ARTICLES

Compulsory Labor in a National Emergency: Public Service or Involuntary Servitude?

The Case of Crippled Ports

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The Thirteenth Amendment ban on involuntary servitude has new relevance as the United States grapples with national emergencies such as catastrophic hurricanes, flu pandemics, and terrorism. This Article considers work refusal and coerced work performance in the context of life-threatening employment. 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 demonstrates concern 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, catastrophic accident, or major earthquake—in a vital Pacific port. Such ports have a history of work stoppages that disrupt the nation’s economy. I examine potential federal government responses if dock

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workers were to refuse 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; or (3) the president could issue strong
executive orders that mandate continued work and authorize imprisonment
for noncompliance.

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 its original purpose of abolishing African slave-
holding. The Supreme Court in Kozminski broadly defined involuntary
servitude as forcing any person to work by physical or legal coercion.
The Supreme Court narrowed the broad ban on involuntary servitude,
however, by creating exceptions for transportation work. In Robertson, the
Court upheld a law barring merchant seamen from quitting work and
imprisoning deserters. Similarly, Butler permits states to conscript citizens
to work on highways, and to imprison workers who refuse. Both of these
cases are applicable to dock work, since ports integrate ships and trucks in
a transportation hub. Courts now apply these precedents to new
compulsory activities, such as mandatory public service in order to
graduate from a school or program.

As a result of these Supreme Court cases, it is unlikely that the
Constitution would 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
exigency, we invariably come to regret it."

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. U.S. CONST. amend. XIII, § 1. Section 2 of the Amendment states: "Congress shall have
power to enforce this article by appropriate legislation." In this vein, see 18 U.S.C. § 1584; see also
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I.
INTRODUCTION

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 or new threat has enlarged government power at the expense of individual liberties.

Our society’s need for order and security, balanced against a constitutional tradition of valuing individual liberty, sets the stage for this Article. I re-contextualize these fundamental interests in a hypothetical though realistic setting: the civilian workplace in an extreme catastrophe, disaster, or attack that frightens employees to the point of refusing to work. Suppose these workers perform a public service that is so vital that their duties cannot be interrupted, not even for a short period of time.
This Article asks: Can the government force these civilians to work against their will? Do compulsory work laws violate the Thirteenth Amendment ban on involuntary servitude? While work refusal in national emergencies is extremely rare, we have witnessed it on the news, simulated it in disaster drills, and learned about it in congressional hearings. At the height of chaos during the Hurricane Katrina disaster, 200 New Orleans police officers abandoned their jobs while on duty, and health care workers, fearful of drowning in the rising torrent, abandoned nursing home patients and residents.

The future portends similar forms of worker flight. Just months before 9/11, Dark Winter simulated a smallpox attack in the United States. In the exercise, many unvaccinated emergency room personnel failed to show up for work after a smallpox outbreak was reported. More recently, a report by Congress on avian flu suggested that ill or frightened medical personnel would stay away from work, jeopardizing a coherent response to such a national crisis.

In this Article, I assume that a natural disaster, catastrophic accident, or significant attack will pose a national emergency, and that a sizeable number of workers will abandon their jobs during this crisis. The flight of these employees 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 under various sources of authority, but that workers would resist orders to stay on the job. I then explore the question: At this critical


4. Robert Davis & Kevin Johnson, Hospital Workers Subpoenaed in Post-Katrina Deaths, USA TODAY, Oct. 27, 2005, at 1A (noting investigators were reviewing whether patients and residents at nearly two dozen facilities were abandoned).

5. JOHN'S HOPKINS CENTER FOR CIVILIAN BIODEFENSE ET AL., DARK WINTER (June 22-23, 2001), http://www.upmc-biosecurity.org/website/events/2001_darkwinter/dark_winter.pdf. Dark Winter, a bio-terror attack simulation, was planned by reputable national security groups and held at Andrews Air Force Base. The planning event was conducted on June 22-23, 2001—several months before 9/11—and identified a largely ignored terror group, Al Qaeda, as a potential smuggler of weaponized biopathogens. Dark Winter simulated a smallpox attack that was first detected in Oklahoma City and spread throughout the United States. As the simulated bio-terror attack spread, planners estimated that "[m]any employees are not showing up for work for fear of contagion." Id. at 24 (stating that "many hospital employees are not showing up for work for fear of contagion"). During the exercise the director of the Federal Emergency Management Agency (FEMA) 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." Id. at 34 (emphasis added).

6. Id. at 24 (stating that "many hospital employees are not showing up for work for fear of contagion"). During the exercise the director of the Federal Emergency Management Agency (FEMA) 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." Id. at 34 (emphasis added).

moment, to what extent could the government force these individuals to work without violating the constitutional ban on involuntary servitude?

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

In this Article, I explore the constitutionality of forced work during an emergency by utilizing a hypothetical situation: where a vital Pacific port has experienced a large release of radiation. Since ports are key transportation hubs, with the Los Angeles and Long Beach ports handling 60% of the nation’s imports from Asia, they are also potential choke points in the nation’s distribution system for a wide variety of commodities and goods.\(^8\) Recently enacted port legislation reflects the real possibility of this theoretical radiation scenario by requiring assessments of port vulnerability and preventative measures to avoid radiation leaks.\(^9\)

In this hypothetical I further suppose that the dock workers at this port refuse to work until the radiation hazard has subsided. This is also a realistic supposition: Experts advise that although radioactive exposure from a dirty bomb would not pose a direct threat to human life, fear would significantly outweigh any tangible harm.\(^10\) A radiation exposure need not be large to create a frenzy and wreak economic havoc.

The National Labor Relations Act (NLRA) broadly grants employees the right to strike,\(^11\) and an NLRA amendment grants protection to

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9. Coast Guard and Maritime Transportation Act, P.L. 108-293, 108th Cong., 2d Sess., H.R. Conf. Rep. 108-617 (July 20, 2004), reprinted in 2004 U.S.C.C.A.N. 936. 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 § 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 § 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 § 808(a)(ii)(1)(D) (investigations).

10. DR. PHILIP ANDERSON, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, RADIATIONAL DISPERSAL DEVICES: THE DIRTY BOMB CHALLENGE [hereinafter RADIATIONAL DISPERSAL DEVICES], http://csis.org/isp/homeland_rdd.pdf (on file with author). 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. 457 (codified as amended at 29 U.S.C. § 163 (2000)). “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.” Id.
individuals who quit working when they are exposed to abnormal dangers. This suggests that port employees who refuse to work because of radiation would find protection for their actions under the NLRA. However, the Supreme Court has limited this protection by narrowly interpreting the meaning of "abnormally dangerous conditions of work." Furthermore, Congress has authorized federal courts to enjoin work stoppages that harm the nation's welfare through the Taft-Hartley Act and the War Labor Disputes Act, and through the implementation of Executive Orders.

At this point it is useful to address the rationale for inventing this hypothetical labor crisis and assessing the constitutionality of possible governmental attempts to keep workers on the job. Traditional legal scholarship focuses on a critical development—a court ruling, a new law or regulation, or an emerging trend. In contrast, this Article departs from this practice and adds to an emerging and important genre of simulated constitutional crises. Scholars are plowing this furrow not because they are fiction writers, but because "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."

B. How Far Can the United States Go in Forcing Reluctant Civilians to Perform Essential Jobs in a National Emergency?

Through the hypothetical scenario of a radiation leak at a Pacific port, this Article discusses various mechanisms available to the government to keep workers on the job during such an emergency, and assesses the constitutionality of these governmental actions. In Part II, I examine the options available to the government as it seeks to impede a port work stoppage. Part II.A explores an existing policy response—an injunction


13. See Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368 (1974); see infra notes 39-41 and accompanying text.

14. See infra notes 19-21, and accompanying text.


under the Taft-Hartley Act that would last a maximum of eighty days. This section includes analysis of the counter section of the Act, section 502, under which workers could claim that their walkout is permissible due to abnormally dangerous work conditions. Part II.B examines a dormant but once-effective option 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 thirty days. Part II.C then surveys executive orders that could be used as models to compel dock workers to return to their jobs for an additional thirty days after the expiration of a Taft-Hartley injunction. At the end of Part II is Table 1, which summarizes these governmental response options by charting the following: (a) the feasibility of each action, (b) the duration of compulsory work it would provide, and (c) the enforcement mechanisms.

Parts III and IV of this Article focus on the prohibition of involuntary servitude under the Thirteenth Amendment, and assess the constitutional implications of the governmental responses to the work stoppage under the hypothetical scenario. Part III.A traces the history of the Amendment from its original purpose of outlawing slavery to its expanded usage over time: prohibiting any labor resulting from physical or legal coercion. I also discuss in this Section how the Supreme Court has subsequently narrowed this seemingly expansive doctrine. Part III.B further illustrates this history by discussing the way the Amendment has been significantly limited by judicial embrace of the ancient doctrine *trinoda necessitas*, a principle that compels individuals to perform public service. Finally, Part III.C examines the maritime duty exception to the Thirteenth Amendment that has been applied to anchored ships in U.S. ports.

Part IV constitutes the heart of my analysis, exploring whether the Thirteenth Amendment would prevent the government from ordering dock workers back on the job at a radioactive port. I conclude that a court would likely find the Amendment does not bar compulsion of dock work for up to 110 days. However, I also consider grounds for the less likely opposite court ruling.

In Part V, I lay out four conclusions to my analysis. I also take the analysis one step further by considering not only the hypothetical scenario of a radiation leak at a port, but also other national emergency threats that could engender a crippling work stoppage. 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. Conclusion No. 2 notes, however, that this type of injunction is not available for key public sector occupations such as firefighters, police, and public health care workers—a fact that could complicate a federal response to a national emergency work stoppage. Conclusion No. 3 postulates that the strength of employee protection under the Thirteenth 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. Thus, while a court would likely order dock workers back on the 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 were scarce. 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. Finally, in Part V, I include Table 2, which organizes this discussion by listing key occupations likely to be affected by national emergencies. The Table indicates the availability of government responses to compel labor and whether the Thirteenth Amendment ban on involuntary servitude offers any protection to the workers.

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

Suppose that a vital Pacific port experiences a radiation release, and dock workers refuse to do their jobs until the hazard has been mitigated. The government would have several response options to compel employees to keep working: (a) a Taft-Hartley injunction, (b) a War Labor Disputes Act ban on discontinuing work, and (c) executive orders that compel work performance. In this Part, I explain how these government responses force employees back to work, and evaluate these measures by asking: (1) How feasible are these governmental actions? (2) How long does each compel the employees to continue working? and (3) How does the government enforce these orders? Table 1, located at the end of this Part, charts my responses to each of these questions with respect to the various response options available to the government.

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

It would take only a few days for closed ports to significantly harm the U.S. economy.17 Even short work stoppages—for example, the eleven-day interruption of commerce at Pacific ports in 2002—cause serious economic effects for the nation.18 Because of this, the president has the power to  

17. *See* Larry Kanter, *Devastating Port Strike Feared*, L.A. BUS. J., Dec. 7, 1998, at 1 (“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.”).

18. Each day of the work stoppage cost the rest of the nation’s economy $2 billion. April Fulton, *Port Dispute May Help to Prompt Deal on Seaport Security Bill*, CONG. DAILY, Oct. 9, 2002, available at 2002 WLN 11725423. Pacific ports are vital because the Panama Canal is too small to allow passage of the large container ships that are common in trans-Pacific service. The alternative route, to ship from Asia to the East Coast going through the Suez Canal, is currently too costly. *See Cost Is King:*
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." More generally, the Taft-Hartley Act imposes a series of restrictions on concerted activities, including strikes; the national emergency provision is simply a specific restriction on the right to strike. To enjoin a national emergency strike, the Attorney General petitions a federal court for an injunction to halt the work stoppage. The court can issue this emergency order so long as conditions specified in the Act are met. As Table 1 reflects, seeking an injunction under the Taft-Hartley Act is a highly feasible governmental response.

Presidents have sought Taft-Hartley injunctions during port disputes in the past. Federal judges routinely granted these motions, and ordered dockworkers back on the job. One such situation occurred in 2002, when

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The Pressure Is on to Cut Costs, But the Biggest Challenges for Logistics Professionals Are to Deliver Results while Shedding the "Cost Center" Label, TRANSPL. & DISTRIBUTION, Dec. 1, 2002, at 25, available at 2002 WLNR 10782669. 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 B1, available at 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, available 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.").

19. Labor-Management Relations Act § 206, 29 U.S.C. § 176 (West 2006) (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).


21. Id. This section authorizes 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.

Id.


Pacific port workers engaged in a slowdown to protest unsafe working conditions from fast-moving machines that lug heavy and hazardous objects. The workers were represented by the International Longshore Workers Union (ILWU), a spirited union with a tradition of solidarity. 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. Invoking emergency powers under the Taft-Hartley Act, President Bush won a back-to-work order from a federal court.

The track record of Taft-Hartley injunctions makes future use of this power highly feasible. Historically, however, courts have granted these injunctions when economic disputes, and not safety concerns, are at issue. Already, the ILWU has stated its concerns about unsafe work conditions and more recently, port attacks. A section 502 walkout spurred by radiation exposure would differ from earlier Taft-Hartley disputes by raising a life-threatening worker safety issue with long-lasting effects. This would present a court with an issue of first impression because previous disputes involved economic issues.

(1978), App. A at 5 (summarizing thirty-two occasions, from 1947-1978, when a president used this power).


26. See The ILWU Story, Origins, http://www.ilwu.org/history/ilwu-story/ilwu-story.cfm (last visited Feb. 20, 2007). 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.


30. The Dispatcher reports that “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.” Safety Is Job One, supra note 24. Additionally, “[g]eneral 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.” Id.

In such a situation, the union would likely ask a court to apply section 502 of the Taft-Hartley Act, which allows for "the quitting of labor" when employees encounter "abnormally dangerous conditions for work."\textsuperscript{32}

Interestingly, this right came about through the Labor-Management Relations Act (which amended and is also referred to as the Taft-Hartley Act) that was enacted mainly to limit work stoppages.\textsuperscript{33}

Section 502 protects walkouts that look like strikes by categorizing work stoppages related to compelling safety reasons as something other than strikes.\textsuperscript{34} The Republican sponsor of the bill proposed this distinction believing that "it would be very unfair and very unjust to employees in any industry to penalize them, if, because of abnormal or unusually dangerous conditions, they should refrain from working."\textsuperscript{35}

Despite the fact that section 502 appears to block a Taft-Hartley injunction, a court would likely still issue the national emergency restraining order. Although case law under section 502 is limited,\textsuperscript{36} decisions have mostly been unfavorable to workers.\textsuperscript{37}

A key problem for


\textsuperscript{33} For example, section 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 (1947), reprinted in 1 LMRA LEG. HIST., supra note 12, at 7. This provision diminished union power by reducing the amount of economic pressure they could exert against employers. \textit{Id.}

\textsuperscript{34} The complete statement of section 502 makes this clear:

\textit{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.}\textit{Id. at § 502.}

\textsuperscript{35} Speaking on the Senate floor on May 26, 1946, Sen. Revercomb explained:

\begin{quote}
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.
\end{quote}

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

\textsuperscript{36} The cases, starting with the most recent, include: TNS v. NLRB, 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. Local 1766, 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 Am., 414 U.S. 368 (1974); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974); Anaconda Aluminum Co., 197 N.L.R.B. 336 (1972); Machaby v. NLRB, 377 F.2d 59 (1st Cir. 1967); Phila. Marine Trade Ass'n v. NLRB, 330 F.2d 492 (3d Cir. 1964); Redwing Carriers, Inc., 130 N.L.R.B. 1208 (1961); and NLRB v. Knight Morley Corp., 251 F.2d 753 (6th Cir. 1957).

\textsuperscript{37} \textit{See Goodyear Tire & Rubber}, 269 N.L.R.B. 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
employees is that courts tend to require objective, factual proof of abnormal danger to justify a section 502 walkout, and this is difficult to obtain. This standard has led courts to rule against unions even when workers were subjected to unusual hazards and risks. Consider coal miners walking off the job after air passages to their underground mine were obstructed and managers concealed the problem, as occurred in Gateway Coal Co. v. United Mine Workers of America, the only section 502 case ever heard by the Supreme Court. Although the Court did not directly rule on the standard for assessing abnormally dangerous work conditions, it strongly suggested that an objective test was appropriate. The dictum in Gateway Coal indicates that worker perceptions of abnormal risks posed by radiation exposure would not be relevant to a court’s determination of whether a situation is “abnormally dangerous” under section 502. Objective proof would be required to invoke the protection of this law.

A recent section 502 decision, TNS v. NLRB, shows why a court would likely 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 serious radiation exposure. The controversy was litigated more than twenty years after workers struck over unsafe conditions. Where radiation poses a gradual threat, a court would
likely find no protection under section 502, leaving employees only with lengthy litigation as in the TNS case.45

A court wields coercive power when it enjoins a national emergency dispute, and can force fearful workers back on the job by issuing a Taft-Hartley order.46 Workers usually comply with these orders, so there is no experience in worker disobedience under Taft-Hartley's national emergency conditions. But United States v. United Mine Workers of America47 reveals that federal courts have broad contempt powers to enforce back-to-work orders.48

Under a Taft-Hartley order, a court can issue an injunction of up to eighty days. However, this period might be too short for a work stoppage sparked by a release of radioactivity because the hazard would likely still exist after that period of 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 additional grant of judicial authority to renew the injunction. After the expiration of the injunction, the president might return to Congress for further consideration and action.49

45. Id.
46. 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. See, e.g., United States v. Int'l Longshoremen's Ass'n, 293 F. Supp. 97, 99-102 (S.D.N.Y. 1967) (basing court's 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.
48. 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 (May 21, 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. United States v. United Mine Workers of Am., 330 U.S. 258, 265 (1947). 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 265-67. 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.
49. 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.
However, this has never occurred, so it is unclear whether Congress would extend the injunction, or for how long. The hypothetical scenario would probably test Taft-Hartley’s fuzzy endpoint, because in this situation the dangerous condition or perceived threat would likely last for a long period of time. Thus, the port scenario is unprecedented.

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

If the eighty-day period of forced work under the Taft-Hartley injunction ran out and port employees were still fearful of working due to radiation exposure, the U.S. government would face two choices: acquiescing to a work stoppage for an indefinite period of time, or finding another way to extend the forced labor. The ILWU labor dispute in 2002 suggests that the government would find a way to extend the dock workers’ duty to work.50

Enacting a law modeled after the War Labor Disputes Act (WLDA)51 provides the most viable legislative tool for extending a back-to-work injunction.52 The WLDA barred individuals and unions from ceasing work activities unless they gave notice of their intent to discontinue production thirty days in advance, and it also made the workers or union liable for damages resulting from work discontinued prematurely.53 Under the WLDA, a president had the authority to seize and operate any business whose operation was hindered by a work interruption.54 Enacting and utilizing a law modeled after the WLDA to extend a forced work injunction is feasible, as demonstrated by the fact that the WLDA has been used to address work interruptions in a national crisis.55

The WLDA came about after President Roosevelt unilaterally seized private factories without congressional authority.56 Dire conditions during World War II fostered tacit approval of these extreme measures, and led Congress to enact legislation to provide explicit authority to seize and

50. See Lochhead et al., supra note 28.
52. See War Labor Disputes Act, supra note 51, at § 3 (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”).
53. 50 U.S.C. § 1501 et seq.
54. See War Labor Disputes Act, supra note 51.
55. See France Packing Co. v. Dailey, 166 F.2d 751, 758 (3d Cir. 1948); Hamilton v. NLRB, 160 F.2d 465 (6th Cir. 1947).
56. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 612 (1952) (Frankfurter, J., concurring) (reporting that President Roosevelt ordered seizures on twelve occasions prior to the enactment of the WLDA).
operate a workplace whose production was affected by a labor dispute.\textsuperscript{57} The WLDA expired shortly before Congress passed the Taft-Hartley Act in 1947, and thus its enforcement mechanism never co-existed with the national emergency injunction in Taft-Hartley. It is worth discussing, however, because Congress could consider re-enacting a portion of the WLDA, or using it as a model for a new Act.

Under section 8 of the WLDA, employees were entitled to voice their concerns of a government take-over through a grievance process.\textsuperscript{58} At the same time, however, section 8 imposed an extraordinary constraint by compelling individuals to “continue production under all the conditions which prevailed when such dispute arose” for thirty days.\textsuperscript{59} Although section 8 was not enforceable by an injunction, it authorized a company to hold employees financially responsible for the costs of a premature work stoppage, giving it enforcement power.\textsuperscript{60}

The scope of the WLDA makes it an inappropriately extreme measure to apply to a work stoppage in a radioactive port because it presents an isolated crisis rather than a long-running series of interruptions to the nation’s economy. Furthermore, a port work refusal lacks the traditional conflict over negotiating new labor agreements that plagued union-management relationships, which the WLDA was also meant to address by providing unions and employers more time to settle their difference between resorting to a strike or lockout. Therefore, wholesale re-enactment of the WLDA is inappropriate. However, Congress might consider passing section 8 of the WLDA again, specifically to address work stoppage scenarios during a national emergency.

The coercion mechanism of WLDA section 8 was challenged on constitutional grounds in two cases, and upheld in both. In \textit{France Packing Co. v. Dailey},\textsuperscript{61} the Third Circuit Court of Appeals ruled that an employer could seek monetary damages from workers who walked off the job before

\textsuperscript{57} See War Labor Disputes Act, \textit{supra} note 52.

\textsuperscript{58} 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.

\textsuperscript{59} 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.

\textsuperscript{60} 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—by stating:

\textsuperscript{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.

\textsuperscript{61} 166 F.2d 751 (3d Cir. 1948).
the thirty-day notice period expired.\textsuperscript{62} However, the court strictly construed section 8 as a "national security measure" that applied "to employers and employees alike in their fundamental obligation as citizens functioning in a wartime emergency."\textsuperscript{63}

The Sixth Circuit Court of Appeals adopted similar reasoning in \textit{Hamilton v. NLRB},\textsuperscript{64} where employees who engaged in a sudden work stoppage were found to have violated the thirty-day notice provision of the WLDA.\textsuperscript{65} \textit{Hamilton} strictly construed the law's requirement that employees "continue production,"\textsuperscript{66} holding that "employees can not be permitted to discontinue work."\textsuperscript{67} 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."\textsuperscript{68} In fact, the \textit{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 . . . ."\textsuperscript{69}

The courts in both \textit{France Packing} and \textit{Hamilton} found it constitutional for a president to utilize WLDA section 8 to coerce workers to stay on the job, suggesting that reenactment and implementation of this law is conceivable, and as Table 1 shows, moderately to highly feasible. Its limited duration on discontinuing work makes reenactment of the law even more realistic. This assessment is tempered, however, by legislative ambiguity on the application of the law when an individual intends to quit a job, illustrated by the sparse judicial history on section 8. The uncertainty of the law's reach is also demonstrated in strong dissenting opinions in both \textit{France Packing} and \textit{Hamilton}, which highlight Congress' acknowledgment of the Thirteenth Amendment constitutional limits of section 8 before passing the WLDA.

In \textit{France Packing}, Judge O'Connell's dissent 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

\begin{itemize}
  \item \textsuperscript{62} The court also made clear that the WLDA applied in this case "against three individuals and 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." \textit{Id.} at 756.
  \item \textsuperscript{63} \textit{Id.} at 755.
  \item \textsuperscript{64} 160 F.2d 465 (6th Cir. 1947).
  \item \textsuperscript{65} \textit{Id.} at 468.
  \item \textsuperscript{66} \textit{Id.} at 470.
  \item \textsuperscript{67} \textsuperscript{68} \textsuperscript{69} \textit{Id.}
\end{itemize}
interruptions to war production induced by restraint or coercion." This indicates a reluctance to utilize section 8 except in extreme situations. 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.

Hamilton presented a similar pattern in which a lower court ruling relied extensively on legislative history. Because the only two cases that address WLDA section 8 upheld its constitutionality, I conclude that it is feasible for Congress to reenact this law. However, considering that the judges and labor board members who adjudicated its constitutionality were split on the issue, with just enough votes to produce two rulings that upheld the law, I rate the law's future feasibility as 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 assuming that both policies were successfully implemented in consecutive eighty- and thirty-day periods, these options would not provide a long-term method of forcing dock workers back on the job. Unless a lasting solution was found—for example, a sufficient quantity of emergency protective work suits, or shifting the workload to unaffected ports—the nation would remain vulnerable to a costly work stoppage. Critical deadlines would occur at day eighty-one when the Taft-Hartley injunction expired, and at day 111 when the WLDA ban on quitting ended.

However, the federal government has additional tools beyond these statutory responses—a variety of executive orders could be utilized at any point in the crisis timeline. These directives are potent and far reaching, and courts have generally upheld executive orders that regulate private

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70. France Packing Co. v. Dailey, 166 F.2d 751, 758 (3d Cir. 1948). 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.

Id. at n.4.


entities. In a pertinent example, Congress granted presidents the authority to approve or restrict contracts to sell port terminals. Although this delegation of power became a point of contention when President Bush approved the sale of key U.S. ports to a Dubai entity, the utilization of executive orders is still a viable option.

Recently, Hurricane Katrina furnished another example of this concentrated presidential power to regulate private employment. Soon after the storm decimated large parts of the Gulf Coast, President Bush suspended a law that required payment of prevailing wages, arguing that this would enable the federal government to provide greater assistance. This executive power is extremely agile, and whereas Congress may deliberate and stall on enacting or amending a law, executive orders bypass the legislative process. This renders executive orders particularly suited for running a crippled port, because a president could take immediate action.

History demonstrates that the ability of a president to regulate private workplaces is long-standing. For example, President Lincoln abolished slavery through the Emancipation Proclamation, despite the fact that this usurped legislative powers. Although his action violated the

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73. E.g., Bldg. and Const. Trades Dept., AFL-CIO v. Allbaugh, 295 F.3d 28 (D.C. Cir. 2002) (upholding Exec. Order 13,202). 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.

74. For a lucid explanation of this complex operation, see Statement of Daniella Markham, CFIUS Overhaul, FED. DOC. CLEARING HOUSE, May 24, 2006, available at 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.


76. Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005). By proclamation, President Bush suspended 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.” Id.

constitutional institutionalization of slavery. Lincoln was still able to carry out his directive. President Roosevelt’s regulation of private workplaces similarly provides a strong precedent for a president to order port workers back on the job. Executive Order 8802 was a particularly bold and undemocratic use of this power, requiring federal contractors who supplied the nation’s World War II arsenal to end race discrimination at work. The order was intended to set a good example to confront Hitler’s ideology of racial superiority. Fundamentally, however, the order was also meant to address a critical labor shortage after millions of Caucasian males entered the armed services, leaving behind factory jobs in segregated communities.

Many orders that presidents have utilized in the past addressed union-management conflicts, setting out dispute resolution procedures. When a company and union reached impasse, the president could issue an order to seize and operate a private workplace. No port has been taken over by

78. *See* Mark E. Neely Jr., *Emancipation Proclamation*, in 2 *Encyclopedia of the American Presidency* 551 (Leonard W. Levy & Louis Fisher eds., 1994) ("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* 422 (Henry S. Commager & Milton Cantor eds., 1988).

79. U.S. CONST. art I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2 (basing representation and taxation on "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").

80. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 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 . . . ."


82. Exec. Order No. 8802, 6 Fed. Reg. 3,109 (June 27, 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").

83. Peaceful labor-management relations were deemed essential to win World War II. For example, the Policy Preamble to Executive Order 8716 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); 2.

such an order, but the U.S. government has seized and operated railroads, an analogous transportation system. 85

These examples demonstrate that executive orders are a highly feasible response to a national emergency work stoppage. They have potential to be coercive by ordering workers back on the job, much like a Taft-Hartley injunction. A president’s power under these orders is not limitless, however. For example, although President Roosevelt’s workplace seizure orders appear to be extremely coercive, they were actually premised on an explicit consensus by labor and management leaders to forgo strikes and lockouts during World War II. 86 Eventually, Congress codified the president’s unilateral use of this extraordinary power when it passed the WLDA. 87 After World War II hostilities ended, however, Congress repealed this seizure power, 88 and thus a legislative form of property seizure


86. Exec. Order No. 9017, 7 Fed. Reg. 237 (Jan. 12, 1942) (stating that “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”).

87. See Youngstown, 343 U.S. at 612-13 (Frankfurter, J., concurring) (reporting that President Roosevelt ordered twelve seizures prior to the enactment of the War Labor Disputes Act, of which only three were sanctioned by existing law). See id. at 606 n.11 for a precise explanation of how the WLDA authorized presidential seizure.

COMPULSORY LABOR IN A NATIONAL EMERGENCY

no longer exists. A crippled port, therefore, could not be seized and operated as railroads were during World War II.\textsuperscript{89}

Could a president nevertheless seize and operate a port without congressional authority? The answer to this is no. During the Korean War President Truman faced an imminent nationwide strike by the United Steelworkers of America. He feared this would weaken the United States in confronting communism, and after exhausting efforts to encourage voluntary settlement of labor disputes between the union and leading manufacturers, President Truman seized steel factories and ordered them to continue production.\textsuperscript{90} Unlike the World War II experience, however, unions did not acquiesce to this seizure order, highlighting the involuntary nature of President Truman's back-to-work order.\textsuperscript{91} Although the order was not challenged on Thirteenth Amendment grounds, the Supreme Court in \textit{Youngstown Sheet & Tube Co. v. Sawyer} found that the president lacked constitutional authority to seize private property.\textsuperscript{92}

This national experience is reflected in Table 1, where I conclude that the executive power to unilaterally seize and operate a port has zero feasibility. To be clear, port seizure is not completely precluded, but it would require coordination between the legislative and executive branches. However, without labor-management consensus, as there was behind the WLDA, this option is not feasible. Because the crippled port scenario lacks this key element, I have found the feasibility of ordering workers back to a port under an executive order to be zero.

Nevertheless, 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),\textsuperscript{93} granting the president wide authority to implement procurement policies that promote efficiency and economy.\textsuperscript{94} Using this power, President Carter issued Executive Order 12092 to moderate severe inflation by imposing stringent wage and price guidelines on the nation's private sector.\textsuperscript{95} The D.C. Court of Appeals upheld this vast presidential

\begin{itemize}
\item \textsuperscript{89} See executive orders cited in supra note 85.
\item \textsuperscript{91} This point is made clear by Justice Frankfurter's historical analysis in \textit{Youngstown}, 343 U.S. at 602 n.5 (quoting a key labor leader's opposition to extending strike controls in the War Labor Disputes Act after World War II).
\item \textsuperscript{92} Id. at 579.
\item \textsuperscript{94} 40 U.S.C. § 121(a) (2000 & Supp. 2002) ("The President may prescribe policies and directives that the President considers necessary to carry out this subtitle.").
\item \textsuperscript{95} Citing authority under the Federal Property and Administrative Services Act of 1949, Executive Order 12,092, 43 Fed. Reg. 51,375 (Nov. 1, 1978), 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
\end{itemize}
power in *AFL-CIO v. Kahn.*\(^6\) Considering two key facts—the federal government relying on Pacific ports in the course of procuring goods for itself, and the precedent set in *Kahn*—a directive modeled on Executive Order 12092 would appear a highly feasible option.

However, Executive Order 12092 was made enforceable by terminating government contracts of firms who exceeded voluntary wage and price guidelines.\(^7\) This has no relevance to port workers, who depend on employment with private companies rather than a government contract. For this reason alone, I conclude that this policy option has low feasibility.

An executive order that draws on FPASA would not be feasible without incorporating a coercive employment penalty. However, in the long record of presidential regulation of employment, two actions stand out as possible models for synthesizing FPASA and a back-to-work order, though I conclude that each is improbable.

One option draws from President Reagan's firing of over 11,000 air traffic controllers who engaged in an illegal strike in 1981 when they failed to return to work within the forty-eight hour deadline set by the president.\(^8\) A future president might consider this precedent, reasoning that port workers are as essential to ground-based commerce as air traffic controllers are to air transport. However, the right to strike is provided in the private sector, whereas the same right is expressly denied to federal employees, including air traffic controllers.\(^9\) Moreover, President Reagan was the effective employer for federal air traffic controllers, whereas presidents do not have supervisory authority over dock workers. Finally, there is the

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by instructing the head of each federal agency and military department to require that all contractors certify their compliance with the wage and price standards.

\(^6\) 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 12,092. 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.”).

\(^7\) *Id.* at 786.

\(^8\) On August 3, 1981, PATCO members commenced a nationwide strike against the federal government. See *Clarry v. United States*, 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...”; *Clarry*, 85 F.3d at 1046. Ruling that President Reagan had authority to ban the strikers' 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.” *Clarry*, 85 F.3d at 1046.

practical matter of finding replacement workers—although it was not difficult for President Reagan to replace the air traffic controllers, it would presumably be much harder to find people willing to work in a radioactive port.

A second possible model for synthesizing the FPASA and a back-to-work order is Executive Order No. 10173. Since the early twentieth century Congress has authorized the president to issue rules and regulations to safeguard U.S. ports and waterfront facilities, and in Order No. 10173, President Truman set forth detailed employment regulations for dock workers and seafarers. The order penalized dock workers by providing for denial of access to ports, and applied a higher standard to seafarers by subjecting them to criminal penalties. In ruling on an individual’s eligibility to work in a port, the Coast Guard could consider the “character” of dock workers and seafarers. Given that this was during the anti-Communist era of the 1950s, allowing for the consideration of a person’s character was likely a means to screen out those with Communist sympathies. While it would be unreasonable to equate work refusal at a radioactive port with an assessment of character, Executive Order 10173 was also based on specious and vague reasoning over an individual’s politics. However, since the order was never challenged on these grounds, the possibility of a president modeling future action on this cannot be completely ruled out. Nevertheless, I rate this policy response as highly infeasible.

101. Exec. Order No. 10,173, 15 Fed. Reg. 7005 (Oct. 18, 1950). 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 that “[a]ny 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.
102. Id. Section 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 section 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.
103. 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.” Id. Section 6.10-9 set forth an appeals process for persons who claimed a violation of rights under these employment regulation procedures. Id.
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III.
COMPULSORY WORK AND THE EVOLVING MEANING OF "INVOLUNTARY SERVITUDE"

In Part II, I examined options available to a U.S. president to order civilian employees back to work at a radioactive port. This presidential power would prove crucial in the hypothetical radioactive port scenario. Many port employees would not voluntarily return to work without the implementation of significant safety precautions, which would take substantial time and money, and without back-to-work directives, the nation's trade would suffer. This leads to the question addressed 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 discussed above and 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 Proclamation on September 22, 1862.\(^{104}\) Delivered as a battlefield speech after a major Union victory,\(^{105}\) the proclamation declared a radical policy to free all slaves.\(^{106}\) In codifying this idea, the Thirteenth Amendment repeated key parts of the Proclamation.\(^{107}\)

The Amendment quickly evolved from this original intent. The Slaughter-House Cases,\(^{108}\) decided by the Supreme Court in the 1872, set the course of this dynamic law. In his majority opinion, Justice Miller spoke of the history "fresh within the memory of us all,"\(^{109}\) a clear reference to the enslavement of Africans and their descendants.\(^{110}\) Nevertheless, in that opinion the Supreme Court extended the Thirteenth Amendment beyond "the negro['s] color and his slavery" and "the grievances of that race."\(^{111}\) The Court 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 within

\(^{104}\) See Proclamation No. 16, 12 Stat. 1267 (Sept. 22, 1862).
\(^{105}\) See THE EMANCIPATION PROCLAMATION, supra note 77.
\(^{106}\) Id. (stating "[t]hat 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 . . .").
\(^{107}\) U.S. CONST. amend. XIII, § 1. The Amendment draws its conception of involuntary servitude from section 9 in the Emancipation Proclamation ("[A]ll 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.").
\(^{108}\) 83 U.S. 36 (1872).
\(^{109}\) Id. at 68.
\(^{110}\) Id. at 71-72.
\(^{111}\) Id. at 72.
our territory, this amendment may safely be trusted to make it void.”

*U.S. v. Harris* 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 . . .”

The legislative branch similarly took a broad view of the Thirteenth Amendment, as is apparent by Congress’ efforts. Lawmakers in 1874 sought to eliminate other forms of involuntary servitude—specifically, a particular form of child exploitation known as the Padrone system.

That law, 18 U.S.C. § 1584, remains in effect and criminalizes a variety of exploitative work arrangements.

Recent federal courts have further expanded the meaning of involuntary servitude. Since 1980, the Thirteenth Amendment and section 1584 have been invoked successfully to end practices such as abusive child labor, forcible employment of migrant farm hands, intimidation to remain in religious sects, threatening workers with involuntary commitment to mental institutions, and forcible household

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112. *Id.*

113. 106 U.S. 629, 639 (1882).

114. U.S. CONST. amend. XIII, § 1. Section 2 of the Amendment states: “Congress shall have power to enforce this article by appropriate legislation.” See also 18 U.S.C. § 1584, infra note 116.

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

116. 18 U.S.C. § 1584. After recent amendments, the statute 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 under this title or imprisoned not more than twenty years, or both.


117. 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." The Case of Mary Clark, A Woman of Color, 1 Blackf. 122 (Ind. 1812), available at 1821 WL 974 (Ind.). 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. *See*, e.g., Pinellas County Classroom Teachers Ass'n v. Bd. of Pub. Instruction of Pinellas County, 214 So.2d 34, 37 (Fla. 1968) (holding that an injunction that prohibits a strike by teachers did not impose involuntary servitude); In re Block, 50 N.J. 494, 499 (N.J. 1967) (“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.”).


labor by isolating immigrants. In doing so, several courts have stated justifications for broadening the original application of the term “involuntary servitude” to modern situations. The Western District of Michigan in United States v. Lewis advised courts applying the Thirteenth Amendment to “consider the realities of modern life.” The Lewis court 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.” 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.” 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, and both apply to contemporary as well as to historic forms of involuntary servitude.” 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.”

All of these cases involved extreme mistreatment of workers. However, there are current efforts to expand the Thirteenth Amendment and § 1584 even further to other mainstream settings. The most suggestive example is Zavala v. Wal-Mart, involving recent claims that the large retailer and its janitorial contractors locked undocumented workers in stores around the country at night to perform cleaning duties. A federal district court found insufficient evidence to support this § 1584 allegation, but a milestone was nonetheless reached when the judge seriously considered this complaint against Wal-Mart.

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 narrow interpretation of involuntary servitude in U.S. v. Shackney, a case before the

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123. Lewis, 644 F. Supp. at 1400, aff’d, King, 840 F.2d 1276 (6th Cir. 1988).
124. Id.
125. Id.
126. 726 F.2d 1448, 1451 (9th Cir. 1984).
127. Warren, 772 F.2d at 833-34.
128. United States v. Kozinski, 821 F.2d 1186, 1213 (6th Cir. 1986) (Guy, J., dissenting) (noting that “involuntary servitude cases are few and far between”).
130. Id. at 310-11.
Second Circuit in 1964.\textsuperscript{131} In this case, Rabbi Shackney and his wife recruited and employed a family from Mexico to work on their farm.\textsuperscript{132} The workers lived in sub-standard housing,\textsuperscript{133} they rarely left the farm,\textsuperscript{134} and their children did not attend school.\textsuperscript{135} Additionally, and key to the government’s prosecution, the Shackneys held the Mexican family against their will by threatening them with deportation.\textsuperscript{136}

Nonetheless, Judge Friendly’s decision reversed the Shackneys’ § 1584 conviction.\textsuperscript{137} Exploring the psychological dynamics of involuntary servitude, Judge Friendly found that threats are endemic in a work relationship.\textsuperscript{138} In doing so, he rejected the idea that the § 1584 criminal sanctions 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.”\textsuperscript{139} 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[s] . . . .”\textsuperscript{140}

More recently, the Supreme Court approved Judge Friendly’s approach in \textit{United States v. Kozminski}.\textsuperscript{141} This case involved a married couple that also provided squalid housing to their farmhands, and who threatened two workers, both of whom had IQ scores under 70, with institutionalization if they left the farm. Successfully prosecuting the Kozminskis in the district court under § 1584,\textsuperscript{142} the government theorized that the men were held at work as “psychological hostages.”\textsuperscript{143} However, in her opinion Justice O’Connor rejected this approach. Resolving a conflict among appellate courts,\textsuperscript{144} the decision limited involuntary servitude to “situations involving

\begin{itemize}
  \item 333 F.2d 475 (2d Cir. 1964).
  \item \textit{Id.} at 476-77.
  \item \textit{Id.} at 478 (noting the walls were made of cardboard, the floor had holes, and the dwelling was heated by a wood-burning stove).
  \item \textit{Id.} at 478-79.
  \item \textit{Id.} at 478.
  \item \textit{Id.} at 479-80.
  \item \textit{Id.} at 487.
  \item \textit{Id.} (“Friction over employment punctuated by hotheaded threats is well known and inevitable.”).
  \item \textit{Id.} at 487. A court must weigh the objective options that an employee has at the moment of the alleged coercion: “[I]nvoluntary 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.” \textit{Id.} at 486.
  \item \textit{Id.}
  \item \textit{Kozminski}, 487 U.S. at 931. It is a crime under 18 U.S.C. § 1584 to hold another person to involuntary servitude.
  \item \textit{Id.} at 936-37.
  \item \textit{Id.} at 936.
  \item \textit{Id.} at 939.
\end{itemize}
physical or legal coercion.” The 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.” Kozminski rejected this view because it “would appear to criminalize a broad range of day-to-day activity.” 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.” Justice O’Connor believed that “the Government’s interpretation would 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.” Her opinion lauded Judge Friendly’s narrow interpretation, and notably, it upheld key exceptions to the Thirteenth Amendment, discussed below.

Providing guidance to future courts, the opinion used the historical example of the padrone system as a way to distinguish between physical coercion, which is prohibited by law, and psychological coercion, which is not. Justice O’Connor concluded that the padrone system amounted to physical coercion prohibited by the Thirteenth Amendment and § 1584, since “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.” In contrast, although the men in Kozminski may have

145. 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.
146. Id. at 949.
147. Id.
148. 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 indoctrination.” Id.
149. Id. She explained that “[b]y its terms the [Thirteenth] Amendment excludes involuntary servitude imposed as legal punishment for a crime.” Id. at 943.
150. Id. at 950.
151. 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.”
152. Thousands of Italian immigrants were prisoners of the padrone system of labor, where labor brokers recruited the immigrants for large employers and then oversaw the work site. Library of Congress Learning Page: Immigration, available at http://memory.loc.gov/learn/features/immig/italian7.html (last visited April 15, 2007). In practice, many of these labor brokers acted more like slave holders than managers. Id. A padrone often controlled the wages, contracts, and food supply of the immigrants under his authority, and could keep workers on the job for weeks or months beyond their contracts. Id. Some of the labor brokers built sizable labor empires, keeping thousands of workers confined in locked camps, which had barbed wire fences and were patrolled by armed guards. Id. Despite its injustices, the padrone system was not eradicated until the middle of the 20th century. Id.
153. Kozminski, 487 U.S. at 948.
experienced psychological coercion, they were not subject to physical coercion as prohibited by § 1584, as were the victims of the padrone system.

B. The Public Service Exception to the Thirteenth Amendment

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

Two longstanding Supreme Court cases addressing this exception offer precedents particularly relevant to a situation in which a president orders dock workers back to a radioactive port. In Butler v. Perry, the Court upheld a Florida law that required men to work without pay for six days every year on roads and bridges, thus permitting local government to conscript citizens for road duty. Failure to answer a roadwork summons was a criminal offense, and plaintiff Butler was jailed for thirty days after ignoring this duty.

The Supreme Court rejected Mr. Butler’s Thirteenth Amendment challenge. In his opinion Justice McReynolds recalled that the text of the Thirteenth Amendment came from the Ordinance of 1787, which created the Northwest Territory that was to be free of slavery and involuntary servitude. Nevertheless, the Territory approved the ancient tradition of conscripting men to build roads and bridges. 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” from conscription. Courts upheld state authority to compel this physical labor on pain of imprisonment. Giving weight to this

156. 240 U.S. 328 (1916).
157. Id. at 329.
158. Id. at 330.
159. Id.
160. Id. at 331 (stating that 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”) (internal citation omitted).
161. Id.
162. Id. at 331.
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history, the Court in Butler concluded that Congress did not abolish compulsory public service when it enacted the Thirteenth Amendment.164

Butler reflects judicial embrace of the ancient doctrine of *trinoda necessitas*, meaning “the threefold necessary public duties[,] . . . repairing bridges, maintaining castles or garrisons, and going on expeditions to repel invasions . . . .”165 This doctrine of compulsory service appeared as early as 1550, when public road maintenance in England was left to the male inhabitants of parishes.166 Blackstone’s *Commentaries* stated:

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, whatever other immunities he might enjoy; this being a part of the *trinoda necessitas*, to which every man’s estate was subject.167

States frequently imposed this doctrine on their citizens, requiring individuals to provide road, military, and jury duty, and some of these duties survive today.168 Current courts have also breathed new life into this civic duty principle, upholding service requirements imposed on a conscientious objector in lieu of military service during the draft,169 and upholding high school community service graduation requirements.170

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164. Butler v. Perry, 240 U.S. 328, 333 (1916). Conscription of free men to perform road duty stretched from the Roman Empire to the Middle Ages, and continued into the twentieth century. Id. at 331-32. Twenty-seven states in the U.S. had laws similar to the Florida statute. Justice McReynolds believed that the Thirteenth 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.

165. Galoway v. State, 202 S.W. 76 (1917) (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, 240 U.S. at 331.


167. Id. at 1032 (quoting 1 Blackstone, Commentaries 538).

168. 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); Proffit v. Anderson, Deputy Sheriff, 20 S.E. 887 (1894).

169. Howze v. United States, 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.

170. Steier by Steier v. Bethlehem Area School Dist., 987 F.2d 989 (3d Cir. 1993); Immediato by Immediato v. Rye Neck Sch. Dist., 873 F. Supp. 846 (S.D.N.Y. 1995); Hemdon by Hemdon 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 Steier, 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 sixty 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
C. The Maritime Duty Exception to the Thirteenth Amendment

The other longstanding Supreme Court precedent that creates an exception to the Thirteenth Amendment and is particularly relevant to the hypothetical crippled dock scenario is *Robertson v. Baldwin.* In this case Mr. Robertson and other merchant seamen contractually agreed to work on a lengthy merchandise ship voyage up and down the Pacific coast. The men quickly grew dissatisfied with their employment and went AWOL in Astoria, Oregon. Police arrested them for maritime desertion, an offense punishable under federal law. After being jailed for sixteen days the men were forcibly returned to the ship. They remained disobedient, and they were discharged in San Francisco to the custody of federal marshals. Suing on a writ of habeas corpus, Mr. Robertson argued that the federal law subjected him to involuntary servitude. The Supreme Court found no Thirteenth Amendment violation because even though his employment contract required a form of servitude to the ship, the agreement was voluntary.

Courts continue to recognize *Robertson* as valid authority. For example, in a decision steeped in maritime law and tradition, *NLRB v. Sea-Land Service, Inc.* reversed a labor board finding that a captain coercively interrogated a ship’s navigator about a message that he radioed to that federal agency. Courts have also broadened *Robertson* as precedent, such as by ordering an attorney to represent a Title VII plaintiff against his will, and ordering high school students to perform unpaid lunchroom duty.

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sanction constitutes involuntary servitude. Governments may require individuals to perform certain well-established civic duties . . . .” Steirer, 987 F.2d at 999. The court expressly affirmed Butler as controlling authority. *Id.*

171. 165 U.S. 275 (1897).

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

173. *Id.* at 276-77 (stating that the 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 . . . .”).

174. *Id.* at 276.

175. *Id.* at 288.

176. 837 F.2d 1387, 1394 (5th Cir. 1988). Examining *Robertson* at length, the Fifth Circuit came to the same conclusion as its nineteenth 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. 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 (internal citations omitted).


The two longstanding Supreme Court cases of *Butler* and *Robertson* offer precedents for government authority to order dock workers back to work at a radioactive port. Furthermore, the more recent uses of *trinoda necessitas* show that courts give government authorities considerable latitude in defining necessary public duties, and that an individual’s right to avoid compulsory service is far from absolute.

### IV. COMPULSORY LABOR IN A NATIONAL EMERGENCY?

#### A THIRTEENTH AMENDMENT ANALYSIS

Thus far I have laid out a hypothetical scenario where dock employees refuse to work at a radioactive port, and have discussed potential governmental responses to order workers back on the job. I then provided a historical look at the original purpose of the Thirteenth Amendment, and its expanded application over time. I now turn to the heart of my analysis and address the question: Would the back-to-work orders set out in Part II as possible government responses to a port work stoppage violate the Thirteenth Amendment ban on involuntary servitude? Precedent and history suggest that these government actions fall within constitutional limits. Also, courts are generally inclined to limit economic harm caused by critical work stoppages. But how much weight would a court give to protecting workers from an extraordinary hazard? During a national emergency work stoppage, how would a court strike a balance between individual liberty interests and societal needs for order, stability, and security?

As my analysis below delineates, I conclude that a court would likely uphold the constitutionality of the back-to-work orders discussed in Part II, in part because these orders require workers to stay on the job for a limited period of time. My research suggests that the longest period of time the government could order workers to stay on the job is 110 days.\(^1\)

Courts would likely reject a Thirteenth Amendment challenge to consecutive eighty and thirty-day work orders, as supported by the Supreme Court decisions in *Butler* and *Robinson*. Recall that in *Butler* the Court upheld a Florida law that required all men to work on roads and bridges six days each year without pay.\(^2\) The duration of a Taft-Hartley injunction and WLDA order in the hypothetical radioactive port scenario would also be limited in duration. While this mandatory work period is longer, it is

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179. 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.

tempered by the fact that neither Taft-Hartley nor the WLDA lowers a worker’s pay, whereas Butler mandated unpaid work.

The Supreme Court’s heavy reliance on the concept of *trinoda necessitas* in Butler would prove pivotal in a Thirteenth Amendment challenge. Butler not only gave weight to this ancient concept of an individual’s public service duty, but it also applied the principle to current realities. *Trinoda necessitas* has endured for a millennium because of its vital social utility, 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.

Less likely, courts could rule contrary to my analysis and 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.” But when a dock worker must choose between radiation exposure and disobeying a court order on pain of imprisonment, 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.

I doubt, however, that a court would take this approach. Every time the Supreme Court has had occasion to examine an issue of involuntary servitude, it has cited Butler approvingly. For example, although the Court struck down a state law that enforced peonage in *Pollock v. Williams*, it  carefully preserved the holding of Butler. When the Supreme Court most recently addressed involuntary servitude in *Kozinski*, the majority opinion

181. Id. (citing VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY 82 (1908)).
182. Id. (“For, though the reparation of bridges only is expressed, yet that of roads also must be understood.”).
183. Id. at 950.
185. Id. at 17-18 n.28 (noting that “[f]orced 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”).
cited Butler on four different occasions, and in doing so explicitly reaffirmed Butler as a precedent. This means that trinoda necessitas is an enduring doctrine that limits individual freedom from involuntary servitude.

In addition to Butler, the Supreme Court decision in Robertson would likely also play a pivotal role in a court’s ruling on a Thirteenth Amendment challenge to the government’s back-to-work orders at a crippled port. In upholding a prison term for a seaman’s desertion, Robertson created an exception to the Thirteenth Amendment for maritime workers. But the question is: Would a court extend this exception 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.

Even though the occupations of seamen and dock workers are distinct, a court could analogize Robinson to the hypothetical situation because employees in both positions perform work on anchored ships at port, and in fact ILWU workers routinely board ships to do their jobs. However, the analogy between maritime employment and dock work is strained, even if workers in 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. The ancient curtailment of a seaman’s right to quit his work does not apply to dock work, notwithstanding the close proximity of their jobs in a port. Congress recognized this distinction in 1950 when it authorized the president to safeguard U.S. ports and waterfront facilities. Even though employment regulations applied to dock workers and seamen, only seamen and crew members were subject to criminal penalties. Dock workers faced a much

186. Kozinski, 487 U.S. at 942 (two separate citations), 944, 962.
187. Id. at 944.
189. See ILWU & PMA, PACIFIC COAST MARINE SAFETY CODE (2002 Rev.), available at 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 from 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.
190. PACIFIC COAST WALKING BOSSES AND FOREMEN’S AGREEMENT (July 1, 2002 – July 1, 2008), http://www.ilwu.org/longshore/contracts/index.cfm (see section 1.1, defining Walking Bosses and Foremen as “direct supervisory representatives of the Employers in the performance of all cargo handling stevedoring activities”).
192. See discussion supra note 102.
193. Id.
milder sanction: denial of access to the port—ironically, the kind of physical removal from port work that individuals in this hypothetical would prefer.

Nonetheless, a court could draw on Robinson to analogize the occupations of seamen and dock workers by relying on a more recent Supreme Court precedent, Southern S.S. Co. v. NLRB. The merchant seaman in Robinson and dock workers in the hypothetical situation perform work on anchored ships at port. In Southern S.S., the Supreme Court held that ships anchored dock-side in ports are subject to maritime law. Furthermore, Southern S.S. explored how a work stoppage by seamen disrupted the transfer of cargo, which would affect not only a ship in navigable waters, but also the work conducted on a port. By applying the federal maritime law prohibiting mutiny to a dispute that occurred in a port, this decision extended to ports the law prohibiting maritime work abandonment. If the rationale for barring maritime desertion extends to strikes on docked vessels, then any work stoppage that interferes with transfer of a ship’s cargo falls outside the shelter of the Thirteenth Amendment. As such, a court could cite to Robertson and Southern S.S. as precedents in finding that dock workers can be compelled to work amid radiation in a national emergency.

194. 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.").
195. Id.
196. 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. Id. 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. Id. at 34-35. 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.” Id. at 35. 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.
197. 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.
198. 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, 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 Forth Worth. 535 U.S. 137, 143-44 (2002). In sum, Hoffman Plastic Compounds broadened the reach of an isolated desertion case to the current context of illegal immigration.
V.
CONCLUSIONS: BEYOND EMERGENCY WORK IN CRIPPLED PORTS

At this point, my inquiry broadens beyond whether back-to-work orders are constitutional under the Thirteenth Amendment in the hypothetical radioactive port context. I now ask whether other national emergencies affecting many laborers beyond dock workers might also give rise to back-to-work orders that are constitutionally permissible.

The United States has become vulnerable to a whole host of national emergencies, any of which might cause serious disruptions to the nation’s economy or otherwise threaten the nation’s well-being, and thus might prompt a president to order workers to stay on the job. Terror attacks have interfered with financial markets, as well as the nation’s air transport and postal systems. Extraordinary natural disasters also have significant potential to cause national emergencies. Hurricane Katrina’s severe impact suggests the possibility of other weather calamities, and geologists believe that California is ripe for a major earthquake. SARS recently impacted the global economy. Health experts worry that avian flu has catastrophic potential, and the Congressional Budget Office is concerned that a pandemic would shrink the nation’s labor supply by killing 2.5% of the workforce, with countless others becoming ill or staying home out of fear. Furthermore, health care workers would be exposed to the disease and would strain the medical system’s capacity.

The following four conclusions discuss the feasibility of governmental back-to-work orders for different job categories in various disasters, and assess Thirteenth Amendment implications. Additionally, Table 2 charts out this legal landscape for national emergencies that have already affected, or could affect, key occupations.


202. 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).


204. Id. at 10 ("[S]ome workers [would become] sick and others [would stay] home to care for others or to avoid becoming ill.").
Conclusion No. 1: An eighty-day 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, in imposing a Taft-Hartley injunction, the U.S. government has limited jurisdiction over critical jobs in a national emergency work stoppage.

Some state laws authorize similar back-to-work orders, such as a Louisiana law that gives courts authority to issue a temporary restraining order on police officers who abandon their jobs. However, the Taft-Hartley injunction is advantageous for the government compared to state counterparts since it lasts for eighty days, which is long enough to weather the worst effects of closed ports, pandemic disease, or a catastrophic hurricane. In contrast, state temporary restraining orders often expire much sooner, and permanent orders are infeasible because their unlimited duration would not withstand Thirteenth Amendment challenges.

205. See City of New Orleans v. Police Ass'n of La., 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 not 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.").

206. See, e.g., LA. CODE CIV. PROC. ANN. ART. 3604 (2007) (providing courts authority to issue a temporary restraining order for up to ten days, and also providing for extending this period for one or more periods).

207. See S. REP. NO. 105, 105th Cong., 1st Sess. at 15, reprinted in LMRA LEG. HIST, supra note 12, at 463, 472 ("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.").
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<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Dock Workers</td>
<td>Radioactive Exposure</td>
<td>Yes</td>
<td>Yes</td>
<td>Doubtful</td>
</tr>
<tr>
<td>Police</td>
<td>Hurricane Katrina</td>
<td>No</td>
<td>No</td>
<td>Doubtful</td>
</tr>
<tr>
<td>Postal Workers</td>
<td>Anthrax Attack</td>
<td>No</td>
<td>Yes</td>
<td>Questionable</td>
</tr>
<tr>
<td>Congressional Staff</td>
<td>Anthrax Attack</td>
<td>No</td>
<td>Questionable</td>
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</tr>
<tr>
<td>Emergency Doctors</td>
<td>Smallpox Attack</td>
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<td>Partial</td>
<td>Questionable</td>
</tr>
<tr>
<td>Nurses</td>
<td>SARS and Hurricane Katrina</td>
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<tr>
<td>Pharmaceutical Plant Workers</td>
<td>Avian Flu</td>
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<td>Yes</td>
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</tr>
<tr>
<td>Firefighters</td>
<td>9/11</td>
<td>No</td>
<td>No</td>
<td>Doubtful</td>
</tr>
<tr>
<td>Utility Workers</td>
<td>9/11</td>
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<td>Yes</td>
<td>Likely</td>
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<tr>
<td>Sanitation Workers</td>
<td>9/11</td>
<td>No</td>
<td>No</td>
<td>Likely</td>
</tr>
<tr>
<td>Construction Workers</td>
<td>9/11</td>
<td>Yes</td>
<td>Yes</td>
<td>Likely</td>
</tr>
</tbody>
</table>
Conclusion No. 2: Key emergency response jobs—notably police, fire, and sanitation workers—are regulated by municipal and state courts, and are therefore more difficult for the federal government to control during a disaster.\(^\text{208}\) 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.\(^\text{209}\) This was further exacerbated by the fact that the devastation caused courts to close, so that the city would have had difficulty obtaining a court injunction.\(^\text{210}\)

Conclusion No. 3: Employee protection against involuntary servitude under the Thirteenth Amendment depends on two factors that vary by type of 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. In *Butler*, the Supreme Court upheld a compulsory road work law.\(^\text{211}\) However, the mandatory road labor only lasted for one week each year, and was not dangerous to one’s health, tipping the balance towards no Thirteenth Amendment involuntary servitude violation. Port employment amid radioactivity that does not cause an imminent threat of injury is probably close enough to *Butler’s* road duty to also defeat a dock worker’s Thirteenth Amendment claim.\(^\text{212}\)

However, turning to Table 2, I postulate that the same law would likely prevent the U.S. government from ordering sick pharmaceutical factory workers back on the job, regardless of the public’s need. First, this is because the concept of *trinoda necessitas* is closely tied to construction and repair of public infrastructure, and pharmaceutical work is too remote for the doctrine to apply. Second, while the hazard to dock workers in the hypothetical scenario is speculative,\(^\text{213}\) flu-stricken workers would present a court with a more tangible peril. A judge would likely find that the choice presented to these pharmaceutical employees—either to work while stricken with the flu or face contempt sanctions—amounts to actual coercion prohibited by the Thirteenth Amendment, and is thus distinguishable from cases where the Supreme Court found only psychological coercion that is not protected by the Thirteenth Amendment, such as *Shackney* (where the employers threatened employees with deportation) and *Kozinski* (where

\(^\text{208}\) 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 . . . any State or political subdivision thereof . . .”).

\(^\text{209}\) See *Police Ass’n of La., Teamsters Local No. 253*, 369 So.2d at 189.

\(^\text{210}\) 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, available at 2005 WLNR 17376435.

\(^\text{211}\) *Butler*, 240 U.S. at 333.

\(^\text{212}\) See supra notes 179-183 and accompanying text.

\(^\text{213}\) *Radiological Dispersal Devices*, supra note 10.
the employers threatened workers with institutionalization if they left the farm).

In view of the serious health effects from exposure to airborne toxins that followed the 9/11 attacks, courts would probably grant Thirteenth Amendment protection to utility and construction workers who are ordered against their will to work without protective gear. Similar protection would also likely be granted to phone technicians at a future Ground Zero. However, 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. Even if such an emergency occurred at just one single site, the president would likely have the power to enact a national emergency order to enjoin work stoppage at that one location. Although time would be critical in ordering these workers back on the job, a Taft-Hartley injunction could be put into effect relatively quickly.

Conclusion No. 4: Unless new legislation bolsters legal protections against involuntarily servitude, courts will determine the regulation of compulsory labor in the heat of an economic crisis. As is evident in the conclusions above and in Table 2, there are numerous categories of workers who could face mandatory work orders in extremely dangerous conditions. To address this alarming prospect, I suggest that the best policy option is for Congress to amend the Taft-Hartley Act, and divest federal courts of


215. 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, Oct. 1, 2002, at 40, available at 2002 WL 10741955. Researchers at Johns Hopkins University were surprised to find persistent symptoms among truckers and crane operators who worked at Ground Zero inside climate-controlled cabs. Id. Researchers concluded that these “inside workers” “probably had less exposure to air contaminants than ironworkers who labored in the open to clear the twisted wreckage of the buildings but who were not included in [the] study.” Id.

216. 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).

217. See United States 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. Id. at 87. The facility was the exclusive manufacturing site for piping and heat exchanges that were essential in making atomic weapons. Id. at 80-81.

218. See United States v. United Steelworkers of Am., 202 F.2d 132, 136, 139 (2d Cir. 1953) (affirming district court’s expedient grant of an ex parte restraining order under Taft-Hartley that was based solely on the president’s board of inquiry findings). More generally, see Robert B. 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 either to prevent the strike or have it called off at the earliest practicable moment”).

219. See N. Sec. Co. v. United States, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting) (“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.”).
jurisdiction to enjoin work stoppages that stem from "terrorism" or a "major disaster." When Taft-Hartley was enacted, Congress intended to protect workers from abnormally dangerous working conditions.\textsuperscript{220}

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. However, my research shows that in the midst of an 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 exigency, we invariably come to regret it."\textsuperscript{221}

\textsuperscript{220} See supra notes 32-35.

\textsuperscript{221} Skinner, 489 U.S. at 635 (Brennan, J., dissenting).
Table 3
Analysis of Dock Workers' Claim that Back-to-Work Order Violates the Thirteenth Amendment

<table>
<thead>
<tr>
<th>Strongest Rationale</th>
<th>Alternative Rationale</th>
<th>Weakest Rationale</th>
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<tbody>
<tr>
<td>• Butler v. Perry, 240 U.S. 328, 331 (1916): <em>trinoda necessitas</em>—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.</td>
<td>• 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.”</td>
<td>• 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.</td>
</tr>
</tbody>
</table>

**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)

**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)