butler* by emphasizing Judge Friendly's view of involuntary servitude. He reasoned that the Thirteenth Amendment does not come "into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful."²¹⁵ But when a dock worker must choose between obeying a court order on pain of imprisonment, and radiation exposure, he has much less choice than the immigrant who labors under a threat of deportation. A court might conclude that the choices for a dock worker are so unreasonable that the individual has no choice at all.

²¹¹ *Pollock v. Williams*, 322 U.S. 4 (1944).

²¹² *Id.* at 17-18, n.28, noting: "Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways."

²¹³ *Kozminski*, *supra* note 164, at 942 (two separate citations), and 944.

²¹⁴ *Id.* at 944.

²¹⁵ *Id.* at 950.

Robertson would also play a role in a court’s ruling on restoring work at a crippled port. In upholding a prison term for a seaman’s desertion, *Robertson* created an exception to the Thirteenth Amendment. But would this exception extend to dock workers? Predicting the reach of *Robertson* is harder than *Butler* because the work of seamen and dock workers is not as similar as the connection between roads and ports.

How could a court analogize the occupations of seamen and dock workers? Both perform work on an anchored ship at port. ILWU workers routinely board ships to do their jobs.²¹⁶ According to *Southern S.S. Co. v. N.L.R.B.*,²¹⁷ ships that are anchored dockside in ports are subject to maritime law.²¹⁸ Furthermore, *Southern S.S.* explored how a work stoppage by seamen disrupted transfer of cargo²¹⁹— a job action that would affect not only a ship in navigable waters, but also a port. This decision thereby extended the

²¹⁶ See Pacific Coast Marine Safety Code 2002 Revision ILWU and PMA, http://www.ilwu.org/longshore/contracts/upload/2002_PCMSC.pdf. To illustrate this connection, Rule 234 provides that a “life net furnished by the vessel shall be rigged under all gangways and accommodation ladders used by employees in such a manner as to prevent a person falling between the ship and the dock.” *Id.* at 6. Rule 271 says that if “a ship, boat, or vessel is alongside any other ship, boat, or other vessel, and persons employed are required to pass from one to the other, a safe means of access shall be provided.” *Id.* at 14. Also, Rule 1048 provides: “When a crane is loading or unloading a tier of containers across a vessel, employees working aloft on that tier shall maintain a minimum athwartship distance of five (5) container widths or half the width of the tier, whichever is greater, offshore of the container being loaded or unloaded.” *Id.* at 59.

²¹⁷ 316 U.S. 31, 41 (1942): “The water in the harbor of Houston is certainly navigable, and a boat at dock there is obviously within the territorial limits of the United States.”

²¹⁸ *Id.*

²¹⁹ The work stoppage began when a seaman failed to turn the steam on deck for use in loading the cargo. *Id.* at 34. This fact is emphasized because the striker’s action was directly related to the work of unloading cargo. A management crew management turned on the steam, in order to start the unloading process, but again was thwarted when a deck fireman left his post. The record shows that from “that time until evening the strikers sat quietly by, engaging in no violence and not interfering with the officers of the ship or the non-striking members of the crew who proceeded with the loading of the cargo.” *Id.* Again, this shows that this work stoppage interfered with the unloading process, an activity that clearly falls today within the work jurisdiction of Pacific ILWU members. The captain ordered strikers to return to work— another part of the hypothetical scenario— and they refused. The crew “continued to refuse after a deputy United States Shipping Commissioner came aboard and read to them that provision of their shipping articles in which they had promised ‘to be obedient to the lawful commands’ of the master.” Here, too, is another factual similarity— the use of federal authority to end a work stoppage by directing workers to go back to their jobs. *Id.* at 35.

law against maritime work abandonment beyond the desertion case in *Robertson*.²²⁰ A future court could reason that a work stoppage at a crippled port is controlled by the strictures against work abandonment in *Robertson* and *Southern S.S.*²²¹

Robertson has already been extended beyond cases involving maritime desertion. The strikers in *Southern S.S.* were not imprisoned pursuant to federal mutiny law. They were simply denied the protection of the NLRA, a law that otherwise privileged their work stoppage.²²² If the rationale for barring maritime desertion extends to strikes on docked vessels, then any work stoppage which interferes with transfer of a ship's cargo falls outside the shelter of the Thirteenth Amendment. The progeny of *Robertson* suggest that dock workers could be compelled to work amid radiation in a national emergency.²²³

However, the analogy between maritime employment and dock work is strained, even if workers these occupations co-mingle in ports while they transfer cargo. A seaman's duty to a captain has no parallel in civilian employment. Dock workers are led by foremen, who are common supervisors.²²⁴ The ancient curtailment of a seaman's right to quit his work does not apply to dock work, notwithstanding the close proximity of their

²²⁰ By applying the federal maritime law that prohibits mutiny to a dispute that occurred in a port, *Southern S.S.* extended this law to the physical boundary that separates the sea and land.

²²¹ *S.S. Southern* broadened the concept of mutiny at sea to include activity that was otherwise protected under the NLRA: "The water in the harbor of Houston is certainly navigable, and a boat at dock there is obviously within the territorial limits of the United States. The words of the [mutiny] statute alone, therefore, do not warrant an exception in the case of a vessel situated as the *City of Fort Worth* was when the strike occurred." *Id.* at 41.

²²² *Id.* at 46-47.

²²³ There is more evidence to suggest the plausibility of this analogy. The Supreme Court recently adapted its reasoning in *Southern S.S.* to a new context, illegal immigration. In *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the Court equated the Board's improper remedy in compensating illegal aliens with the Board's much earlier order to compensate law-breaking strikers who obstructed the unloading of the *City of Fort Worth*. In sum, *Hoffman Plastic Compounds* broadened the reach of an isolated desertion case to the current context of illegal immigration.

²²⁴ *Pacific Coast Walking Bosses and Foremen's Agreement*, (July 1, 2002 – July 1, 2008) (Section 1.1, defining Walking Bosses and Foremen as "direct supervisory representatives of the Employers in the performance of all cargo handling stevedoring activities"), available at <http://www.ilwu.org/longshore/contracts/index.cfm>.

jobs in a port. Congress recognized this distinction in 1950 when it authorized the president to safeguard U.S. ports and waterfront facilities.²²⁵ Even though employment regulations applied to dock workers and seamen,²²⁶ only seamen and crew members were subject to criminal penalties.²²⁷ Dock workers faced a much milder sanction, denial of access to the port—ironically, the kind of physical removal from port work that individuals in this hypothetical would prefer.

V. CONCLUSIONS: BEYOND EMERGENCY WORK IN CRIPPLED PORTS

My inquiry now broadens beyond crippled ports to compulsory labor in other national emergencies. The U.S. has become vulnerable to serious economic disruptions. Terror attacks have interfered with financial markets, and the nation's air transport and postal systems. Putting terrorism aside, extraordinary natural disasters have significant potential to cause national emergencies. Hurricane Katrina's severe impact²²⁸ suggests the possibility of other weather calamities, while geologists believe that California is ripe for a major earthquake.²²⁹ SARs recently impacted the global economy.²³⁰ Meanwhile, health experts worry that avian flu has catastrophic potential.²³¹ Congress is concerned

²²⁵ Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220, 50 U.S.C. § 191.

²²⁶ See *supra* notes 123 and 125.

²²⁷ See *supra* note 124.

²²⁸ See *supra* notes 2-4.

²²⁹ Tammy Krikorian, *Southern California Overdue for An Earthquake*, SUN (YUMA, AZ.), June 23, 2006, page unavailable online, at 2006 WLNR 10881597.

²³⁰ *U.S. Senator Richard G. Lugar (R-In) Holds A Hearing On Avian Flu Preparedness - Part 5*, FDCH CAPITAL TRANSCRIPTS (Nov. 9, 2005), at 2005 WLNR 18273490 (U.S. Department of Health and Human Services estimates that SARS cost the global economy \$30 billion to \$50 billion, even though it caused only around 8,000 infections worldwide. A pandemic could infect billions).

²³¹ Jeffrey Staples et al., *Preparing for a Pandemic*, HARV. BUS. REV. (May 1, 2006), at 20, available at 2006 WLNR 9075328 (worst case estimate by the World Health Organization shows that 30% of the world's population could be stricken over the course of roughly a year, resulting in as many as 150 million deaths, causing widespread failure in global supply chains fragment and services).

that a pandemic would shrink the nation's labor supply.²³² Health care workers would be exposed to the disease and strain the medical system's capacity.²³³ Congress estimates that a pandemic could kill 2.5% of the workforce.²³⁴ Like health care workers, the general labor force would shrink as workers became ill, or stayed at home out of fear.²³⁵ Table 3 (*infra*) is a template of the legal landscape for national emergencies that have already affected, or could affect, key occupations. It summarizes these conclusions:

Conclusion No. 1: A Taft-Hartley injunction—the most potent legal tool to order fearful workers back on the job—is only available for private sector jobs such as dock workers, pharmaceutical plant workers, utility workers (phone, gas, and electrical power), and construction workers. Most doctors and nurses are subject to this federal law, but those who are public employees are beyond the purview of Taft-Hartley. Thus, the U.S. has limited jurisdiction over critical jobs in a national emergency work stoppage.

Taft-Hartley injunctions have important advantages over state counterparts. They last for 80 days, a lengthy but pre-determined period. This is long enough to weather the worst effects of closed ports, pandemic disease, or a catastrophic hurricane. In contrast, temporary restraining orders expire too soon,²³⁶ while permanent orders are infeasible because of their unlimited duration. In addition, Congress designed Taft-Hartley injunctions to acquire legitimacy by mobilizing public opinion against strikers.²³⁷

²³² CONGRESSIONAL BUDGET OFFICE, A POTENTIAL INFLUENZA PANDEMIC: POSSIBLE MACROECONOMIC EFFECTS AND POLICY ISSUES (December 8, 2005), at 9.

²³³ *Id.* at 10 (“some workers [would] become sick and others [would stay] away to care for others or to avoid becoming ill”).

²³⁴ *Id.* at 11.

²³⁵ *Id.* at 9.

²³⁶ In Louisiana, where police officers abandoned their jobs, the law provides courts authority to issue a temporary restraining order for up to ten days, and also provides for extending this period for one or more periods. La.C.C.P. Art. 3604 (2006).

²³⁷ See S. Rep. No. 105, 80th Cong., 1st Sess. at 15, reprinted in 1 Legislative History of the

<p align="center">Table 3</p> <p align="center">Jobs in National Emergencies: Government Power to Compel Labor Versus Thirteenth Amendment Employee Protections</p>				
Private-Sector Jobs Are <i>Italicized</i> ; Public-Sector Jobs Are in Bold Font ; Jobs in Both Sectors Are <u>Underlined</u>	National Emergency	Taft-Hartley Act Coverage and 80 Day Injunction	Executive Order Coverage	13 th Amendment Protection
<i>Dock Workers</i>	Radioactive Exposure	Yes	Yes	Doubtful
Police	Hurricane Katrina	No	No	Doubtful
Postal	Anthrax Attack	No	Yes	Questionable
Congressional Staff	Anthrax Attack	No	Questionable	Likely
<u>Emergency Doctors</u>	Smallpox Attack	Partial	Partial	Questionable
<u>Nurses</u>	SARS and Hurricane Katrina	Partial	Partial	Questionable
<i>Pharmaceutical Plant Workers</i>	Avian Flu	Yes	Yes	Likely
Fire	9/11	No	No	Doubtful
<i>Utility Workers</i>	9/11	Yes	Yes	Likely
Sanitation	9/11	No	No	Likely
<i>Construction</i>	9/11	Yes	Yes	Likely

Labor-Management Relations Act of 1947, at 463, 472 (1948): “In most instances the force of public opinion should make itself sufficiently felt in (the) 80-day period (during which the strike is enjoined) to bring about a peaceful termination of the controversy.”

Conclusion No. 2: Key emergency response jobs— notably police, fire, and sanitation— are regulated by municipal and state courts, and are therefore harder to run in disasters.²³⁸ Hurricane Katrina illustrates this problem. New Orleans took no legal action to enjoin police officers who stopped working, even though state law prohibits this conduct.²³⁹ The region was too devastated for courts to be open.²⁴⁰ The most effective response to this problem is to relax broad strictures in the Posse Comitatus Act of 1878 against using federal troops in domestic crises.²⁴¹ This recommendation also applies to my proposal in Conclusion No. 4 to limit Taft-Hartley injunctions— that is, the military should serve in place of unwilling civilian workers during these extreme emergencies.

Conclusion No. 3: Employee protection under the 13th Amendment depends on two factors that vary by national emergency— the scope of *trinoda necessitas* as it bears on specific types of work, and the imminent threat to an individual’s life by working in great danger. *Butler* upheld a compulsory work law out of deference to a common law

²³⁸ *Id.* This is because these public employees are excluded from the coverage of the National Labor Relations Act, the law that Taft-Hartley amends. See 29 U.S.C. § 152(2), broadly defining employers but excluding “the United States or any wholly owned Government corporation, or . . . or any State or political subdivision thereof. . . .”

²³⁹ See *City of New Orleans v. Police Ass’n of Louisiana, Teamsters Local No. 253*, 369 So.2d 188, 189 (La.App. 4th Cir. 1979), explaining in dicta that while Louisiana has a law that broadly prohibits issuance of state court injunctions of strikes, this law does apply to police strikes: “In the case of a police strike, the concerted refusal to work by the peace-keeping employees of the government not only leaves society defenseless against crime but even inspires lawlessness.” In prophetic words, the court added: More swiftly and surely than any other, a strike by law enforcement officers takes law enforcement and consequently the rule of law itself from our society. A police strike begins as anarchy and leads towards terrorism.” *Id.*

²⁴⁰ *Id.* After Hurricane Katrina, the Louisiana Supreme Court was shut down by a closure order from August 29 through November 25. See *Courts Reopen, Or Work At Other Sites*, NEW ORLEANS TIMES PICAYUNE (Oct. 27, 2005), at 4, also available in 2005 WLNR 17376435.

²⁴¹ See 10 U.S.C.A. § 332 (2006), prescribing use of militia and armed forces to enforce federal authority under the Posse Comitatus Act. Also see Chris Strohm, *Official Says Plans for Federal Crisis Response Still Needed*, CONG. DAILY (July 14, 2006), at 2006 WL 12219549, explaining that the Defense Department’s response to Hurricane Katrina revealed problems that needed to be fixed regarding the military’s handling of domestic disasters.

doctrine.²⁴² Road duty was hard labor for one week each year, and not dangerous to one's health. This probably tipped the balance against the individual who asserted a Thirteenth Amendment claim. My research suggests that port employment amid radioactivity that does not threaten imminent injury is probably close enough to *Butler's* road duty to defeat a dock worker's Thirteenth Amendment claim.²⁴³

But turning to Table 3, I postulate that the same law would likely prevent the U.S. from ordering sick pharmaceutical factory workers back on the job, regardless of the public's need. This is because *trinoda necessitas* is closely tied to construction and repair of public infrastructure. Pharmaceutical work is too remote to apply the doctrine. Moreover, while the hazard to dock workers in this Article is speculative,²⁴⁴ flu-stricken workers would present a court with a more tangible peril. Applying *Kozminski*, a judge would likely find that the choice presented to these pharmaceutical employees— work while stricken with the flu, or face contempt sanctions— differs enough from the threat of deportation in *Shackney* or institutionalization in *Kozminski* to grant Thirteenth Amendment protection.

In view of the serious health effects from exposure to airborne toxins that followed the 9/11 attacks,²⁴⁵ courts would probably grant Thirteenth Amendment protection to utility and construction workers who are ordered against their will to work without protective gear in another inferno.²⁴⁶ Similar protection would probably be

²⁴² *Supra* notes 208-09.

²⁴³ *Id.*

²⁴⁴ *Supra* note 10, RADIOLOGICAL DISPERSAL DEVICES:

²⁴⁵ Carl Campanile, *Hill Wants \$2B For Sick WTC Heroes*, N.Y. POST, Sept. 14, 2006, at 10, also 2006 WLNR 15958803 (study by Montefiore Medical Center shows that firefighters at Ground Zero lost 12 years of lung function).

²⁴⁶ An academic assessment of the long-term effects of worker exposure to 9/11 debris is reported in WTC Workers Report Acute Health Problems, 64 Occupational Hazards 40, Oct. 1, 2002, available at

granted to phone technicians at a future Ground Zero.²⁴⁷ But after 9/11, courts would probably rule that the services of emergency doctors and nurses are so vital as to fall within the doctrine of *trinoda necessitas*. Since there is precedent for enjoining a national emergency work stoppage at one factory,²⁴⁸ even a single site would be subject to national emergency orders. Time would be critical in ordering these workers back on the job, but Taft-Hartley injunctions can be speedily ordered.²⁴⁹

Conclusion No. 4: Unless new legislation bolsters legal protections against involuntarily servitude, the regulation of compulsory labor will be determined by courts in the heat of an economic crisis. To address this alarming prospect,²⁵⁰ I suggest that the best policy option is to amend the Taft-Hartley Act. Congress can divest federal courts of jurisdiction to enjoin national emergency work stoppages that stem from “terrorism” or a “major disaster.” Elsewhere, Congress has defined these terms with great specificity.²⁵¹

2002 WL 11200763. Researchers at Johns Hopkins University are surprised to find persistent symptoms among truckers and crane operators who worked at Ground Zero inside climate-controlled cabs. *Id.* Researchers conclude that these “inside workers” probably had less exposure to air contaminants than ironworkers, who were not in the study group but labored in the open to clear the twisted wreckage of the buildings. *Id.*

²⁴⁷ See Shawn Young et al., *Verizon Says NYSE’s Phone System Is Up and Running*, WALL ST. J., Sept. 17, 2001, at B5 (stating that more than 2,000 service technicians were deployed in and around Ground Zero to undertake massive emergency rebuilding of lower Manhattan’s phone system).

²⁴⁸ *U.S. v. Am. Locomotive Co.*, 109 F.Supp. 78 (W.D.N.Y. 1952). The court issued a national emergency injunction for a single factory in Dunkirk, New York. The facility was the exclusive manufacturing site for piping and heat exchanges that were essential in making atomic weapons.

²⁴⁹ See *U.S. v. United Steelworkers of Am.*, 202 F.2d 132, 136 (2d Cir. 1953), where the court hastily granted an *ex parte* restraining order under Taft-Hartley that was based solely on the president’s board of inquiry findings. More generally, see Robert Dishman, *The Public Interest in Emergency Labor Disputes*, 45 AM. POL. SCI. REV. 1100, 1109 (1951) (observing that “(i)n a number of disputes, the board of inquiry has been forced to hurry its investigation in order to report to the President in time for him to prevent the strike or have it called off at the earliest practicable moment”).

²⁵⁰ See Justice Oliver Wendell Holmes’ dissent in *Northern Sec. Co. v. U.S.*, 193 U.S. 197, 364 (1904), stating: “Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”

²⁵¹ Pub.L. 107-296 (Nov. 25, 2002), 116 Stat. 2135, Homeland Security Act of 2002, codified at 6 U.S.C.A. § 101 (2006). Section 101(11) defines “major disaster” by reference to 42 U.S.C.A. § 5122(2), which states:

any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven

This policy change would not interfere with the normal operation of Taft-Hartley, which pertains to strikes and lockouts that result from bargaining impasses. Moreover, when Taft-Hartley was enacted, Congress also intended to protect workers from abnormally dangerous working conditions.²⁵² While enacting this limit on courts, Congress should amend the Posse Comitatus Act of 1878 to permit U.S. military forces to substitute for civilian workers during these extreme national emergencies.²⁵³

The federal government has powerful tools to force recalcitrant workers back on the job in a national emergency. These instruments, some of which lay dormant, can be readily adapted to the next national emergency that presents a work-stoppage crisis. But my research shows that emergency courts rarely side with the individual who stands in the way of the public's welfare. Without a labor policy to address emerging national crises, America may belatedly realize "that when we allow fundamental freedoms to be sacrificed in the name of real or perceived emergency, we invariably come to regret it."²⁵⁴

water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance . . . to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

Section 101(15) defines "terrorism" as

any activity that—

(A) involves an act that—

- (i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and
- (ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and

(B) appears to be intended—

- (i) to intimidate or coerce a civilian population;
- (ii) to influence the policy of a government by intimidation or coercion;
- or
- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

²⁵² See *supra* notes 50 - 53.

²⁵³ See *supra* note 241.

²⁵⁴ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (J. Brennan, dissenting).