YET ANOTHER REAPPRAISAL OF THE TAFT-HARTLEY ACT EMERGENCY INJUNCTIONS

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"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."¹ The maintenance of the "rule of law" must not shackle a government in such a manner as to render it unable to protect itself in the face of actual or threatened emergencies or other national security threats. The events of 9/11 have caused many nations to rethink the contours of human rights law. The exigencies of modern terrorism affect our conceptions of civil liberties, and provide a daunting task for lawmakers who must preserve their nation's security and simultaneously stand tall as defenders of human rights. The fear resulting from the exigencies of modern terrorism is that human rights standards will suffer if there are no adequate safeguards in place to protect them.

Paradoxically, a liberal democracy will cease to exist, and will become something far different, if national security is redefined as being primary to civil liberties and such liberties are seen as merely getting in the way of security. Aharon Barak, President of the Israeli Supreme Court, eloquently explained: "This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand."²

The right to strike is a human right subject to derogations under international law.³ The right to strike is the "necessary and desirable counterpart" to the combination of power on the employers' side, "if the battle is to be carried out in a fair and equal way."⁴ That is, by suppressing the right to strike, the government "puts the workers at the mercy of their

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3. See infra Part III.A.

employers.”

Also, the right to strike is “closely associated with democratic concepts of freedom,” and essential if workers’ freedom of association is to be recognized.

In 1914, the United States exempted labor from antitrust laws, because “[t]he labor of a human being is not a commodity or article of commerce.” Thus, nearly a century ago, the United States explicitly recognized that labor law could not be set aside as an economic issue; rather, “it should be a consideration before, not among, purely economic factors.” Nevertheless, developments in American labor law bring into doubt the importance of the human dimension. American labor law began as a guarantee of core social justice issues for workers, yet it has strayed to the point that on the NLRA’s fiftieth anniversary, the House Committee on Education and Labor’s Subcommittee on Labor-Management Relations concluded: “[l]abor law has failed.” If labor law has failed during times of peace and prosperity, one must especially question how the laws governing emergencies have fared, since people are often quick to dismiss others’ rights in times of threats that are both perceived and real.

There have been multiple studies analyzing the Taft-Hartley emergency injunctions, but these studies have remained within the confines of American law. This Article seeks to build upon these prior studies by adding an international element to the equation. This Article provides an in-depth analysis of the Taft-Hartley Act emergency injunction, which gives the President power to enjoin a “threatened or actual strike or lockout affecting an entire industry . . . , [that] will, if permitted to occur or to continue, imperil the national health or safety”. The emergency injunction fails to adequately protect the right to strike, and there is no adequate protection for preventing post-9/11 national security concerns

5. OTTO KAHN-FREUND & BOB HEPPLE, LAWS AGAINST STRIKES 8 (Fabian Research Series No. 305, 1972).


7. See infra Part III.A.


11. See id. at 480–82 (discussing the Wagner Act’s guarantees of social justice).


13. See infra text accompanying notes 203–04.

14. See, e.g., infra notes 25, 95, 105–06.

from being used as pretenses to enjoin otherwise lawful strikes.

Part I of this Article provides an overview of American labor law, explaining where and how the Taft-Hartley emergency injunctions fit in. Part II is a case study of the 2002 West Coast port closure, the first time in almost thirty years that a president invoked the emergency injunction. Lastly, Part III assesses the emergency injunction in light of International Labor Organization (ILO) jurisprudence, concluding that the injunction is contrary to workers' freedom of association, because it unjustifiably restricts a worker's right to strike.

I. NATIONAL EMERGENCY STRIKES UNDER AMERICAN LAW

This section describes and analyzes the Taft-Hartley Act emergency injunction. First, the legislative background, policy, and statutory procedure are discussed. Second, the jurisprudence developed by the courts is analyzed.

A. Statutory Scheme

There are a plethora of statutory provisions defining the contours of collective employment relationships in both federal and state law, separating public from private, and creating different classifications of employees. The National Labor Relations Act (NLRA) covers most private sector employers in the United States. The NLRA covers all employees, except for those specifically excluded from its coverage. Thus, agricultural laborers, domestic servants, independent contractors, supervisors, employees subject to the Railway Labor Act, and public employees (whether they are federal, state, or local) have no protection under the NLRA. Employees governed by the NLRA are subject to the Taft-Hartley emergency injunctions.

16. Unlike British law, the terms "employee" and "worker" are not terms of art, and retain their plain meaning.


19. 29 U.S.C. § 152(3). For judicial and agency interpretations and definitions of the excluded classes of employees, see Gross, supra note 18, at 365 n.53.

20. See supra note 17. The Taft Hartley emergency injunctions were created as an amendment to the NLRA, known as the Labor-Management-Relations Act, commonly called the Taft-Hartley Act. The specific provisions governing national emergency disputes are found in 29 U.S.C. §§ 176–180 (2000).
1. Background Statutory Landscape

Congress provided a federal right to strike in the NLRA, and in choosing the wording of the statute, selected "language to forewarn courts not to interfere in labor disputes." The relevant language states that nothing in the NLRA, "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." The Norris-LaGuardia Act divests the federal courts of the jurisdiction to enjoin most strikes, with narrow exceptions, but this Act does not affect the ability of state courts to enjoin strikes. However, state injunctions rarely present the "problem of judicial interference in substantive aspects of labor negotiations." Rather, conduct that endangers public safety and welfare, such as violence, coercion, and intimidation, may be enjoined. Such violent conduct falls within the scope of traditional state police powers, and is not preempted by the NLRA's preemption of the field. Moreover, these injunctions do not address peaceful striking.

The enactment of the NLRA provided substantive collective bargaining rights and preemption of state regulation of labor disputes for the first time. The two main premises of the NLRA, as it was enacted in 1935, which provided employees with an unabridged right to strike were:

25. Federal courts may enjoin strikes when they arise during the existence of an agreement not to strike. Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 237-38 (1970). This decision was narrowed six years later in Buffalo Forge Co. v. United Steelworkers of Am., where the Supreme Court stated that Boys Markets only applied where collective bargaining agreements had mandatory grievance and arbitration procedures. 428 U.S. 397, 406-07 (1976).
26. See LeRoy & Johnson, supra note 21, at 96 (describing the Supreme Court's view of enjoining strikes under the Norris-LaGuardia Act).
27. Id. at 96-97.
28. Id. at 97 n.197.
30. See LeRoy & Johnson, supra note 21, at 97-98 n.198 (citing cases which involve peaceful picketing).
31. Id. at 99.
(1) non-interference by the government when employers and unions negotiate terms and conditions of employment; and (2) equality of bargaining power. The economic weapons of both employers and unions were left unfettered, providing an economic incentive to bargain in good faith. Justice Brennan explained that good faith bargaining and economic pressure exist "side by side." Overall, except for the limited types of injunctions mentioned above, there was no ability to intervene in lawful strike action in the NLRA. This changed in 1947 with the passage of the Taft-Hartley Act. Through the Taft-Hartley emergency injunction, Congress moved away from its model of unfettered private collective bargaining, to include both presidential intervention and mobilization of public opinion to end industrial disputes.


Congress expressly acknowledged its preference for private settlement of labor disputes by "the processes of conference and collective bargaining between employers and the representatives of their employees." To help facilitate private settlement, Congress provided for "adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements". Congress acknowledged the need to protect the national health or safety whenever it is imperiled by a strike or lockout, and under the Taft-Hartley Act, provided a means to enjoin even the "most peaceful strike . . . during the eighty day period if the Court finds it runs counter to the public interest and affects the national welfare." Consequently, the "[g]overnment’s right to enjoin the strike or lockout does not hinge on violation of federal law, breach of agreement, which union or unions represent the men, which union called the strike, who is the employer, or the merits of the unresolved controversy."

The national emergency provisions in the Taft-Hartley Act authorize the President to adopt emergency measures whenever, "a threatened or actual strike or lockout affecting an entire industry . . . will, if permitted to occur or to continue, imperil the national health or safety." First, the President may appoint a board of inquiry to investigate and report the facts and the positions of the parties. This report "shall include a statement of the facts with respect to the dispute, including each party's statement of its position", but the board of inquiry has no power to make any recommendations in the report. The board of inquiry has broad powers to subpoena witnesses and documents in order to prepare the report. The President must also file a copy of this report with the Federal Mediation and Conciliation Service (FMCS), and make the contents of the report available to the public.

The President, upon receipt of the board of inquiry's report, may direct the Attorney General to petition the appropriate federal district court to issue an injunction to prevent or stop a lockout or strike. If the district court finds that the actual or threatened strike or lockout:

(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.

Thus, in order to have an injunction granted, the government must be able to convince the court that the threatened lockout or strike affects an "entire industry or substantial part thereof" and that there is a threat to "national health or safety."

The provisions of the Norris-LaGuardia Act are inapplicable, and injunctions, or denial thereof, are appealable. If the injunction is granted,

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44. 29 U.S.C. § 176.
48. Id. (emphasis added).
49. 29 U.S.C. § 178(b).
50. 29 U.S.C. § 178(c).
an approximately eighty-day "cooling-off" period begins, whereby parties are intended to peacefully resolve their differences.\textsuperscript{51} During the pendency of the "cooling-off" period, it is the "duty of the parties . . . to make every effort to adjust and settle their differences, with the assistance of the [FMCS]."\textsuperscript{52} However, "[n]either party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the [FMCS]."\textsuperscript{53} During the pendency of the injunction, the terms and conditions in existence before the dispute arose continue.\textsuperscript{54}

The granting of an injunction also triggers the board of inquiry to reconvene.\textsuperscript{55} At the end of a sixty-day period, unless the dispute has been settled by that time, "the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement."\textsuperscript{56} Then, the President makes this report available to the public, and the National Labor Relations Board (NLRB), within the next fifteen days, "shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer."\textsuperscript{57} After the NLRB certifies the vote to the Attorney General, it must petition the district court to discharge the injunction.\textsuperscript{58} At this point, if the parties have not come to an agreement, the President's only course of action is to submit a report to Congress and make recommendations for legislative action.\textsuperscript{59}

\textbf{B. Jurisprudence of the Emergency Injunction}

A president has invoked the Taft-Hartley emergency injunction thirty-five times, and the 2002 West Coast port closure was the first time a president sought to use it since 1978 when President Carter attempted to stop striking mineworkers during the middle of an energy crisis.\textsuperscript{60} There have only been two occasions where a court has refused to enjoin a strike: the 1978 coal miner's strike, and a 1971 strike, where the court refused to

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item E.g., Int'l Ass'n of Machinists v. Boeing Co., 315 F.2d 359, 360 (9th Cir. 1963).
\item 29 U.S.C. § 179(b).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
grant an injunction over a dispute involving 200 grain elevator employees.  

1. Judicial Interpretation of Emergency Injunctions

The Supreme Court of the United States reviewed the issuance of an emergency injunction in United Steelworkers of America v. United States.  

The Court affirmed the lower court, permitting a blanket injunction. Justice Douglas, dissenting, described the deferential approach to granting injunctions, noting that federal courts became a mere "rubber stamp for the President." He believed that the President wrongly construed "health," as found in 29 U.S.C. section 178(a)(2), to have a broad definition encompassing "the material well-being or public welfare of the Nation." The statute creating emergency injunctions was intentionally narrowly drafted, despite some senators and representatives' desire to "outlaw strikes 'in utilities and key Nation-wide industries' in order to protect the 'public welfare.'" Moreover, the version of the bill eventually adopted specifically excluded terms such as "public welfare" or "national interest," because such terms were seen as too indefinite and were capable of covering much more than health or safety.

Relying on the legislative record and the sour history of pre-Taft-Hartley Act labor injunction abuses, Justice Douglas concluded: "[t]o read 'welfare' into 'health' gives that word such a vast reach that we should do it only under the most compelling necessity.... [W]e should hesitate to conclude that Congress meant to restore the use of the injunction in labor disputes whenever that broad and all-inclusive concept of the public welfare is impaired." In fact, Justice Douglas believed the Court was abdicating its constitutional duty, becoming the "President's Administrative Assistant" such that it would "rise to no higher level than an IBM machine."

Justice Douglas's observations were indeed correct, as various federal courts have left their mark on history by all too often acting "upon assumptions rather than findings of fact." Justice Douglas was likely not impressed by the Supreme Court's notion that the board of inquiry would

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61. Kirchhoff, supra note 60; see also infra text accompanying note 85.
63. Id. at 61.
64. Id. at 71 (Douglas, J., dissenting).
65. Id. at 63 (Douglas, J., dissenting).
66. Id. at 65 (Douglas, J., dissenting) (citing 93 Cong. Rec. A1035).
67. Id. at 65–66, n.4 (Douglas, J., dissenting).
68. Id. at 67–68 (Douglas, J., dissenting).
69. Id. at 71 (Douglas, J., dissenting).
70. LeRoy & Johnson, supra note 21, at 110.
be the location of serious and reaching fact-finding.\textsuperscript{71} Notwithstanding the Supreme Court's statement, the boards could not possibly have undertaken in depth studies of the disputes before making their reports.\textsuperscript{72} For example, in \textit{United States v. International Longshoremen's Ass'n}, the court made its decision on a series of affidavits, without providing the union an opportunity to cross-examine the affiants or to challenge the information in the affidavits.\textsuperscript{73} Also, the court annualized all of the financial data when there was no evidentiary basis for assuming the dispute would last that long.\textsuperscript{74}

Interestingly, the court saw nothing wrong with the fact that the board of inquiry took only one day to investigate, and was able to create its report several hours after the parties provided presentations.\textsuperscript{75} In \textit{United States v. Avco},\textsuperscript{76} the district court granted an injunction, taking the President simply at his word, parroting the government's petition, which was itself based on a report that the board of inquiry produced in less than forty-eight hours.\textsuperscript{77} In yet another case, a federal district court saw no error when the board of inquiry delegated all of its functions to one member of the board, and denied the union a chance to provide evidence contrary to the government's position.\textsuperscript{78}

One legacy of the 1959 \textit{Steelworkers} case was that extremely broad blanket injunctions would not be sufficiently scrutinized. Justice Douglas noted that the statute provided only that the district court has the jurisdiction to enjoin a strike or work stoppage.\textsuperscript{79} Therefore, there is no need to "enjoin 100% of the strikers when only 1% or 5% or 10% of them are engaged in acts that imperil the national 'safety.'"\textsuperscript{80} The courts' powers have been interpreted as to preclude the possibility of applying the injunction selectively so that enough mills, ports, etc., can be left outside of the injunction's ambit so as to permit work vital to national health or safety, while minimizing restrictions on the right to strike.\textsuperscript{81} It may be possible that courts, after undergoing an in depth inquiry of the facts, will come to the conclusion that for a particular labor dispute, a broad blanket

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\item \textsuperscript{71} \textit{United Steelworkers of Am.}, 361 U.S. at 41.
\item \textsuperscript{72} LeRoy & Johnson, \textit{supra} note 21, at 112.
\item \textsuperscript{73} United States v. Int'l Longshoremen's Ass'n., 293 F. Supp 97, 99–102 (S.D.N.Y. 1968).
\item \textsuperscript{74} \textit{Id.} at 100.
\item \textsuperscript{75} \textit{Id.} at 103.
\item \textsuperscript{76} 270 F. Supp. 665 (D. Conn. 1967).
\item \textsuperscript{77} \textit{Id.} at 670–71.
\item \textsuperscript{79} United Steelworkers of Am. v. United States, 361 U.S. 39, 70 (1959) (Douglas, J., dissenting).
\item \textsuperscript{80} \textit{Id.} at 70 (Douglas, J., dissenting).
\item \textsuperscript{81} \textit{Id.} at 74–75 (Douglas, J., dissenting).
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injunction is the only recourse to avert imperiling the "national health or safety." Yet, no such inquiries are performed, so this issue remains open. Another legacy of the 1959 Steelworkers case was the broad scope given to defining the "national health or safety." Justice Douglas believed that the "national health or safety" was limited to "safeguarding the heating of homes, the delivery of milk, the protection of hospitals, and the like," but his view did not win the day. Other courts have expounded on the definition of "national health or safety," concluding that it must be given a broad construction. This broad scope finally received some boundaries when President Nixon's request to enjoin an extremely small-scale strike was rejected in United States v. International Longshoremen's Ass'n, Local 418. The government sought an injunction based solely on economic grounds, and was unable to provide the court with a single instance "of any decision that has granted an injunction based solely on national economic interest without considerations of national defense or physical health." The court emphasized that solely fiscal harm is insufficient for an injunction, explaining:

Some harm or threat of injury is regrettably a natural indispensable element of any strike; however, it is the very essence of the only weapon labor can aim at management. But such injury remains a question of degree. The closing of a small factory somewhere in the United States, due to the striking of ten employees may injure the economy, if we stretch the meaning of injury to absurd proportions, by decreasing the Gross National Product by $25,000 and might add to the balance of trade deficit by that same amount. Yet, no one would venture that this is an injury of such consequential dimensions as to necessitate governmental intervention. On the other hand, the fact that only two—or two hundred—workers are on strike is not of itself dispositive of whether a strike is critical or not. A qualitative as well as quantitative approach must be taken; it is not how many do it but rather what they do. If two men manufacture the firing pins for all of this country's rifles, quite obviously their refusal to work is of enormous significance despite their insignificant number.

82. Id. at 76 (Douglas, J., dissenting).
83. Id. at 65 (Douglas, J., dissenting).
86. Id. at 507.
87. Id. at 509.
The government appealed the district court’s order, but was unable to convince the Court of Appeals to reverse the lower court. However, the appellate court broadened the definition of “national health,” stating:

The health of the nation is a concept which includes more than the physical well-being of its citizenry. In other words, if the economic impact of the strike is so great that the national economy is threatened, in my opinion its health is “imperiled” within the meaning of the Act even if adequate provision may have been made to protect the physical health of the citizenry.

Thus, economic harm caused by a strike will suffice to bring about an injunction if the “essential well-being of the economy” is threatened as a result of the strike. When President Carter’s petition for an injunction was rejected in 1978, the court found that there was insufficient “evidence of irreparable harm to the national health or safety of the United States.” Needless to say, the government’s evidence must be severely lacking for a President to fail at obtaining an injunction.

2. Reviewing the History of the Emergency Injunctions: Were They Necessary?

The previous subsection demonstrated that courts do not require much evidence from the President when deciding whether to order an injunction or not, and this low evidentiary threshold creates a risk that emergency injunctions may be sought when the nation is not under serious threat. Ray Marshall, President Carter’s Secretary of Labor, stated that the purpose of the injunction was not to avert a national emergency; rather, it was meant to be a “catalyst to bring about the resumption of productive collective bargaining negotiations.” That use of injunctions is nothing less than a perversion of presidential authority, and certainly not what the drafters of the Taft-Hartley Act had in mind. Two studies undertaken by the United States Department of Labor (DOL) concluded that the economic

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88. United States v. Int’l Longshoremen’s Ass’n, Local 418, 66 Lab. Cas. (CCH) ¶ 12,238 (7th Cir. 1971).
89. Id. at 22,836.
90. Id.
92. LeRoy & Johnson, supra note 21, at 134 n.409.
94. See supra text accompanying notes 66–67.
95. U.S. DEP’T OF LABOR, COLLECTIVE BARGAINING IN THE BASIC STEEL INDUSTRY: A
consequences of strikes were seriously exaggerated. Consequently, it may be the case that President Carter was not the only president to make disingenuous use of the injunction on pretenses. Fortunately, the court in United States v. United Mine Workers called President Carter’s bluff and did not grant the injunction.

The 1961 Study concluded that the economic impact of strikes on the national economy was “usually seriously exaggerated,” contradicting the judicial fact-findings made by the courts in strikes affected by injunctions. The 1961 Study criticized the courts for not taking account of factors such as “seasonal and cyclical forces,” the general industry practice of working below capacity, the impact of inventory accumulations, and the levels at which the “economy will be seriously hurt.” The 1961 Study also questioned the government’s early intervention, noting: “[the] imposition of neutrals, as distinct from a situation in which parties voluntarily seek the assistance of neutrals, would appear more likely to intensify conflict than to aid in the resolution of issues.” Moreover, the Study argued, government involvement served to prolong disputes. The Study also noted that rather than listening to union arguments, the courts drafted broad injunctions despite the fact that “[a]n injunction seems to be a sufficiently flexible device to be used at a single plant or group of plants within one industry.”

Taft-Hartley injunctions often are unsuccessful at bringing disputes to speedy settlements. Out of all the strikes that were enjoined from 1947 through 2001, four were not halted, seven continued after the injunction was discharged, and nine continued after the cooling-off period ended. Overall, settlement was not achieved in thirty percent of enjoined strikes. The “final offer” votes have fared worse, as workers have never voted to accept the final offer, and “the vote has only the effect of solidifying the parties’ differences . . . and prolonging the strike by making compromise more difficult,” often causing "emergency pause a time for heating up

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96. 1961 STUDY, supra note 95, at 48; 1970 STUDY, supra note 95, at 4.
97. 1961 STUDY, supra note 95, at 48.
98. LeRoy & Johnson, supra note 21, at 118.
99. 1961 STUDY, supra note 95, at 49.
100. Id. at 10.
101. Id. at 207.
102. Id. at 224.
103. LeRoy & Johnson, supra note 21, at 130.
104. Id.
105. Frederick J. Lewis, Proposals for Change in the Taft-Hartley Emergency Procedures: A Critical Appraisal, 40 TENN. L. REV. 689, 703 (1973); see also WILLIAM B. GOULD IV, AGENDA FOR REFORM 195–96 (1993) (stating that “every single last offer has
rather than cooling off . . . [as the] bargaining position of the parties becomes frozen as they posture for advantage.”¹⁰⁶ The drafters of the emergency injunction assumed “that the rank-and-file in many instances are more reasonable than their leaders,” but both leaders and the rank-and-file see the ballots as “a vote of confidence for union leadership.”¹⁰⁷ This fact leads management to hold something in reserve when drafting its last offer, because it knows that there will be more give-and-take in further rounds of bargaining or later offers once the strike resumes.¹⁰⁸ Management has less incentive to bargain since it knows that the government will intervene, and unions respond by not bargaining in good faith as well; consequently, collective bargaining is hurt, and the dispute is exacerbated.¹⁰⁹

Courts generally do not consider union arguments regarding partial operation of plants and industry, even though a Department of Commerce study concluded that it is “technically and economically feasible to meet . . . needs through partial operation.”¹¹⁰ The conclusion of the 1961 Study was that “the consequences of steel strikes to the public need not cause alarm and are typically exaggerated, [but] the crisis atmosphere which is created can outweigh a logical appraisal.”¹¹¹ The 1970 Study also concluded that the economic impact of Longshoremen strikes was exaggerated.¹¹² LeRoy and Johnson provided two tables contrasting the courts’ and the Department of Labor’s assessments of “National Emergency Risks” by Steel Strikes and Longshore Strikes,¹¹³ and concluded that: “Courts assumed worst-case strike scenarios for fuel shortages, forced layoffs, and reduced economic output. In contrast, DOL reports noted that strikes are almost always foreseeable, which prompts stockpiling of inventory. This preparation reduces the impact of large strikes.”¹¹⁴ Consequently, emergency injunctions, while noble in purpose, have become something far different than the drafters intended them to be,¹¹⁵ denying workers their right to strike when the national health or safety is not under threat.

¹⁰⁷. Id.; Gould IV, supra note 105, at 195.
¹⁰⁹. See id. at 1482–83 (referring to the tendency of parties to rely on emergency strike provisions to “save the day”).
¹¹⁰. 1961 Study, supra note 95, at 48.
¹¹¹. Id. at 17.
¹¹³. LeRoy & Johnson, supra note 21, at 120–21 tbls.2A & 2B.
¹¹⁴. Id. at 122.
¹¹⁵. See supra text accompanying notes 66–67.
II. MOST RECENT TAFT-HARTLEY INJUNCTION: OCTOBER 2002 WEST COAST PORT CLOSURE

President Bush successfully obtained a Taft-Hartley emergency injunction, sending the locked-out International Longshore and Warehouse Union (ILWU) on America’s West Coast back to work.116 The dispute involved the Pacific Maritime Association (PMA), which represents eighty shipping lines and port operators on the West Coast, affecting twenty-nine ports on America’s West Coast and 10,500 members of the ILWU.117 This section will first describe the facts surrounding the period leading up to the injunction that ended ILWU’s lockout. Second, it will analyze the court’s order granting the injunction. Lastly, it will examine the dispute in light of the issues discussed in Part I; concluding that the usage of the Taft-Hartley injunction in this case, while arguably legitimate, left many questions and should not be seen as a triumph of the statutory procedure. Rather, this recent experience lends further credence to the need to change the injunction process.

Lockouts are different than strikes, but this industrial dispute must be read in the same light as a denial of the right to strike. The lockout was the PMA’s response to an alleged slowdown by the ILWU, and the language that the administration used framed the dispute as being the workers’ fault. An unnamed Labor Department official stated: “[t]he way these guys have negotiated, they make demands and when they don’t get what they want, they engage in slowdowns.”118 The official continued: “[t]his time, before the normal historic pattern was allowed to unfold, we went in to assess the situation. . . . It would be irresponsible to waltz for the meltdown.”119 However, what the official meant by “meltdown” is unclear, as the ILWU has not gone on strike since 1971, demonstrating that the historical pattern is that this union leaned towards settlement.120 Still, the discourse of work stoppage regarded the workers as the party that was out of line, and the injunction prevented the workers from trying to counteract the lockout. Therefore, the issues surrounding the right to strike remain relevant here, despite the source of the work stoppage.

119. Id.
A. Background of the Dispute

The dispute involved new technology that the PMA wanted to introduce, and whether the new jobs would be held by union members. The ILWU had been working without a contract since September 1, 2002, and on September 29, 2002 the PMA, accusing the ILWU of engaging in a slowdown during contract negotiations, locked out the workers. The union denied that it was engaging in a work slowdown, arguing that it was taking safety precautions in light of record cargo volumes and increased accidents, including five deaths in as many months. Through the Labor Department, the Bush administration asked both sides on October 8, 2002 to extend the contract for thirty days. The union accepted the offer, but the PMA refused. Within a few hours of the PMA refusing to extend the contract, President Bush sought the injunction.

B. Court Proceeding

Prior to commencement of the action for the Taft-Hartley injunction, President Bush appointed a board of inquiry, which concluded on the following day that the PMA and the ILWU would not resolve the port shutdown in a reasonable time. The government did not have a hard time meeting the first prong of the statutory test, demonstrating to the court that the work stoppage affected "an entire industry or a substantial part thereof." According to the Secretary of Transportation, the twenty-nine affected West Coast ports are "crucial gateways to America's trade routes to Asia and the Pacific." These ports handle over fifty percent of the United States' containerized imports and exports, totaling 300 billion dollars annually. Moreover, the Secretary of Commerce considered the

121. David Bacon, Unions Fear "War on Terror" Will Overcome Right to Strike, INTER PRESS SERV., Aug. 9, 2002.
124. Raine, supra note 122.
125. Id.
126. Id.
128. Id. (citing 29 U.S.C. § 178(a)(i) (2002)).
129. Id. (citing Mineta Decl. ¶ 9).
130. Id. (citing Mineta Decl. ¶¶ 9, 11).
twenty-nine affected ports as being critically important to the United States' maritime industry. Neither the PMA nor the ILWU disputed these facts.

While it was unnecessary to demonstrate that a prolonged work stoppage imperiled both national safety and national health, the government convinced the court that both were imperiled, which satisfied the second prong of the statutory test and secured the injunction. The American economy was in the midst of an economic recovery, and Secretary of Commerce Evans stated that the stoppage came at a “critical time” for the United States economy, involving “critical inventory-building ... when retailers are stocking for the end-of-year holidays.” Secretary Evans further concluded that key industries such as transportation and agriculture would be substantially harmed, and the overall rate of growth of real Gross Domestic Product would decline. The work stoppage was said to have created a “substantial transportation bottleneck,” and substantial spoilage of perishable goods. Secretary of Labor Chao stated: “over the entire fourth quarter of 2002, employment on average will be reduced by approximately 140,000 jobs.”

Secretary Chao also stated that the work stoppage had “directly resulted in the unemployment of approximately 12,500 persons, including not only ILWU workers but also some management and support employees.” This statement was particularly interesting, as those employees involved in the dispute should not be counted for purposes of determining the loss to the economy. First, the losses are a result of PMA engaging in a lockout, and whether it was in response to a slowdown is irrelevant. Second, and more important, the emergency injunction is predicated on the theory that the public is being harmed by the actions of the private actors to the extent that intervention in private negotiation is necessary, and supercedes either parties' right to engage in economic warfare.

Regarding the threat to national safety, Secretary of Defense Rumsfeld argued the lockout was disrupting “the transport of essential military cargo and jeopardizes one of the Department of Defense’s core missions—equipping and sustaining the military at a time when it is prosecuting a

131. Id. at 1010 (citing Evans Decl. ¶ 4).
132. Id. at 1010.
133. Id. at 1010–15.
134. Id. at 1011 (citing Evans Decl. ¶¶ 12, 13).
135. Id. (citing Evans Decl. ¶¶ 12, 13).
136. Id. at 1012, 1013.
137. Id. at 1011 (citing Chao Decl. ¶¶ 6–7).
138. Id. (citing Chao Decl. ¶¶ 6–7).
139. See supra text accompanying notes 35–41.
global war on terrorism." Secretary Rumsfeld explained: "[the Department of Defense] relies on commercial ships in common carrier service operating from commercial terminals to carry [goods and supplies] necessary for the support of the armed forces." Moreover, the Department of Defense relies on "just-in-time" deliveries as they are the most efficient means to conduct business, and the overall impact of the work stoppage has disrupted "the flow of essential military cargo." Also, the ports need to be left open in the event of unforeseen developments that require immediate attention. The ILWU and PMA provisionally agreed to move military shipments, so as not to impede the war effort, but Secretary Rumsfeld stated that such an agreement would be impossible to carry out in a manner that would meet the Department of Defense's needs, because military supplies are often not separately marked and distinguishable from commercial supplies. Overall, the administration argued that a port shutdown or slowdown endangered the war on terrorism, which was sufficient to convince the court that national safety was imperiled.

The court rejected the ILWU's argument that the invocation of the emergency junction was the product of collusion as speculation, explaining that the court's focus was whether the government could meet the statutory preconditions, "not on the politics behind its decision." The ILWU also argued that the lockout was on the verge of collapse. However, the court was not swayed, and pointed out that the government's "powerful showing" was enough, and anything else would be mere guesswork, which was not the duty of the court. Along with requiring the ports to open and halting the lockout, the court also enjoined the union from striking and engaging in slowdowns under its authority "to make such other orders as may be appropriate."

C. Assessing the Lockout and the Bush Administration's Actions

Despite the Bush Administration's expressions of neutrality, the union saw the federal intervention as simply part of a pattern of actions intended

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140. Pacific Maritime Ass'n, 229 F. Supp. 2d at 1013.
141. Id. (citing Rumsfeld Decl. ¶ 3).
142. Id. (citing Rumsfeld Decl. ¶ 3).
143. Id. at 1014 (citing Rumsfeld Decl. ¶¶ 4, 28).
144. Id. (citing Rumsfeld Decl. ¶ 4).
146. Pacific Maritime Ass'n, 229 F. Supp. 2d at 1015.
147. Id. (citing United Steelworkers of Am. v. United States, 361 U.S. 39, 41 (1959)).
148. Id. at 1015–16 (citing 29 U.S.C. § 178(a)(ii) (2000)).
to weaken unions. The union did not see neutrality, as prior to the expiration of the collective bargaining agreement, Tom Ridge, Director of Homeland Security, suggested that: "any job slow-down or strike would be viewed as a threat to national security." In the months leading up to the lockout, the administration made it clear that they were prepared to intervene if any strike occurred, using the term "strike" despite the reality that employers can resort to a lockout. Both Ridge and Secretary Chao told the ILWU how the administration was ready to prevent any strike. The PMA was not entirely ignored, however, as the administration encouraged it to offer more medical benefits to the union, and the PMA explained that it was being pressured too. Law Professor and former Chairman of the NLRB, William B. Gould IV, concluded that "whatever the facts about the slowdown, the lockout is a tactic aimed at bringing in the Bush administration through Taft-Hartley." Leading up to the invocation of the emergency injunction, the ability of both parties to collectively bargain in good faith started to break down, reflecting a trend that has been identified by both scholars and the DOL. The union argued that the employers group was "not negotiating seriously... because it is counting on federal intervention if a strike is called." Union leaders also said that they were unable to bargain in good faith, because Bush's pledge to intervene cut off the possibility of them using the strike. As a result of the threatened intervention, the PMA was also prevented from negotiating fairly, because as many union members believed, "it knows the government 'has their backs.'" From the union's viewpoint, they wanted to work, but were kept out. AFL-CIO Secretary-Treasurer Richard Trumka explained: "[t]his is the first time... a president

149. Cleeland, supra note 118.

There have been multiple instances which the labor movement argues have given them reason to believe that the Bush administration was anti-union. For example, "the creation of the Department of Homeland Security ("DHS") was delayed for several months due to the Bush Administration's refusal to accept collective bargaining rights for DHS workers." Ken Matheny & Marion Crain, Disloyal Workers and the "Un-American" Labor Law, 82 N.C. L. Rev. 1705, 1725 (2004). Recently, Secretary of Education Roderick R. Paige characterized the National Education Association, one of the largest labor unions in the United States, as a "terrorist organization." Amy Goldstein, Paige Calls NEA a 'Terrorist' Group, WASH. POST, Feb. 24, 2004, at A19.


151. Bacon, supra note 121.

152. Id.

153. Cleeland, supra note 118.


155. Cleeland, supra note 118.


157. Id.
has let an employer lock out workers in an extended quest to undermine the workers' union—creating a phony crisis—and then reward that employer's action with government intervention.158

The unions also saw President Bush's actions as indicative of bias, as the White House provided private briefings for business lobbyists seeking presidential intervention,159 without extending the same meetings to the ILWU or the AFL-CIO.160 Rather, the White House had top Bush aide Karl Rove and Chief of Staff Andrew H. Card Jr. call Teamsters President James P. Hoffa and AFL-CIO President John J. Sweeney.161 While these phone calls cannot be dismissed, there is a difference between meeting with individuals in private and making a telephone call. The cause of the breakdown in negotiations is impossible to pinpoint, nevertheless, the negotiations had reached a historic low. Bob McEllrath, an ILWU vice president, commented: "I've negotiated these contracts for the West Coast since '93, and I've never seen this before."162 The low level of trust between the parties was also apparent at the beginning of the federal mediation, when the ILWU president walked out upon the arrival of the PMA president, who arrived escorted by two armed guards, which he claimed were necessary because of death threats.163

Whether or not the union was correct in arguing that the Bush administration was biased, or whether the PMA was stalling and waiting for intervention, the union was nonetheless in fear. This fear may have forestalled an earlier settlement, as the union admitted they could not bargain in good faith while they were under the shadow of federal intervention.164 Nevertheless, this example proves what the 1961 and 1970 Studies as well as various academics concluded: the threat of intervention may often have adverse consequences on collective bargaining,165 because once the ability or desire to bargain in good faith is lost, little progress can be made. The long history of governmental exaggeration during alleged "crises" gives credence to unions' views of injunctions being "one-sided relief, inequitable from the union's point of view."166

President Bush's behavior also helps demonstrate that presidents can

160. Id.
161. Id.
162. Cleeland, supra note 118.
164. See supra text accompanying notes 35–41.
165. See supra text accompanying notes 95–102.
use injunctions as a tool for addressing and soothing the public’s legitimate concern over the economy, which confirms the view that emergency injunctions can be extremely useful for political gain. However, the emergency injunction’s purpose is not to gain political clout. Nevertheless, it is nearly impossible to imagine invoking such a powerful device without considering the amount of political clout or harm it may bring. For one thing, defining an emergency is strikingly difficult in an academic context, but in the political contest it is “anything so denominated by the President.”[167] “[T]he decision to declare or not to declare an emergency is essentially political, and is as much a reflection of the incumbent President’s temperament and style as of the actual or potential economic impact of the dispute.”[168]

Before the 2002 port closure, the most recent time a President openly considered invoking the emergency injunction was during a nationwide strike of United Postal Service (UPS) workers, who were members of the Teamsters Union in 1997.[169] The 1997 Teamsters’ strike was one of the top media stories of the year,[170] and despite a strong push from the business sector for President Clinton to intervene, the White House refused to become involved.[171] Also working in the Teamsters’ favor was that a majority of the public supported the strike, and this public mood likely affected President Clinton’s decision to stay out of the dispute.[172]

Although there are no available polls indicating public support of the PMA or the ILWU, indicators of the public mood were quite prevalent and the poor state of the economy was at the forefront of most people’s minds. Leading up to the port closure and subsequent intervention, President Bush’s references to the economy were “winning more prominent billing” despite a month of intensive focusing on Iraq.[173] A recent poll indicated that fifty-five percent of voters identified the economy as the issue of highest concern, as opposed to twenty-two percent who were most concerned with the war on terrorism.[174] President Bush was well aware of the public mood regarding the economy, and his behavior surrounding the intervention indicated that his actions were meant to address the public’s

168. Id. at 141.
172. Id. (noting that a Gallup Poll indicated that fifty-five percent of the public supported the Teamsters, compared to twenty-seven percent who supported UPS).
173. Gosselin & Gerstenzang, supra note 159.
174. Id.
economic concerns, while not spending much time discussing national security. A memorandum released after President Bush called for the board of inquiry made only a small mention of military concerns, mostly discussing health and safety in purely economic terms. When President Bush addressed a crowd in Michigan several days after the injunction was granted, he spoke for forty minutes, never once indicating that the injunction protected national security, only mentioning that the injunction would help Michigan’s workers.

Overall, there was little public mention of national security concerns and the case for war in Iraq, yet in the legal briefs filed in court to obtain the injunction, the Bush administration “went to great lengths to portray the country as effectively at war.” In doing so, the government was able to avoid the problems that Presidents Nixon and Carter faced when seeking their ultimately rejected injunctions. When Nixon petitioned for an emergency injunction, the court insisted that it was insufficient to obtain an injunction when solely economic harm is threatened. Despite the appellate court broadening the district court’s definition, it nevertheless affirmed the denial of the injunction. Overall, there were no connections between Nixon and Carter’s petitions for injunctions and any sort of war effort or foreign threat to the United States or its allies. Accordingly, in practice the state of the economy and threats to commercial interests need to be linked to national defense.

The 2002 port closure also highlights the difficulty of defining the “national health.” Despite the fact that the term “national health” has been defined as “the essential well-being of the economy,” it is still a vague and indeterminate standard. That is, when can it be said that the essential well-being of the American economy is threatened? There cannot be a specific degree of inflation or level the GDP must drop to before it can be said that the essential well-being of the economy is threatened. Rather, much of the threat depends on how the economy is performing prior to the labor dispute; that is, the poorer the economy is, the lesser the economic harm resulting from a work stoppage needs to be before the essential well-being is threatened. The concept is much more esoteric than mathematical, requiring both a political and an economic analysis: two tasks that the courts are unable or unwilling to partake in. Moreover, as the term is so

176. Id.
178. Gosselin & Gerstenzang, supra note 159.
179. See supra text accompanying note 85.
180. See supra text accompanying notes 88–90.
181. See supra text accompanying note 90.
difficult to define, the President takes a risk that his or her administration’s economic analysis may fall short in convincing the court that the essential well-being of the economy is threatened. Yet, since there have been only two occasions where a president failed at his gamble, history favors the President despite the inherent risk.

Despite the limited risk that the administration faces when seeking an emergency injunction, it is exponentially aided by the degree of time the union or employers have to counter the government’s position, and the parrot-like nature of the boards of inquiry. During the 2002 dispute, a temporary restraining order ordering the ports to open was secured the day following President Bush’s executive order, which was ultimately converted into the injunction, within one day. The parties had less than a day to gather any evidence to refute the government’s contentions. Moreover, neither the ILWU nor the PMA objected to any of the evidence the government put forward, but this was not surprising, as the government affidavits were from Cabinet-level officers, and such opinions are deemed to be expert testimony. There was simply not enough time for the ILWU or PMA to gather their own experts to present contradictory evidence, and even if they could, there is no requirement that the court hear their objections.

The United States, at the time, was effectively at war with international terrorists, and the President has a wide degree of discretion when waging war, albeit with limitations. Justice Jackson explained in his concurring opinion in Youngstown Sheet & Tube: "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." But unlike President Truman’s unconstitutional seizure of the steel mills without statutory authority half a century ago, President Bush’s action was perfectly legal, as the Taft-Hartley Act provided him a clear license to intervene. There was nothing unconstitutional about President Bush’s actions; nevertheless, the events surrounding the 2002 port closure and the

182. See supra text accompanying notes 71–75.
185. See supra text accompanying notes 70–78. Cabinet-level officers in their areas of expertise are granted substantial deference, United Steelworkers of Am. v. United States, 361 U.S. 39, 40 (1959), and their affidavits served the purpose as if they testified in person in the courtroom.
186. Pacific Maritime Ass’n, 229 F. Supp. 2d at 1014.
187. See Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (discussing the extent of the President’s power when the country is at war).
189. See id. at 587–88.
subsequent emergency injunction are flawed policy. Yet again, private collective bargaining negotiations were interfered with, possibly leading to the bargaining break down, and sweeping economic and military assessments and predictions that have often been exaggerated went unchallenged because of the limitations on putting together a defense.

The 2002 port closure witnessed a philosophy for defining “national safety” put forward for the first time. That is, the district court judge accepted Secretary Rumsfeld’s assertion that military and commercial goods and supplies are so inextricably linked during the shipping and unloading process that any work stoppage involving commercial goods and supplies risks harming national security. Consequently, there is little doubt that the President would be willing to seek an injunction again, since dockworkers’ labor disputes almost qualify as per se threats to “national security” under Secretary Rumsfeld’s formulation. Thus, the result of the 2002 injunction may be that dockworkers have been effectively denied a right to strike without any law being passed, usurping the will of Congress, which chose not to enjoin particular classes of workers when the Taft-Hartley Act was passed. Moreover, the dockworkers have not been supplied with any substitute weapon or option to combat their employers’ economic power.

In the end, the President intervened, and fortunately the FMCS facilitated the union and the PMA agreeing to a new six-year contract, which was seen as a victory by both sides, without either party engaging in any lockouts or strikes. Yet, as discussed below, presidential intervention creates a whole host of issues, and the peaceful settlement of one dispute does not answer whether the national health or safety were truly threatened, or whether the parties would have settled earlier. Moreover, this peaceful settlement does not lead to the conclusion that all settlements in the future will be peaceful. Lastly, this dispute leads to a new threat to collective bargaining and specifically dockworkers, namely, that “national security” may have effectively ended the dockworkers’ use of the strike.

D. What Now for the Dockworkers?

LeRoy and Johnson concluded from their research that emergency injunctions have been a major cause in the decline of unionism and the usage of the strike weapon, in part because the injunction “contextualizes

190. See supra text accompanying notes 141–44.
strikes as a harm to the public.' After 9/11, union leaders have become increasingly concerned that the "war on terror" could be successfully invoked to label any future strike a "threat to national security" if it has an adverse economic impact. There is no doubt that the unions' concerns are real, and Secretary Rumsfeld's explanation of how commercial interests and military interests are inextricably linked means that absent a change in the law, the only hope for dockworkers is a president unwilling to seek an injunction, and even more importantly, a public siding with the dockworkers. The Sword of Damocles would always hang above the union members' heads in the form of an imminent emergency injunction. Knowing that a strike would be blunted, losing much of its force, as well as the President painting the workers as harmful to the national interest, would stop any strike before it ever began.

One hundred years ago, Justice Oliver Wendell Holmes made the poignant observation that "great cases are called great... because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." LeRoy and Johnson, using Holmes' valuable insight, argue that "great strikes" without additional legal safeguards suffer from the "'immediate interests' [that] will 'exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.'" In other words, the tyranny of the majority should not determine human rights standards based merely on their immediate interests.

Obviously, the need to maintain public order and handle emergencies in an expeditious manner may justify preventing or narrowing the right to strike on occasion, but such laws should be narrowly tailored to minimize the chance for abuse. The rule of law in a modern liberal democracy should minimize the ability of a "Prince" to manipulate the public will and the ability to make the national health or safety a proxy for political expediency and securing the love of the people. The Norris-LaGuardia Act was enacted to curb the "ominous precedent for the easy use of the injunction in labor disputes." In his dissent in United Steelworkers of America, Justice Douglas forcefully argued that the wide statutory scope the majority gave to the emergency injunction allows it to "bludgeon all workers merely because the labor of a few of them is needed in the interest

193. LeRoy & Johnson, supra note 21, at 130, 125.
194. Bacon, supra note 121.
195. See supra text accompanying notes 141-44.
196. LeRoy & Johnson, supra note 21, at 130.
198. LeRoy & Johnson, supra note 21, at 134 (quoting N. Sec. Co., 193 U.S. at 400-01 (Holmes, J., dissenting)).
of 'national safety.'"200 Accordingly, the history of emergency injunctions and the ability to closely align labor disputes to the "war on terror" has likely reintroduced the mischief, which the Norris-LaGuardia Act sought to end.

III. INTERNATIONAL LABOR LAW AND THE TAFT HARTLEY EMERGENCY INJUNCTION

This section examines the Taft-Hartley Act emergency injunction using internationally accepted human rights principles as standards for judgment. Drawing on the jurisprudence of the International Labour Organisation (ILO), this section provides an overview of the right to strike in light of emergencies and services required by the public. Then, the emergency injunction is analyzed in light of the ILO jurisprudence, concluding that the injunction falls significantly short of ILO standards.

A. The ILO and International Labor Law

The ILO is a United Nations (UN) related body with nearly universal membership,201 and is the prominent source for international labor law standards, which are a subset of international human rights law.202 The ILO was founded in 1919 under the Treaty of Versailles and became the first specialized agency of the UN in 1946.203 It is useful to look to the ILO for standards when developing a method for developing better ways to handle national emergency disputes in the United States for two reasons. First, the United States is a member state of the ILO, and as a member it must abide by the obligations it has assumed. Second, the labor laws of most of the world are based on ILO standards,204 and these standards are due to the tripartite efforts of workers' representatives, employers, and

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200. Id. at 74 (Douglas, J., dissenting).
204. Swepston, supra note 202, at 54.
governments. Thus, these standards are "based on the best practice and most recent trends in its member states," and serve as an effective control for assessing the standards that particular States are not yet bound.

No international labor convention or recommendation explicitly recognizes or concerns the right to strike, however, this absence does not mean that the ILO ignores or does not safeguard the right to strike. Rather, the right to strike has been implied from several conventions and the ILO Constitution by the Committee on Freedom of Association (CFA). This is especially relevant, because the CFA procedure is considered legally binding by all member states of the ILO, and other ILO bodies have followed suit.

1. Jurisprudence Regarding the Right to Strike

The CFA was created in 1951 to deal with complaints of infringement on the freedom of association, which are set forth in Convention Nos. 87 and 98. The CFA also relies on the ILO Constitution as an alternative to the various ILO conventions for spelling out the principles of freedom of association. All ratified ILO conventions are dealt with by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Together these bodies have developed a substantial jurisprudence, by scrutinizing the various conventions and the Constitution over the past fifty years.

The CEACR and the CFA have had to deal with the right to strike more often than any other subject related to labor relations. The right to

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206. Swepton, supra note 202, at 55.
207. Jane Hodges-Aeberhard & Alberto Odero de Dios, Principles of the Committee on Freedom of Association Concerning Strikes, 126 INT'L LAB. REV. 543, 543 (1987). The right to strike has been mentioned incidentally in a convention and a recommendation. See, e.g., Abolition of Forced Labour Convention (No. 105), June 25, 1957, art. 1(d) (prohibiting the use of forced labor as punishment for striking); Voluntary Conciliation and Arbitration Recommendation (No. 92), 1951, ¶ 7 (stating that no provision may be interpreted as limiting the right to strike).
211. BEN-ISRAEL, supra note 209, at 27–28.
212. Id. at 67.
214. Id. at 187.
strike is seen as an "essential element of trade union freedoms." It is an "intrinsic corollary of the right of association protected by Convention No. 87." That is, the right to strike stems from the "three-dimensional" view of freedom of association. First, workers must be able to organize and aggregate their power; second, collective bargaining makes use of the workers' aggregation of power so that they can improve their working conditions; third, the right to strike is a "complementary freedom," without which the other two dimensions are ineffective. In over 500 cases since 1951, the CFA has relied on this "three-dimensional" approach to freedom of association to infer the right to strike from Article 3 of Convention No. 87, which provides that "workers' [and employers'] organisations shall have the right to organise their administration and activities and to formulate their programmes without the interference of public authorities." The CEARC has come to same conclusion as the CFA regarding the right to strike.

Yet, not all member states to the ILO have ratified Conventions No. 87 or No. 98, which guarantee the right to organize and collectively bargain with adequate protection against anti-union discrimination in their employment. Notwithstanding this fact, all member states of the ILO are "bound to respect a certain number of principles, including the principles of freedom of association which have become customary rules above the Conventions." The ILO Constitution also establishes principles to which all member states of the ILO are bound. Namely, among these principles is the three-dimensional aspect of the freedom of association. Despite the possibility of non-ratification of Convention No. 87, the CFA and CEARC use the standards laid out in Convention Nos. 87 and 98 as "a yardstick to measure the fundamental principle of freedom of association and its complimentary right to strike which were safeguarded by the ILO

216. COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Sess. 81, GENERAL SURVEY ON FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING ¶ 179 (1994) [hereinafter CEACR GENERAL SURVEY].
217. BEN-ISRAEL, supra note 209, at 27.
218. Id. at 27.
219. Id. at 65.
220. See, e.g., CEACR GENERAL SURVEY ¶ 107 (1973).
221. FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE GOVERNING BODY COMMITTEE ON FREEDOM OF ASSOCIATION ANNEX I ¶ 53 (1996) [hereinafter CFA Digest]; see also CFA Digest ¶ 10 ("When a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association.").
223. BEN-ISRAEL, supra note 209, at 69.
Constitution.”

In conclusion, despite the absence of an explicit right to strike in any ILO Convention, the right to strike is an essential aspect of freedom of association. Regardless of whether a member state is a party to Convention No. 87, the ILO Constitution is an independent source of the freedom of association, which necessarily includes the right to strike.

2. Jurisprudence on Emergency Situations and Essential Services

The right to strike may be restricted or prohibited in essential services, in the strict sense of the term. The right to strike may only be completely prohibited in the event of an acute national emergency and for a limited period of time. General prohibitions on the right to strike have a severe impact on the “essential means” available to workers to defend their interests, and therefore, limitations are only permissible in “genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of society are absent.” For example, the CFA found that a general prohibition on the right to strike imposed after an attempted coup d’état against the constitutional government was justified. Such restrictions and prohibitions may arise from provisions in the law or under emergency or exceptional powers that the government invokes to justify its intervention.

The CEACR accepts, albeit with a degree of skepticism, “that where industrial action could lead to an ‘economic’ emergency, they should be able to prohibit recourse to industrial action.” The crucial question is how severe the danger is to the national economy. Also, long-term restrictions on the right to strike are not permissible to achieve economic recovery, because “[t]he solution to the social and economic problems of any country cannot possibly lie in the suppression of important sections of the trade union movement.”

The ILO supervisory bodies have had difficulty developing any hard and fast rules governing categorization of a given enterprise as an essential
service. The mere fact that a strike affects essential services or the public sector will not in and of itself constitute a state of emergency. Services shall only be considered “essential services in the strict sense of the term” if their “interruption . . . would endanger the life, personal safety or health of the whole or part of the population.” Moreover, a non-essential service can turn into an essential service if a strike lasts too long or extends to such a scope that a state of emergency develops. There is not a complete list of “essential services in the strict sense of the term,” because the concept depends on the particular circumstances occurring within a given country.

The test for whether a given service rises to the level of essential service, in the strict sense of the term, is whether there is an existence of a clear and imminent threat to the life, personal safety, or health of the whole or part of the population. Services that may be essential services include: the hospital sector, electricity services, water supply services, the telephone service, and air traffic control. Services that have not been found to be essential services, in the strict sense of the term, include: radio and television, the petroleum sector and ports (loading and unloading), banking, computer services for the collection of excise duties and taxes, department stores and pleasure parks, the metal and mining sectors, transport generally, refrigeration enterprises, hotel services, construction, automobile manufacturing, aircraft repairs, agricultural activities, the supply and distribution of foodstuffs, the Mint, the government printing service and the state alcohol, salt and tobacco monopolies, the education sector, metropolitan transport, and postal services.

In essential services, it is consistent with the principles of freedom of association to impose additional procedural requirements in appropriate circumstances to temporarily restrict the freedom of association. All restrictions, however, must be proportionate to the likely harms. Such restrictions should be

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234. Novitz, supra note 210, at 314.
235. CFA DIGEST, supra note 221, at ¶ 530.
236. Id. at ¶ 526.
237. Id. at ¶ 541.
238. Id.
239. Id. at ¶ 540.
240. Id. at ¶ 544.
241. Id. at ¶ 545.
242. See Novitz, supra note 210, at 310 (“Whether a restriction is compatible ‘depends on the extent to which the life of the community depends on the services involved.’”).
243. Id. at 313.
244. CFA Digest, supra note 221, at ¶ 505.
complemented with "adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented." Both the employers and workers concerned must consider as impartial the members of the bodies that are entrusted with performing such proceedings. Employees that are denied the right to strike must also be provided with a corresponding denial of the right to lockout. Lastly, compulsory arbitration to end a collective labor dispute is permissible if the strike in question may be restricted or banned. Otherwise, compulsory arbitration is only permissible in cases of acute national crisis.

The CFA has stated that when a prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful if applied to a specific category of staff in the event of a strike, whose scope and duration could cause such a situation. Otherwise, back-to-work requirements are contrary to the principles of freedom of association. Public authorities may establish a system of minimum service to avoid irreversible or disproportionate damages, namely damages to third parties, rather than enjoin all strike activity. The establishment of minimum services is permissible and not contrary to the freedom of association when the services in question are:

(1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term) . . . ; (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population . . . ; and (3) in public services of fundamental importance.

245. Id. at ¶ 547.
246. Id. at ¶ 549.
247. Id. at ¶ 551.
248. Id. at ¶ 553.
249. Id. at ¶ 517.
251. Id.
252. CEACR GENERAL SURVEY, supra note 216, at ¶ 152.
253. CFA Digest, supra note 221, at ¶ 556.
Unions, employers, and public authorities should be able to participate together in defining the minimum service,\(^{254}\) guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact.\(^{255}\) This minimum service may last for the duration of the acute national crisis endangering the normal living conditions of the population.\(^{256}\) Finally, the decision of whether or not a given level of minimum services is indispensable should be pronounced by judicial authorities “in so far as it depends, in particular, upon a thorough knowledge of the structure and functioning of the enterprises and establishments concerned and of the real impact of the strike action.”\(^{257}\)

**B. Emergency Injunctions in Light of ILO Standards**

The United States has not ratified either Convention No. 87 or 98; however, it has accepted review by the CFA for complaints filed under these Conventions.\(^{258}\) Thus, the United States is only bound by those conventions inasmuch as they reflect custom contained in the ILO Constitution.\(^{259}\) More than simply addressing the United States’ legal obligations, this section proposes how American law can be adapted to ILO standards, and consequently, more responsive to human rights concerns.

Taft-Hartley emergency injunctions are capable of prohibiting work stoppages during acute national emergencies, as well as requiring services that rise to the level of essential services, in the strict sense of the term, but they also go far beyond what is permitted by ILO standards. The availability of mediators and conciliators through the FMCS is in line with ILO standards, as they are both independent and voluntary,\(^{260}\) and can work even better at avoiding stoppages in the first place, if the overall injunction procedures are overhauled.

Few events rise to the level of “acute national emergency,” as such events must rise to the level of a coup d’état, national disaster, or siege.\(^{261}\) Consequently, in these circumstances it makes the most sense for the government to impose final-offer arbitration. Resort to arbitration in these circumstances is permissible under ILO standards,\(^{262}\) and final-offer arbitration has been successful in public-employee disputes as well as

\(^{254}\) Id. at ¶ 557.
\(^{255}\) Id. at ¶ 560.
\(^{256}\) Id. at ¶ 558.
\(^{257}\) Id. at ¶ 562.
\(^{258}\) Compa, supra note 201, at 28.
\(^{259}\) See supra text accompanying notes 21–24.
\(^{260}\) See supra text accompanying notes 39, 52–53.
\(^{261}\) See supra text accompanying notes 227–29.
\(^{262}\) See supra text accompanying notes 242–49.
baseball salary arbitrations. In a final-offer arbitration, both parties provide their final offer for each contested issue, and the arbitrator selects from one of the offers, “taking into account practices of other industries, economic considerations, and questions of basic fairness.” Both parties are more likely to be reasonable in an effort to have their offer selected, overcoming the breakdown in good faith negotiations. Final-offer arbitration also permits the selection of independent arbitrators, either by the parties or by the state most affected by the dispute, permitting impartiality.

The language of the ILO standard of “clear and imminent threat” does not differ much semantically from the American standard of “imperil the national health or safety.” But the mechanisms in the emergency injunction are often disproportionate to the harm likely to result from the strike, resulting in restrictions on the right to strike that unjustifiably harm freedom of association. Most importantly, is the “one-size-fits-all” blanket injunction, which result in the courts not taking account of any alternative arguments or contradictory evidence, relying for the most part on a panel that is hand-selected by the President. Creating a presumption against granting emergency injunctions, and providing parties an effective chance to rebut the government’s evidence through the testimony of experts would uphold the principles of freedom of association, because doing so would allow the court to draw the boundaries of the injunction more carefully, making all restrictions proportionate to the likely harms.

The denial of any possibility of creating an establishment of minimum services severely limits the possibility that an injunction will be proportionate to the likely harms. This limitation is compounded by the fact that the judiciary normally does not question the government’s position. By requiring minimum services to operate, and by developing the standards for such an arrangement with the government, union, and employers, restrictions on the right to strike can be minimized, since only workers that are absolutely necessary to secure the public safety will be denied the right to strike. As the PMA and ILWU demonstrated, parties in fierce opposition can still agree to such standards. The government’s position may indeed be correct in many circumstances, but as long as it is not rebutted or questioned, the principles of freedom of association are unlikely to be adequately protected.

263. Gould IV, supra note 123.
264. Id.
265. Id.
266. Id.
267. See supra text accompanying note 43.
268. See supra text accompanying notes 79–82.
269. Id.
270. See supra text accompanying note 144.
The eighty-day cooling-off period also does not seem justified, as history has demonstrated that this requirement tends to hurt bargaining rather than create a period of calm reflection. ILO standards have permitted cooling-off periods, including a forty-day period, but always requiring an eighty-day period increases the likelihood that such a period is disproportionate to the likely harms. Yet, not having a statutorily set number of days would likely lead to a high degree of arbitrariness. Therefore, a better approach would be to require cooling-off period of about twenty days that can be renewed if the government can make its case, an arrangement that would also allow the chance for rebuttal of the government’s position. When cooling-off periods are appropriate, a shorter period of time gives the employer less time to regroup and prepare for a strike, thus promoting more reasonable bargaining as the strike threat is less likely to be blunted.

Overall, the rigidly and overtly discretionary nature of the Taft-Hartley Act prevents it from being applied in a manner that is in compliance with ILO standards. The procedures for enjoining industrial action on the grounds of national emergency should not permit almost unchecked presidential discretion. Applying ILO standards would place a much greater burden on the government to justify its positions, because its evidence and arguments would be subjected to objections and counter-arguments, and a court would take all parties’ arguments and evidence seriously. Moreover, back-to-work orders will always be controversial, but when such orders are made after a thorough and balanced approach that takes account of the evidence and positions of all parties involved, restrictions on the right to strike will be minimized, preserving the principles of freedom of association. Lastly, the United States possesses the machinery to accommodate these suggested changes, so there will not be any major institutional costs of rearranging the injunction procedures.

IV. CONCLUSION

The protection of the citizenry is the most important function of government, and in serving as the protector, the government will from time to time justifiably limit certain specified rights. Such limitations must be proportionate to the likely harm that the limitations seek to avoid, because arbitrary denial of rights or disproportionate limits and derogations are contrary to the fundamental dignity of every human, as they unjustifiably infringe on human rights. Without adequate safeguards for protecting human rights during times of danger or threat, a democracy can devolve

271. See supra text accompanying note 105.
272. See supra text accompanying note 244.
into a cruel dictatorship.

The events of 9/11 have led nations to rethink how international terrorism should be fought, and new threats to domestic tranquility demand that governments take adequate measures to prevent such threats from blossoming into anything further. The news and academic literature over the past several years have emphasized various aspects of how human rights play into the "war on terrorism," and people have engaged in debates regarding the limits of government interference with the press, personal records, and library holdings. Issues including the legality of preemptive attacks, limitations on habeas petitions, immigration policy, and the very definition of what behavior amounts to torture have garnered front-page attention and given rise to countless academic conferences.

The right to strike also faces a threat from the post-9/11 recalibration of human rights, because without adequate safeguards, strikes can be enjoined all too often under the pretense of national security, providing a president with political gain at the expense of the workers' freedom of association. That is, the right to strike may be interfered with on security grounds, when the real harm being avoided is the economic harm that occurs during any strike. For this reason, the Taft-Hartley emergency injunction, a near dinosaur of a statute which has only been successfully invoked twice out of four attempts since 1971, needs attention.

The threats of international terrorism, the war in Iraq, and the nature of the military supply chain, raise the specter that an emergency injunction will never be denied under the present standards. The 2002 port-closure demonstrated this danger, at least with respect to dockworkers. Moreover, the standards used to invoke the injunction have never effectively balanced the need of the public against the workers' right to strike, as injunctions have been limited to blanket back-to-work orders and courts have never endeavored to make injunctions proportionate to the likely harms.

Justice Douglas appears to have been correct after all, as many of his predictions have been verified time and time again. Presently, the standard requires courts to abandon almost all of their powers of review in light of presidential discretion, permitting presidents to play politics with workers' right to strike. Labor law is about balance, a balance between the rights of workers and the rights of employers, but it also includes the rights of the public that are affected by labor disputes. The ability to effectively prevent dockworkers from having the right to strike is a philosophy that may be expanded to other classes of employees. Such a philosophy must be seen as anti-labor, as the workers are placed in a "take it or leave it" scenario for all future contract negotiations, which exponentially strengthens the hands of business. A pro-labor emergency strike law would provide unions a greater ability to counter the government's experts, and the procedures would not undermine good faith collective bargaining.
The threat of terrorism must not be used to restrict peoples' rights absent substantial and compelling evidence, and in the cases of certain rights, restrictions should never be permitted. However, the right to strike may be restricted without unjustifiably restricting workers' freedom of association, and the ILO, through its jurisprudence, has developed standards for justifiably restricting this important right. Interestingly, had Justice Douglas' arguments and reasoning carried the day over a half-century ago, the Taft-Hartley emergency injunction would likely be in accordance with ILO standards today. The post-9/11 era has seen a large degree of dialogue on permissible limitations on human rights, but there is no reason why we cannot use this period to rethink all of our laws with the goal of furthering human rights and living up to the ideals that we profess to be securing. The Taft-Hartley emergency injunction should be replaced by something more conducive to human rights, and the ILO standards provide the ideal template.