No. 745

In the Supreme Court of the United States

OCTOBER TERM, 1951

CHARLES SAWYER, SECRETARY OF COMMERCE,
PETITIONER

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 63–76) is not yet reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 447–449), on consideration of motions for stays, is not yet reported.

JURISDICTION

The orders of the District Court were entered on April 30, 1952 (R. 76). On April 30, 1952, petitioner filed notice of appeal and docketed the

[1] Since respondents herein have filed a petition in No. 744 we shall, to avoid confusion, refer to them as "plaintiffs."

appeal with the Court of Appeals for the District of Columbia Circuit (R. 77). The petition for certiorari was filed, prior to judgment by the Court of Appeals, on May 2, 1952 (R. 456.) Certiorari was granted on May 3, 1952. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on the facts recited in Executive Order No. 10340 and established by the uncontroverted affidavits, the President had constitutional authority to take possession of plaintiffs' steel mills in order to avert an imminent nationwide cessation of steel production.

2. Whether, in the circumstances of this case, the district court erred in reaching and deciding the constitutional issues on motions for preliminary injunctions.

3. Whether the district court erred in granting injunctive relief.

CONSTITUTIONAL PROVISIONS AND EXECUTIVE ORDER INVOLVED

Article II of the Constitution provides, in pertinent part:

> SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *
>
> * * * * * *
>
> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or

affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

> SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.
>
> * * * * *

The Fifth Amendment provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Executive Order 10340, and orders issued pursuant thereto, are set out at R. 6, 22.

STATEMENT

These are proceedings for injunctive relief against the petitioner, the Secretary of Commerce, to restrain through him the action of the President in ordering the taking of possession and operation of certain of plaintiffs' properties by Executive Order 10340, 17 F. R. 3139, issued on April 8, 1952. The underlying circumstances and the proceedings below are as follows:

1. THE WAGE DISPUTE

On November 1, 1951, plaintiffs' employees, represented by the United Steelworkers of America, C. I. O., which had a collective bargaining agreement due to expire on December 31, 1951, gave notice to the plaintiffs that they wished in a proposed new collective bargaining agreement between the parties to effect changes in wages and working conditions over those established by the old contract (R. 3, 81). No progress was made in the negotiations which followed and, on December 22, 1951, the dispute was referred by the President to the Wage Stabilization Board, in accordance with the provisions of Executive Order 10233, 16 F. R. 3503. The Presidential letter of referral, a copy of which is attached to the affidavit of Mr. Harry Weiss, Executive Director of the Wage Stabilization Board, requested the Board to investigate the dispute and promptly to report with recommendations as to fair and equitable terms of settlement.[2] The President noted that the union and the steel producers had made

[2] The Presidential letter of referral, the report of March 13, 1952, by the Steel Panel which heard the presentation of steel wage dispute, and the "Report and Recommendations" of the Wage Stabilization Board of March 20, 1952, all of which are contained in the certified transcript of record as appendices to the affidavit of Mr. Harry Weiss (R. 59–61), were omitted in printing the record. Copies of these documents have been assembled and deposited with the Clerk for the Court's use.

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no progress in resolving their differences and that it appeared unlikely that further bargaining or mediation and conciliation would suffice to avoid early and serious production losses in the vital steel industry. The President emphasized that the entire progress of national defense was threatened because any work stoppage would paralyze the entire steel industry and have an immediate and serious impact on the defense effort.

Pursuant to the referral, the Board immediately appointed a tripartite special steel panel (consisting of representatives of the public, of industry, and of labor) to hear all evidence and argument in the dispute and to make such reports as the Board might direct (R. 59). After a procedural meeting, public hearings were held in Washington, D. C., and New York City beginning on January 10, and continuing until February 16 (R. 60). The participating parties and the masses of evidence and argument heard are indicated by the Panel Report, dated March 13, 1952, a copy of which is attached to Mr. Weiss' affidavit. This Panel Report outlined the issues in dispute, summarized the position of the parties, and was submitted to the parties for consideration and comment. Meanwhile, the Board met and prepared the "Report and Recommendations of the Wage Stabilization Board," dated March 20, 1952, and submitted it to the President on that

date. A copy of the Board Report is attached to the affidavit of Mr. Weiss. The Board's recommendations, acceptable to the union, were rejected by steel management (R. 81).[3]

[3] Rejection of the Board's recommendations by plaintiffs was consistent with their position from the outset of the dispute. As stated by the Chairman of the Board in the March 20 report (pp. 5–6), after reviewing the critical nature of any labor dispute in the key steel industry, the "situation clearly called for unusually extensive bargaining. Instead, there was virtually no bargaining." On the major issues, such as wages, fringe benefits, etc., plaintiffs made no counter proposals, at least until after March 20, 1952. Report, pp. 6–7; Panel Report, March 13, 1952, *passim.* The need for bargaining in the best faith was underscored by the fact that the dispute presented the first occasion since 1947 for thorough review and revision of the collective bargaining agreements between the parties (Report, March 20, p. 5), and the fact that the Board's recommendations to the President were of a "catch-up" nature, designed to equate the position of steel workers with workers in comparable industries. Testimony of Nathan P. Feinsinger, Chairman, Wage Stabilization Board, Hearing before Subcommittee on Labor and Labor-Management Relations, Senate Committee on Labor and Public Welfare, 82d Cong., 2d Sess., March 31, 1952. See also Steel Panel Report, *passim;* Staff Report to Subcommittee on Labor and Labor-Management Relations, Senate Committee on Labor and Public Welfare, Senate Document 122, 82d Cong., 2d Sess. Perhaps, a principal stumbling block was the position taken by plaintiffs that any increase in wages required a compensating increase in prices, a position which Price Stabilization officials deemed absolutely destructive of the present stabilization program. See Statement on Steel by Ellis Arnall, Director of Price Stabilization, before the Senate Committee on Labor and Public Welfare, Senate Document No. 118, 82d Cong., 2d Sess., pp. 6–7, and *passim.*

2. THE SEIZURE

As noted above, no progress was made in negotiations between the parties pursuant to the union's notice of November 1, 1951, and a strike was called, as contemplated by the notice, for December 31, 1951. After the President's referral of the dispute to the Wage Stabilization Board on December 22, 1951, the union voluntarily deferred the strike which had previously been set. After plaintiffs' refusal to accept the Board's recommendations, the strike was called for 12:01 A. M., April 9, 1952 (R. 7). Ninety-six hours' notice had been given; the mill were closing and the fires were being banked. The resulting catastrophic threat to steel production was averted by the Executive Order issued by the President directing the Secretary of Commerce to take possession of the steel industry on the night of April 8, 1952. The Secretary of Commerce thereupon issued Order No. 1 taking possession of the plants, facilities and other properties of plaintiffs and numerous other steel companies (R. 22). The Order, and the accompanying telegrams sent to the companies, designated the president or chief executive officer of each company as the Operating Manager for the United States and directed that the management's officers and employees of the plants continue their functions (R. 21).

The union immediately called off the contemplated strike and full-scale production of steel continued without interruption until April 29, 1952 after the issuance of Judge Pine's decision in the District Court. See *infra*, pp. 22–24.

In his Executive Order, the President set forth his findings that steel is an indispensable component of substantially all the weapons used by the armed forces, that it is indispensable in carrying out the programs of the Atomic Energy Commission, and that a continuing and uninterrupted supply of steel is indispensable for the maintenance of the civilian economy of the United States upon which our military strength depends (R. 6–9). He concluded with the finding that

> a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field

and that in order to avert these dangers it

> is necessary that the United States take possession of and operate the plants, facilities and other properties of [the plaintiffs].

The affidavits filed below by petitioner, which were not controverted, spell out in greater detail these findings of the President. Secretary of Defense Lovett, the cabinet officer most directly concerned with all problems of armed forces

procurement and development, points out, in his affidavit, the following (R. 27–31): That an adequate and continuing supply of steel is essential to every phase of our defense production effort at home, including the ever increasing needs of troop training; that a continuing steel supply is essential to the effectiveness, safety and very existence of the armed forces fighting in Korea and stationed elsewhere overseas as part of our effort in world defense; and that no cessation of steel production can fail to add materially to the risk, from a military point of view, to which we are already subject by reason of the "stretch out" of our armament program and as a result of which we are barely able to meet our defense goals. Secretary Lovett, after disclosing, to the extent permitted by the grave considerations of security which are involved in any information of this type, the large percentage of steel production which goes into current defense requirements, emphasized the almost unbelievable extent to which our entire combat technique depends on the fullest use and availability of industrial strength and the use of vastly improved weapons, by reason of which he stated that "we are holding the line [in Korea] with ammunition and not with the lives of our troops" (R. 30). From all of these factors, Secretary Lovett concluded that any curtailment in the production of steel, even for a short period of time, would im-

peril the safety of our fighting men and that of the nation.

Again, the grave effect of any interruption in steel production on the national safety and defense efforts is sharply emphasized in the affidavit of Mr. Gordon Dean, Chairman of the Atomic Energy Commission (R. 31–33).[4] Mr. Dean, referring to the current major expansion of construction facilities for the production of atomic weapons, points out that success is governed by the completion of the facilities construction program on schedule; that time has already been lost and must be recovered; that the most varied and unusual types of structural steel and stainless steel must be continuously available; that inventories of materials needed for such critical projects as development of A. E. C. construction sites are abnormally low; and that, consequently, any cessation of deliveries of steel will have the critical effect of causing an inability to step up the production of atomic weapons to the rate required to meet goals established by the President.

Mr. Henry H. Fowler, Administrator of the National Production Authority, deposes (R. 34–38) that the products of the iron and steel industry are indispensable in the manufacture of

[4] As indicated above, serious security problems are presented in furnishing any detailed information as to the effect of a cessation of steel production on defense production schedules and needs. This consideration is particularly apposite in the case of the Atomic Energy Commision.

military weapons and equipment and in the production of items required for defense-supporting programs such as those of the Atomic Energy Commission and the construction and expansion of power plants and of steel and aluminum facilities for production of railroad equipment, ships, machine tools and the like. He points out that the effect of a stoppage of steel production would vary according to inventories available to the manufacturers but in any event would quickly diminish the volume of output. Because of inventory shortages there would be an immediate slow-down in the manufacture of certain types of ammunition and with respect to certain essential programs of the Atomic Energy Commission, which is in short supply on certain vital specialty items. The production of anti-friction bearings, mechanical power transmissions and aircraft fasteners would be quickly affected, resulting in the immediate curtailment and early shut-down of the production of aircraft, tanks and other military equipment. The same is true as to the production of air valves required for the production program of the Atomic Energy Commission. With respect to heavy power and electrical equipment, such as engines, turbines, motors, power transformers, the situation is similarly critical; shipment of such equipment would be discontinued within one to three weeks after a production stoppage and Mr. Fowler estimates that "even a one week's stoppage would cause as much as one

month's delay in the production of engines and turbines." This in turn would have serious effects upon the programs of the Atomic Energy Commission, the Navy's mine sweeper program and the power, aluminum and steel expansion programs. The production of electronic equipment used for military purposes also would be immediately and seriously affected, and any loss in this field would be irretrievable.

Secretary of Commerce Sawyer's affidavit (R. 49–59) discloses the critical impact which a major stoppage in steel production would have on the transportation programs of the Maritime Administration, the Civil Aeronautics Administration, and the Bureau of Public Roads. He points out that a ten-day interruption in steel production would result in the loss of 96,000 feet of bridge and 1,500 miles of highway, that a twenty-day interruption would result in the loss of 149,000 feet of bridge and 2,280 miles of highway, and that a thirty-day interruption would result in the loss of 196,000 feet of bridge and 2,950 miles of highway; that the highway construction program, vital in defense plant and training areas, cannot continue production from inventory, and that steel for highways and bridges is ordered for specific use, delivered for specific use, and if it is not produced and delivered the program is delayed. With respect to the effect of a steel shutdown on the shipbuilding program, Secretary Sawyer states that of the 98 ships currently in

varying degrees of construction, there is sufficient steel in the yards to permit completion of only 21 of the ships, and that 39 ships are in such a stage of construction as to be directly dependent on the receipt of steel products during the present quarter. Further, Secretary Sawyer details the critical effect which a stoppage of steel production would have on the production of carrier and noncarrier aircraft. He emphasizes, with respect to production of transport type aircraft that should the production of certain components be delayed, it is anticipated that both the Convair and Douglas production lines would have to be stopped within 60 days; and that one manufacturer of aircraft has indicated that it would be preferable to close down his operations immediately rather than wait for the anticipated unavailability of a number of items to cause him to close.

Mr. Oscar L. Chapman, Secretary of the Interior, points out in considerable detail in his affidavit (R. 39–43) the drastic repercussions of any delay in deliveries of the various types of steel permitted by Defense Production Administration allotment orders to the petroleum, gas, and electric power utility fields. Most of the steel and steel products thus allocated are for maintenance and expansion of facilities for production and transportation, areas of activity which are obviously of the greatest importance not only for industrial use and expansion but for direct military use.

The factors involved in these considerations are elaborated in Mr. Chapman's affidavit. In addition, he sets forth the crucial importance of the continued availability of steel supplies for the maintenance, repair, and operation of coal mines and coke ovens. Failure of steel supplies would result in curtailment of power production necessary for defense and military uses and would also result in a progressively severe decline in the production and availability of coal for all purposes.[5]

3. COURT PROCEEDINGS

Immediately upon the issuance of Executive Order 10340, plaintiffs sought, by court order, to nullify the Presidential action thus taken to prevent the complete cessation of production in the steel industry.[6] On the night of April 8, 1952, applications for temporary restraining orders

[5] Further details of the impact upon our national security of a cessation of steel production are contained in the affidavits of Manly Fleischmann, Administrator of the Defense Production Authority (R. 33–34), Homer C. King, Acting Administrator of the Defense Transportation Administration (R. 46–48), and Jess Larson, General Services Administrator (R. 44–46).

[6] Counsel for plaintiff Republic Steel Company advised the District Court that the plaintiffs produce 70% of the nation's steel (R. 291). In addition, a complaint making similar allegations has been filed by Inland Steel Company in the Northern District of Indiana, Hammond Division. Civil Action No. 1381, filed April 16, 1952. That action has been stayed by agreement pending disposition of the present cases.

were presented ex parte to Judge Bastian of the District Court for the District of Columbia. The Judge declined to take action without some notice to the Government, which notice was given on the morning of April 9. At 11:00 a. m., April 9, a hearing was held before Judge Holtzoff (R. 217–266). At the conclusion of the hearing, the applications for temporary restraining orders were denied (R. 128).

Briefly summarized, the complaints (R. 1, 80, 116, 134, 144, 154, 167) filed by the companies pray for declaratory judgment and injunctive relief, narrate the expiration of the wage agreement between plaintiffs and the union, the unproductive negotiations for a new contract, and the strike call of the steel-workers for April 9, 1952. They then allege the issuance of Executive Order No. 10340 (17 F. R. 3139) authorizing and directing Secretary Sawyer to seize the steel industry, and that Secretary Sawyer, in compliance with this order, has seized the steel industry. Plaintiffs aver that this seizure is illegal for want of any constitutional or statutory authority in the President to issue the Executive Order.

Plaintiffs conclude that the seizure of their plants constitutes an illegal invasion of their property rights, which exposes them to injuries for which monetary damages would afford inadequate compensation. The allegations of irreparable harm vary to some extent but center

around the apprehension that the seizures might interfere with plaintiffs' normal customer relations and destroy their good-will, that Secretary Sawyer might make improper use of plaintiffs' trade secrets, might place incompetent management in the plants which would wreck them physically and financially, and finally, that Secretary Sawyer might put into effect the recommendations of the Wage Stabilization Board as to wage increases or union security.

On April 24 and 25, 1952, hearings were held in the District Court before Judge Pine on plaintiffs' motions for preliminary injunctions seeking to restrain petitioner from taking any action under the authority of Executive Order No. 10340 (R. 217–439). Judge Pine announced his opinion and granted the motions on April 29, 1952 (R. 63–76).[7] Formal orders were signed on April 30, 1952, and applications for stay were denied by Judge Pine (R. 76, 79). Notices of appeal were filed by petitioner on the same day in the Court of Appeals for the District of Colum-

[7] At the hearing, plaintiff United States Steel orally modified its request for an injunction so as to pray only that Secretary Sawyer be restrained from making any changes in the terms and conditions of employment (R. 76). The affidavit of John A. Stephens, principally relied upon to show irreparable injury, was filed at the hearing in connection with this oral motion (R. 99–111). This modified request was denied by Judge Pine (R. 76).

bia Circuit and the appeals were docketed (R. 77, 428). Later that day, the Court of Appeals, *en banc,* issued an order staying the orders of the District Court until 4:30 P. M. Friday, May 2 (two days later) and if petition for certiorari were filed by that time, until this Court acted upon the petition for a writ of certiorari; and, if the petition were denied, until further order of the Court of Appeals (R. 444). On May 1, 1952, that Court, *en banc,* denied applications to modify its stay (R. 446). On May 2, 1952, the Court of Appeals filed an opinion in connection with the action taken by it on April 30 and May 1 (R. 447–449). On May 3, 1952, this Court granted certiorari and ordered a further stay pending disposition by this Court, with the provision that Secretary Sawyer "take no action to change any term or condition of employment while this stay is in effect unless such change is mutually agreed upon by the steel companies and the bargaining representatives of the employees" (R. 457).

4. EVENTS SUBSEQUENT TO SEIZURE

A. CONGRESSIONAL ACTIVITY

As an integral part of the action involved in seizure of plaintiffs' properties, the President, on the morning following the issuance of the Executive Order, dispatched a message to Congress.[8] After reviewing the crisis which faced the

[8] House Doc. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962–3963, April 9, 1952.

Nation on the night of April 8, the President stated that "the idea of Government operation of the steel mills is thoroughly distasteful to me and I want to see it ended as soon as possible" but that, after canvassing the available alternatives, he had concluded that "Government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open." The President suggested various courses of action which Congress might deem desirable and stated that he "would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider." On April 21, 1952, the President sent a further communication to the Senate (98 Cong. Rec. 4192) in which he reiterated these statements. He further stated:

> I also indicated that, if the Congress wished to take action, I would be glad to cooperate in developing any legislative proposals the Congress might wish to consider. That is still my position. I have no wish to prevent action by the Congress. I do ask that the Congress, if it takes action, do so in a manner that measures up to its responsibilities in the light of the critical situation which confronts this country and the whole free world.
>
> I do not believe the Congress can meet its responsibilities simply by following a course of negation. The Congress cannot perform its constitutional functions simply

> by paralyzing the operations of the Government in an emergency. The Congress can, if it wishes, reject the course of action I have followed in this matter. As I indicated in my message of April 9, I ordered Government operation of the mills only because the available alternatives seemed to me to be even worse. The Congress may have a different judgment. If it does, however, the Congress should do more than simply tell me what I should not do. It should pass affirmative legislation to provide a constructive course of action looking toward a solution of this matter which will be in the public interest.

Since April 9, there has been no definite or completed legislative response to the various suggestions made by the President in his message. One legislative proposal, S. 2999, introduced by Senator Morse on April 9, contained a broad and new procedure for seizure in the form of an amendment to the Labor Management Relations Act of 1947. A second bill, S. 3016, was introduced by Senator Morse on April 16, proposing a return of the mills to private owners upon acceptance of the recommendations of the Wage Stabilization Board or, alternatively, authorizing Secretary Sawyer to make those recommendations effective under his supervision. On the same day, a study by the Senate Judiciary Committee of the seizure problem was proposed. S. Res. 306. Hearings have been held before the Senate

Committee on Labor and Public Welfare and before a Special Subcommittee of the Senate Judiciary Committee. There has also been extensive debate in both Houses on an almost daily basis. In addition to these proposals, there has been a flurry of bills and resolutions utilizing various parliamentary devices.[9] Three amendments to specific appropriation bills, designed to prevent use of appropriated funds for acquiring or operating any facility whose seizure is not authorized by act of Congress, were favorably voted on in the Senate and are presently in conference. Sec. 403, H. R. 6854, passed Senate as amended on April 29, 1952, 98 Cong. Rec. 4617; Sec. 707, H. R. 7151, passed Senate as amended on April 29, 1952, 98 Cong. Rec. 4626; Sec. 1305, H. R. 6947, passed Senate as amended on April 22, 1952, 98 Cong. Rec. 4267. On April 22, the day

[9] See H. R. 7449, introduced on April 8, 1952; H. Con. Res. 207, introduced on April 9, 1952; H. Res. 604, introduced on April 22, 1952; H. Res. 605, introduced on April 22, 1952; H. Con. Res. 209, introduced on April 22, 1952; H. Con. Res. 210, introduced on April 22, 1952; H. J. Res. 431, introduced on April 22, 1952; H. Res. 607, introduced on April 23, 1952; H. R. 7572, introduced on April 24, 1952; H. R. 7579, introduced on April 24, 1952; H. Res. 609, introduced on April 24, 1952; H. Res. 610, introduced on April 24, 1952; H. J. Res. 433, introduced on April 24, 1952; H. R. 7622, introduced on April 28, 1952; H. Res. 614, introduced on April 28, 1952; H. R. 7647, introduced on April 30, 1952; H. R. 7697 and 7698, both introduced on May 1, 1952; H. J. Res. 441, introduced on May 1, 1952; H. J. Res. 442, introduced on May 1, 1952; H. Res. 627, introduced on May 1, 1952; S. 3106, introduced on May 5, 1952.

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following Senate action amending the Third Supplemental Appropriation Bill for 1952 in this fashion, an effort to extend the prohibition to cover the use of any funds for expenditure during the fiscal year 1952 to implement any seizure unauthorized by Act of Congress, failed. 98 Cong. Rec. 4258–4261, April 22, 1952.[10]

B. COURSE OF NEGOTIATIONS

Immediately after the seizure of plaintiffs' properties, the President directed the Acting Director of Defense Mobilization, Dr. John R. Steelman, to arrange a meeting of representatives of the companies and the steel workers at the earliest possible date for a renewed attempt to settle the dispute.[11] The next day, the Acting Director of Defense Mobilization met with negotiators for the steel workers and the major steel companies.[12] During these negotiations, the President of the United Steelworkers of America, CIO, reiterated his telegraphic undertaking of the night of April 8 of union cooperation in

[10] In considering this legislative activity, mention might be made of a cautionary provision inserted in the Emergency Powers Interim Continuation Act, Pub. L. 313, 82d Cong., 2d Sess., 66 Stat. 54, April 14, 1952. Section 5 of that statute provides: "Nothing contained herein shall be construed to authorize seizure by the Government, under authority of any Act herein extended, of any privately owned plants or facilities which are not public utilities." In making the present seizure the President did not rely on any of the Acts thus extended.

[11] N. Y. Times, April 9, 1952, p. 1, col. 8.

[12] N. Y. Times, April 10, p. 1, col. 8.

continued production of steel.[13] The National Production Authority subsequently revoked orders freezing and controlling the delivery of steel for consumer goods and for export. 17 Fed. Reg. 3235.

The President indicated again, on April 10, his desire that negotiations continue between the companies and the union.[14] Such negotiations, conducted under the supervision of Dr. Steelman, terminated on April 15 (R. 95). At his request, representatives of both the steel workers and the operators conferred with Secretary Sawyer on April 18, but a basic disagreement persisted on major issues, including the question of price increases for the companies, and Secretary Sawyer abandoned plans for convening a final joint meeting.[15]

After the failure of these negotiations, Secretary Sawyer indicated that he felt that he should, under the instructions of the President, undertake consideration of arranging appropriate terms and conditions of employment, although he stressed that the revelation of his intentions on this matter was not intended to serve as an ultimatum to the parties and that it should not be so interpreted.[16]

[13] N. Y. Times, April 11, p. 15, col. 3.
[14] N. Y. Times, April 11, p. 1, col. 8.
[15] N. Y. Times, April 19, p. 1, col. 8.
[16] N. Y. Times, April 21, p. 1, col. 8, p. 22, col. 3.

A further effort to encourage a settlement of the dispute by the companies and workers was made when the Economic Stabilization Administrator instructed the Director of Price Stabilization to perfect procedures for permitting price increases for the steel companies under the Capehart Amendment, Section 402 (d) (4), Defense Production Act of 1950, as amended, 50 U. S. C. A. App. Section 2102 (d) (4), issuance of which had been delayed at the request of the steel industry (R. 396). Simultaneously, Secretary Sawyer released for publication a letter to the Economic Stabilization Administrator requesting recommendations, for submission to the President, concerning appropriate terms and conditions of employment for the steel workers (R. 395).

Steel production continued at a high level during the seizure.[17] However, immediately following the announcement of the district court's opinion, the union called its men out and the production stoppage, which the President sought to avert, began.[18] During the subsequent short period of uncertainty, the steel companies and union leaders took no action on proposals by the Government that collective bargaining be resumed.[19]

On May 2, after an urgent message from the President, and Judge Pine's order having been stayed for the second time, the union cancelled

[17] N. Y. Times, April 28, p. 28, col. 1.
[18] N. Y. Times, April 30, p. 1, col. 6–7, p. 20, col. 1.
[19] N. Y. Times, May 2, 1952, p. 1, col. 6–7–8.

its strike although several of the large steel companies announced unwillingness to resume production unless assurances were given that no further interruptions in work schedules would occur.[20] These companies subsequently indicated that they were undertaking a full resumption of operations on May 3.[21]

On May 2, the President sought personally to foster agreement between the companies and the workers and announced a conference to be held at the White House beginning on the morning of Saturday, May 3.[22] These conferences continued until the afternoon of Sunday, May 4, when they collapsed.[23] Although no agreement could be concluded, the union announced that it would continue efforts to maintain production and the manufacture of steel appears to be continuing without interruption pending the arguments in this case.[24]

ARGUMENT

INTRODUCTION

SUMMARY OF POSITION

The two issues in this case are (1) whether the district court properly granted injunctive relief in view of the great and urgent public inter-

[20] N. Y. Times, May 3, p. 1, col. 8.
[21] N. Y. Times, May 4, p. 1, col. 7.
[22] N. Y. Times, May 3, p. 1, col. 8.
[23] N. Y. Times, May 5, p. 1, col. 8.
[24] N. Y. Times, May 5, p. 1, col. 8; N. Y. Times, May 6, p. 22, col. 8.

ests which impelled the President's decision to seize the steel mills for the purpose of maintaining uninterrupted steel production; and (2) whether on the facts which the President found in the Executive Order, and which are established by uncontroverted affidavits, the President had power under the Constitution and laws to take possession of the plaintiffs' steel mills in order to avert an imminent nation-wide cessation of steel production.

We contend that the granting of injunctive relief by the district court was in clear violation of the applicable equitable principles. Plaintiffs had an adequate remedy at law by suit for just compensation in the Court of Claims. The formal concession of Government counsel, thrice-repeated, that such a suit may be brought and that no defense of lack of jurisdiction can or will be raised should, as a practical matter, be sufficient. *International Paper Co.* v. *United States,* 282 U. S. 399, 406. But in any event, such a suit could be maintained, either on the ground that where, as here, statutory warrant existed for *a* taking, just compensation will be allowed even though the particular procedures prescribed were not followed, *Hurley* v. *Kincaid,* 285 U. S. 95, or on the ground that wherever there has been an actual physical taking and where the Constitution directs that compensation be paid, the Court of Claims will entertain jurisdiction, at least where

the action was taken under a formal executive regulation.

Moreover, we think it quite doubtful whether the plaintiffs will suffer any damage, while it is certain that vital public interests will be damaged, and the lives, liberties and property of all the people will be put in jeopardy by the issuance of an injunction. Under such circumstances, it is clear that the application for preliminary injunction should have been denied on a balancing of the equities, without reaching the constitutional issues involved. *Yakus* v. *United States,* 321 U. S. 414, 440. And even final relief should be denied in the absence of a "clear showing" that equitable relief is necessary. *Hurley* v. *Kincaid, supra,* 104n. These principles are especially applicable to constitutional cases. Such cases will, if it is at all possible, be disposed of on non-constitutional grounds; a court will "undertake the most important and the most delicate of the Court's functions" only if "necessity compels it" to do so. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 569.

On the constitutional issue we contend that under Article II of the Constitution the President possessed power to seize the steel mills to avoid a cessation of steel production which would gravely endanger the national interests which it is his duty to protect. Specifically, we find such authority in the provisions of Article II, that "the executive Power shall be vested in a President of

the United States" (Section 1); that the President shall swear that he will "faithfully execute the Office" and will to the best of his ability "preserve, protect and defend the Constitution of the United States" (Section 1); that he "shall be Commander-in-Chief of the Army and Navy of the United States" (Section 2); that he shall be the sole organ of the Nation in its external relations (Sections 2 and 3); and that "he shall take Care that the Laws be faithfully executed" (Section 3).[25] In a subsequent part of this brief, we shall show from 150 years of American history that the President may act as he did under the conditions in which he did. We shall show further that no statutory enactment even purports to deprive him of the power so to act.

Underlying both sets of issues, however, are the circumstances in which the President acted. None of the questions here presented can be considered in the abstract. In particular, an understanding of the nature of the emergency to which the President's action was addressed is necessary to consideration of the question whether, upon a balancing of the equities, the enormous damage to vital public interests which might result from the granting of an injunction should lead a court of equity to stay its hand. It is equally necessary to a consideration of the constitutional issues.

[25] There are other provisions in the Constitution, which, although not constituting specific grants of power to the President, confer powers on him by implication. For example, Article IV, Section 4 guarantees every State against domestic violence.

For "while emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 426. Accordingly, we shall at the outset describe the national interests which the President sought to protect and the gravity of the injury to those interests which impelled him to act.

THE NATURE OF THE EMERGENCY

In his Executive Order, the President has made the following factual findings (among others):

> WHEREAS American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and
>
> WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and
>
> WHEREAS steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and
>
> WHEREAS a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the

> United States, upon which our military strength depends; and
>
> * * * * *
>
> WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and
>
> * * * * *

These findings by the President describe a serious emergency. They have not been challenged by the plaintiffs nor contradicted by any findings of the district court, even assuming that they would be open to such challenge. Accordingly, they must be accepted as true.

These findings make it clear that the President has not asserted the power to seize private property out of whim or caprice, or with some vague idea that such an act would promote the general prosperity or well-being of the country. In this case, the President found that seizure of the steel plants was "necessary" to avert a work stoppage in the steel industry with the attendant cessation of steel production which "would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." The seizure of the steel mills for this stated purpose was in discharge of

the President's duty to take care that the laws be faithfully executed—the laws in this case being a comprehensive scheme of statutes and treaties establishing and implementing the national policy to deter and repel aggression. Such seizure was also necessary to the effective discharge of the President's responsibilities as Commander in Chief of the armed forces and as the representative of the nation in foreign affairs.

The Military and Foreign Affairs Crisis.—The absolute necessity for continuous steel production which led to the President's seizure of the steel plants on April 8 arises from the fact that the military security of the United States and other countries is endangered by the aggressions of the Soviet Union and its satellite states.

Within a few years after World War II, the Soviet Union had succeeded in annexing Lithuania, Latvia and Esthonia, and in establishing in Poland, Rumania, Hungary, Bulgaria, and Czechoslovakia regimes which completely subordinated the interests of those countries to the interests of the Soviet Union. Similar threats to the independence of Greece and Turkey were averted only through American military and economic aid extended pursuant to the Greek and Turkish Assistance Act of May 22, 1947 (61 Stat. 103). Also, Soviet attempts to exploit the temporary weakness of the devastated nations of Western Europe were a large factor in the establishment of the European Recovery Program under which Amer-

ican economic aid was used to assist those countries in repairing and expanding their economies (62 Stat. 137). Iran maintained its territorial integrity in the face of Soviet aggression only through the efforts of the United Nations.

In 1949, the United States and most of the nations of western Europe decided that a program of economic rehabilitation was not enough. On April 4, 1949, there was signed the North Atlantic Treaty, under Article 5 of which the United States and the other signatory nations

> * * * agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[26]

[26] The Senate ratified the North Atlantic Treaty in July 1949. The original North Atlantic Treaty of April 4, 1949, 63 Stat. 2241, includes, besides the United States, as parties the folowing: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United Kingdom. The scope of the treaty has been extended to include Greece and Turkey. S. Doc. Executive E, 82nd Congress, 2d session.

Congress has implemented the North Atlantic Treaty with the Mutual Defense Assistance Act of 1949, 63 Stat. 714, in which the Congress declared:

> * * * that the efforts of the United States and other countries to promote peace and security in furtherance of the purposes of the Charter of the United Nations require additional measures of support based upon the principle of continuous and effective self help and mutual aid. * * *

In 1951, this was succeeded by the Mutual Security Act of 1951 (Public Law 165, 82d Cong., 1st Sess.) the stated purpose of which is

> to maintain the security and to promote the foreign policy of the United States by authorizing military, economic, and technical assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world, to develop their resources in the interest of their security and independence and the national interest of the United States and to facilitate the effective participation of those countries in the United Nations system for collective security.

The mutual security program has involved appropriations of approximately $13 billion for the two fiscal years ending June 30, 1952. In fulfillment of the North Atlantic Treaty, the United States has stationed in western Europe, without

regard to the approaching end of the German occupation, the equivalent of six divisions plus certain naval and air units. Joint command arrangements, unprecedented except in time of war, have been made by the United States and its west European allies, with General Eisenhower as the first Commander.

More recently, the United States has entered into defense and security pacts with the Republic of the Philippines, Australia, New Zealand and Japan.[27] These agreements are intended to provide the basis for effective mutual defense in the Pacific area.

The Soviet Union has maintained since World War II ground forces much larger than those presently available to the United States and the countries joined with it in mutual security arrangements. In addition, the Soviet Union has maintained the largest air force in the world. In general, the Soviet Union has consistently devoted a much larger portion of its industrial production to military items than has any other country. In the years immediately following World War II, it was widely believed that the United States' exclusive possession of atomic weapons constituted a powerful deterrent to Soviet aggression. However, in 1949, the Soviet Union produced an atomic explosion.

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[27] Senate Documents Executives B, C and D, 82d Cong., 2d Sess. See also Charter of Organization of American States, Executive A, 81st Cong., 1st Sess.

With the sudden and unprovoked attack of North Korean Communist forces upon the Republic of Korea on June 25, 1950, the United Nations, including the United States, were confronted with naked armed aggression. On June 25, 1950, the United Nations Security Council determined that the North Korean attack "constitutes a breach of the peace."[28] On June 26, the President declared that "In accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace." On June 27, the Security Council recommended "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."[29] On the same day, the President announced that "In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support."[30] On June 30, it was announced that the President "had authorized the United States Air Force to conduct missions on specific military targets in Northern Korea wherever militarily necessary and had ordered a Naval blockade of the entire Korean coast. General MacArthur had been au-

[28] *United States Policy in the Korean Crisis* (1950), Department of State Publication 3922, p. 16.

[29] Ibid., p. 24.

[30] Ibid., p. 18.

thorized to use certain supporting ground units."[31] By its resolution of July 7, 1950, the Security Council recommended the creation of a unified command for the military forces of member states assisting in the defense of the Republic of Korea, and requested the United States to designate a commander.[32]

As a result of these events, and pursuant to the decisions of the Security Council, the United States and other members of the United Nations, under the command of General MacArthur and later General Ridgway, have engaged in nearly two years of military operations to preserve the independence of the Republic of Korea. This task was greatly increased by the large-scale intervention of Chinese Communist forces in November 1950.[33] In addition, the Communist forces in Korea have been and are being steadily supplied by the Soviet Union with such items as military aircraft, tanks, guns and radar. The present situation in Korea is one in which the territorial integrity of the Republic of Korea has been substantially maintained, and there exists an uneasy and limited military truce during which negotiations for an armistice have been carried on without success since July 1951. The total casualties

[31] Ibid., pp. 24–25.

[32] Ibid., p. 66.

[33] On February 1, 1951, United Nations General Assembly branded the Chinese Communist intervention as an aggression. UN doc. A/1771.

in the United Nations forces to date are unofficially estimated to exceed 300,000, of which the American casualties are over 108,000. It is roughly estimated that resistance to Soviet aggression in Korea has cost the United States directly about 10 billion dollars.

As Ambassador Austin stated on April 21, 1951, "[The Korean conflict] has alerted people all over the world to the imminent dangers of Soviet aggression." In the domestic life of the United States, these grave events have evoked measures of control and partial mobilization unprecedented except in time of declared war. On December 16, 1950, one month after the Chinese Communists attacked the United Nations forces, the President proclaimed "the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace."[34] The armed forces of the United States have been substantially increased, necessitating large-scale inductions pursuant to the Selective Service Act of 1948 and the recall of thousands of reservists. Congress has appropriated for our defense program, for

[34] 15 F. R. 9029.

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our armed forces and for ~~military~~ assistance to our allies since the beginning of military operations in Korea in excess of $130 billion. Recognizing the impact of such expenditures upon our economy, Congress in the Defense Production Act of 1950, as amended, provided for price and wage controls, allocation of materials, requisitioning powers and credit controls which are equally without peacetime precedent.

In fulfillment of the North Atlantic Treaty and the other security pacts to which the United States is a party, and the implementing acts of Congress, the United States has made many agreements with its allies which call for American economic and military aid to assist those countries to participate in effective mutual security arrangements to deter or repel aggression.

In brief, a world still suffering from the devastation of World War II is confronted by an aggressive Soviet Union commanding massive armaments. The attack upon Korea has demonstrated the willingness of the Soviet Union and its satellites to employ military force for conquest. The United States and the other free nations of the world have resolved that the only hope of deterring aggression and thereby avoiding subjugation or, at the best, a great war, is to place themselves in a military posture which will make military adventures too dangerous. They have also resolved to repel any aggression

which may be attempted. The United States is therefore carrying on an unprecedented program to rearm itself and to assist other countries to rearm for these purposes. More than ever before, we are the arsenal of the free world. More immediately, we must continue to produce and deliver military supplies to the United Nations forces in Korea who have been fighting Soviet aggression for two years, and to the NATO forces in Europe who must maintain a constant state of readiness against potential aggression.

Steel and defense.—In this context of military necessity, the President found that any interruption in the production of steel would endanger the security of the United States, its armed forces abroad, and its allies. The Nation's critical need for such continuous production is set forth in uncontradicted affidavits filed with the district court. In addition, we shall refer to certain information from reliable official sources. To a considerable extent, considerations of security require that the consequences of a cessation of steel production be described in only general terms.

Steel is the "basic commodity involved in the manufacture of substantially all weapons, munitions, and equipment produced in the United States" (R. 29). The Administrator of the Defense Production Administration states that "The total supply of steel normally available to the United States is substantially less than the esti-

mated requirements of defense and civilian production" (R. 33). The Administrator of the National Production Authority states that "In the month of February 1952, the total tonnage of iron and steel products shipped by the iron and steel industry for all uses was approximately 6,400,000 tons, of which it is estimated that 936,000 tons [or nearly 15%] were shipped for direct Department of Defense and Atomic Energy Commission uses" (R. 35).[35] A more accurate index of the defense needs for steel appears in a breakdown of particular types of steel. Thus, Secretary of Defense Lovett states that, "We are now using, for production of military end items (guns, tanks, planes, ships, ammunition and other military supplies and equipment), the following percentages of our total national steel production:

Carbon Steel	13.5 percent
Alloy Steel	36 6 percent
Stainless Steel	32.4 percent
Super alloy Steel	84 0 percent

(R. 29). To illustrate "the crisis which a steel shut-down would produce", Secretary Lovett stated that "35 percent of national production of one form of steel is going into ammunition for the use of our armed forces and 80 percent of such ammunition is going to Korea" (R. 30). Recognizing that even without a cessation of steel

[35] Preliminary figures for the month of March 1952 indicate that shipments of these products for all uses amounted to approximately 6,950,000 tons, of which it is estimated that 1,044,000 were shipped for direct use of the Department of Defense and the Atomic Energy Commission.

production there are shortages in certain types of steel, Secretary Lovett pointed out that "Another specific example of a critical shortage is in stainless steel. Fifteen percent of all stainless steel produced in the United States is used in the manufacture of airplane engines, including jets. No jet engine can be manufactured without substantial quantities of high-alloy steels" (R. 30). Secretary Lovett further states that "the fire power of an infantry division is 50 percent greater today than it was in World War II. We have substituted, insofar as possible, such fire power for man power. Our combat techniques are designed to employ the industrial strength of the United States by the increased use of matériel so as to preserve and protect to the maximum extent possible the lives of our men." From these facts, Secretary Lovett concludes that "A work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds; if permitted to continue, it would weaken the defense effort in all critical areas and would imperil the safety of our fighting men and that of the Nation" (R. 31).

Shortly after the first atomic explosion in the Soviet Union in 1949, the President and Congress determined upon a tremendous expansion of the atomic weapons program. The Atomic Energy Commission was directed, among other things, to

proceed with work upon the hydrogen or fusion bomb. The Chairman of the Atomic Energy Commission states that "This expansion program includes the construction of major facilities at Savannah River, South Carolina; Paducah, Kentucky; Fernald, Ohio, and other places" (R. 31). The scope of the Commission's expanded activities may be measured by the fact that during the fiscal years 1951 and 1952 Congress has appropriated $3,638,000,000 for the Atomic Energy Commission.

The Chairman of the Atomic Energy Commission further states that (R. 32):

> The requirements of AEC's construction projects include virtually all types and kinds of steel including special forms of structural steel for buildings and substantial quantities of stainless steel for process equipment. These requirements include steel for structures and specially fabricated equipment and also for such items of specialized and standard manufacture as pumps, valves, compressors, heat exchangers, piping, heavy electrical equipment, tanks, and the like.
>
> Inventories of steel and other critical products at the AEC construction projects are generally abnormally low for projects of such magnitude. Consequently, any cessation of deliveries of steel to the sites of AEC construction projects or to the manufacturers of equipment for such projects is

> likely to result in delays in the completion of these projects. * * *
>
> * * * * *
>
> The ultimate effect of delayed completion of production facilities will inevitably be reflected in AEC's inability to step up the production of weapons to the rate required to meet the goals established by the President.

In the construction of AEC facilities, as in the manufacture of certain conventional military weapons, it is often necessary to use special alloys and shapes of steel, thus precluding either stockpiling or the utilization of miscellaneous steel inventories.

The Administrator of the National Production Authority points out that the immediacy of the impact of a cessation of production upon the production of weapons cannot be determined from aggregate steel inventories. The lack of a single alloy or shape of steel may completely stop the deliveries of an arms manufacturer who has material for every other part. This condition would be aggravated by the fact that there are already critical shortages of certain types of steel (R. 35–38).

The uncontradicted affidavits submitted by the Government reveal that a halt in steel production for any substantial period of time would have other far-reaching effects upon the military security of the Nation. Thus, the Congress and

the President have determined that American industrial capacity must be substantially increased to support the requirements of a global conflict—if one is forced upon us. This policy is evidenced in the provisions of Title III of the Defense Production Act for government encouragement of industrial expansion and in the statutory provisions for accelerated tax amortization of the cost of new productive facilities "necessary in the interest of national defense" (64 Stat. 939). The scope of this program may be gauged by the facts that as of February 29, 1952, the Government had guaranteed $1.5 billion in private loans under Title III, while as of April 15 certificates for accelerated tax amortization had been issued for expansion projects totalling $18.4 billion. The Administrator of the National Production Authority states that an interruption of steel production "would seriously impede certain construction programs required to support the mobilization effort including facilities for the production of aluminum, steel, certain essential chemicals, urgently needed metal-working equipment, particularly machine tools, and aircraft, ships, tanks, guns, shells and guided missiles. These construction projects will require a total of approximately 1,000,000 tons of steel for completion. All of these projects have a high degree of priority and any delay in completing

them would set back the production schedules of military products urgently needed in the mobilization effort." (R. 38.) It should be noted that there has been a substantial and urgent need for steel with which to increase steel making capacity, as indicated by the fact that certificates for accelerated tax amortization have been issued with respect to an expansion of steel production facilities to cost approximately $3,200,000,000.

We have pointed out the effect of a cessation of steel production upon the military security of the United States. It would have identical effects upon the other countries which have joined with us to deter or repel Soviet aggression. For example, under the North Atlantic Treaty and the implementing legislation, the United States has entered into commitments with its allies to assist their rearmament programs. This assistance takes several forms—all involving large amounts of steel. Substantial amounts of military equipment have been and will be sent to those countries. During the 23 months ended February 29, 1952, the United States under the mutual aid program, delivered 2,577,200 tons of military equipment.[36] Also, the United States assists these west European countries to produce arms themselves by delivering to them both machine tools and certain types of steel. For exam-

[36] Hearings before the Senate Committee on Foreign Relations on a bill to amend the Mutual Security Act of 1951, 82d Cong., 2d Sess., p. 361.

ple, the United Kingdom has placed orders here for over $100 million of machine tools, most of which are still in production. Any stoppage in the delivery of steel to machine tool makers in the United States would have a heavy impact upon the British jet engine and tank production programs.[37] Similarly, during this past winter the United States agreed to allocate 1,000,000 tons of steel to the United Kingdom during 1952, in recognition of the fact that without such steel imports the United Kingdom would be forced to curtail its own military production.

To summarize the current relationship of steel production to the military and foreign affairs interests of the United States in the words of the President's Executive Order, "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." He acted to insure an uninterrupted flow of arms to United Nations forces who already have been repelling Soviet agression in Korea and who must ever be prepared to deal with an all-out attack. He acted to insure the continuous build-up of American armed strength. He acted to insure the fulfillment of our commitments to assist our allies to

[37] For an example of the value of such tools to the British defense program, see *op. cit.* n. 36, p. 566.

resist aggression. Failure to act as he did might well have meant "too little, too late".

We have shown that uninterrupted production of steel is absolutely essential if the President is to insure the safety and efficiency of American troops in Korea and elsewhere and if he is to fulfill our commitments to our allies. He seized the steel mills to carry out those objectives. It is true that the President and other executive officers might possibly have insured continued production of steel otherwise than by seizing the steel mills. Specifically, if they had granted the substantial increase in maximum ceiling prices for steel which the plaintiffs were interested in securing, the plaintiffs and the union might have reached an agreement that would have prevented a strike. In his Message to the Congress on April 9, 1952, the President stated:

> The only way that I know of, other than Government operation, by which a steel shut-down could have been avoided was to grant the demands of the steel industry for a large price increase. I believed and the officials in charge of our stabilization agencies believed that this would have wrecked our stabilization program. I was unwilling to accept the incalculable damage which might be done to our country by following such a course.
>
> Accordingly, it was my judgment that Government operation of the steel mills

> for a temporary period was the least undesirable of the courses of action which lay open. In the circumstances, I believed it to be, and now believe it to be, my duty and within my powers as President to follow that course of action.

The inflationary effects of huge defense expenditures upon our economy need no elaboration. To minimize and control them, Congress provided in Title IV of the Defense Production Act for price and wage controls and entrusted their administration to the President or his delegate. There is not presented in this case any question as to what price increase for steel, if any, would follow an increase in labor costs in the steel industry. The price standards under the Defense Production Act are not here in issue. Indeed, the administrative and judicial review procedures prescribed by the Act for challenging the validity or application of those price standards have not yet been invoked. All that is involved here is the fact that the President determined that to grant the substantial price increase desired by the plaintiffs would scuttle the Nation's stabilization program. Taking into consideration both his obligation to insure the military security of the United States and its armed forces by maintaining steel production, and his obligation to carry out the national stabilization policy expressed in the Defense Production Act, he determined that he could effectuate both of these basic national policies only by seizing and operating the steel mills.

Given conditions under which a cessation of steel production will endanger immediately the military security of the Nation, its armed forces and its allies, we believe the President's power under the Constitution to avert such danger by seizing and operating the steel mills is not lost merely because production might possibly have been maintained by acquiescing in price increases which in his judgment would endanger the national economy. Here, as in *Hirabayashi* v. *United States,* 320 U. S. 81, 93, such "* * * conditions call for the exercise of judgment and discretion and for the choice of means * * *" by the President in the exercise of his constitutional power and duty to meet national emergency.

I

THE DISTRICT COURT ERRED IN GRANTING A PRELIMINARY INJUNCTION

INTRODUCTORY

Judge Pine, in the district court, rested his decision on a determination that Executive Order 10340 was beyond the constitutional authority of the President. Reversing normal procedure, he held that the issue of constitutional power "should be decided first." (R. 68). Only after deciding that the President had exceeded his constitutional power did he consider whether the plaintiffs had made a showing entitling them to equitable relief

(R. 74–75). And even then, he used his decision of the constitutional issues as a springboard from which to find a basis for equitable intervention,[38] concluding, upon his method of balancing the equities, that any injury to the public resulting from "the contemplated strike, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained power,[39] which would be implicit in a failure to grant the injunction." (R. 75).

In his haste to decide constitutional issues, Judge Pine departed from long-established standards of adjudication by failing to apply the principle that the courts will not pass on constitutional

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[38] Judge Pine stated (R. 74):

> As to the necessity for weighing the respective injuries and balancing the equities, I am not sure that this conventional requirement for the issuance of a preliminary injunction is applicable to a case where the Court comes to a fixed conclusion, as I do, that defendant's acts are illegal. On such premise, why are the plaintiffs to be deprived of their property and required to suffer further irreparable damage until answers to the complaints are filed and the cases are at issue and are reached for hearing on the merits. Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached.

[39] We, of course, do not contend that the President has "unlimited and unrestrained" power. We contend only that in a situation of national emergency the President has authority under the Constitution, and subject to constitutional limitations, to take action of this type necessary to meet the emergency. See *infra*, pp. 91 et seq.

questions where the pending matter can be disposed of on non-constitutional grounds. "If two questions are raised, one of non-constitutional and and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. The same rule should guide the lower court as well as this one." *Alma Motor Co.* v. *Timken Co.,* 329 U. S. 129, 136–137. This rule has particular application in passing upon requests for preliminary injunction. *Mayo* v. *Canning Co.,* 309 U. S. 310. Here the immediately dispositive non-constitutional issues were (1) whether the plaintiffs had an adequate remedy at law, and (2) whether, assuming they did not, they could demonstrate that they would suffer irreparable injury which would outweigh the uncontroverted injury to the public interest from the grant of an injunction.

The judicial policy of refraining from deciding constitutional issues "unless absolutely necessary to a decision of the case," *Burton* v. *United States,* 196 U. S. 283, 295, is a rule derived from "the unique place and character, in our scheme, of judicial review of governmental action for constitutionality". *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 571. The foundations of the policy rest

> in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional

> roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system. [*ibid.*]

The issues here touch, moreover, on one of the most delicate problems of our constitutional system—the basic implications of the doctrine of separation of powers. The President has disclaimed any intention to resist the process of the courts should it issue; he has publicly stated that he will abide by the decision of this Court, whatever that decision may be. N. Y. Times, May 2, 1952, p. 1. Nevertheless, we suggest that the courts should consider the inappropriateness of issuing what is in effect a mandatory injunction to the President.[40] At least, the diffi-

[40] This Court in *Mississippi* v. *Johnson*, 4 Wall, 475, 498, held unanimously that the President cannot "be restained by injunction from carrying into effect an act of Congress alleged to be unconstitutional." Cf. *State ex rel. Burnquist* v. *District Court*, 141 Minn. 1; *Dakota Coal Co.* v. *Fraser*, 283 Fed. 415 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8); *Holzendorf* v. *Hay*, 20 App. D. C. 576, writ of error dismissed, 194 U. S. 373; see also *Trial of Thomas*

culties implicit in issuance of such a decree afford a sound reason for denying the injunction sought on other grounds, if it is possible to do so.

Accordingly, the district court, for considerations of policy "transcending specific procedures," *Rescue Army* v. *Municipal Court, supra,* 571, should have refrained from reaching the constitutional issues if there was any other basis on which it was possible to dispose of the case. Similarly, adherence to well-settled practice dictates that this Court can reach the constitutional issues in this case only if it concludes that the usual equity requirements for issuance of a preliminary injunction have been so clearly met

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Cooper, Wharton's State Trials of the United States, pp. 659, 662. With equal logic it could be argued that the President cannot be enjoined from taking action for which he claims authority in Article II of the Constitution. However, it has been contended, and the district court in this case so held, that Secretary Sawyer can be enjoined from carrying out the President's Executive Order. It is by no means clear that department heads can be enjoined from carrying out the President's express orders, by analogy to the fictitious distinction between suits against the United States and suits against an officer personally by which sovereign immunity from suit is minimized (*Larson* v. *Foreign and Domestic Corporation*, 337 U. S. 682), or by analogy to theories of indispensable parties evolved in the solution of venue problems (compare *Williams* v. *Fanning*, 332 U. S. 490, with *Blackmar* v. *Guerre*, 342 U. S. 512). Such theories cannot cope with the problem which would exist if the President personally performed the duties which he here directed Mr. Sawyer to perform. It would seem, therefore, that the issue is sufficiently uncertain and delicate as to constitute a compelling reason for leaving the plaintiffs to their legal remedy for damages.

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that "necessity compels it" to "undertake the most important and the most delicate of the Court's functions," *id.*, at 569.

We believe the usual equity requirements have not been met here, in two respects: *First,* the plaintiffs have an adequate remedy at law for any injury which they may suffer; and *second,* even if there were no such remedy at law, the plaintiffs have failed to show any such irreparable injury as would counterbalance the injury to the public from granting an injunction. Although we would be desirous of an immediate decision on the constitutional issues, we feel that deference to the settled practice of this Court in constitutional adjudications requires that we discuss first these non-constitutional grounds of decision, either of which, we think, requires reversal of the judgment below.

A. PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW

Under the fundamental rules governing equitable jurisdiction, plaintiffs are entitled to injunctive relief only if they can show either that legal relief is not available to them or that such legal remedy, although available, would be inadequate. See, *e. g., Coffman* v. *Breeze Corporations,* 323 U. S. 316, 323. We believe that plaintiffs' recourse to injunctive relief is barred because they have an effective remedy in the Court of Claims pursuant

to 28 U. S. C. 1491.[41] It has, of course, been settled in a long line of cases, beginning with *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, that where the United States takes property for public use a right to compensation is enforceable in the Court of Claims, either directly under the Constitution or by virtue of an implied contract. 28 U. S. C. 1491 (1), (4).[42]

Plaintiffs' argument is that this remedy is not available to them unless Secretary Sawyer's acts are supported by statutory or constitutional authority; hence, that the preliminary question whether plaintiffs have an adequate remedy at

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[41] Section 1491 provides:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort."

[42] See, *e. g.*, *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445, 465; *Tempel* v. *United States*, 248 U. S. 121; *United States* v. *North American Transp. & Trading Co.*, 253 U. S. 330; *Campbell* v. *United States*, 266 U. S. 368; *Phelps* v. *United States*, 274 U. S. 341; *International Paper Co.* v. *United States*, 282 U. S. 399; *Hurley* v. *Kincaid*, 285 U. S. 95; *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18; *United States* v. *Causby*, 328 U. S. 256; *United States* v. *Dickinson*, 331 U. S. 745; *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799.

law hinges on the very merits of the case. We submit, on the contrary, that plaintiffs have a remedy in the Court of Claims, and that therefore the Court need not reach any of the constitutional questions in order to decide that an injunction may not issue.

In such a practical matter as the granting or withholding of an injunction, the formal concession of government counsel, repeated in three courts, that suit may be brought and that no defense of lack of jurisdiction can or will be raised, should be sufficient. See *Pewee Coal Co.* v. *United States,* 115 C. Cls. 626, affirmed, 341 U. S. 114. But even on the theoretical level, plaintiffs need have no fears. For, however one may formulate the rule that unauthorized takings cannot provide the basis for a Tucker Act suit, the qualification has always been recognized that the Court of Claims does have undoubted cognizance of cases, such as this, where a taking of the claimant's property is authorized by statute, although the particular method of taking actually employed by the government official may be claimed to be illegal. In addition, it may now be the law that the Court of Claims has jurisdiction of suits for just compensation for eminent domain takings without regard to whether a taking was legislatively authorized.

1. Even if we accept at face value the doctrine, asserted by plaintiffs, that the Court of Claims remedy depends strictly upon an authorized tak-

ing, it is clear that statutory warrant does exist for a taking by the President and, therefore, that plaintiffs have an indisputable cause of action in that court. Rather than alleging a total absence of any authority in the President to seize the plants, the companies themselves suggest that there are statutes under which the plants could have been seized, but that, since the procedure provided for in those acts has not been followed, they are now entitled to affirmative relief. It is settled, however, that where a taking has been authorized, the use of another method of seizure and the failure to employ the statutory procedure will neither defeat the remedy in the Court of Claims nor justify the issuance of injunctive relief.

The Youngstown and United States Steel complaints both refer to Section 18 of the Selective Service Act of 1948 (62 Stat. 625, 50 U. S. C. App., Supp. IV, 468) (par. 6, R. 2, and par. 12, R. 83, respectively), authorizing the President to place vital defense orders with a manufacturer and to seize his plant if he refuses or fails to fill the order. The United States Steel complaint (par. 12, R. 83) also refers to Section 201 of the Defense Production Act of 1950 as amended (64 Stat. 799, 65 Stat. 132, 50 U. S. C. A. App. 2081), which authorizes the President, whenever he deems it necessary in the interest of national defense, to acquire personal property by requisition and "real property, including facilities, tempo-

rary use thereof, or other interest therein" by way of condemnation. The statute provides that if the property is to be acquired by condemnation the court shall not require the party in possession to surrender possession, unless a declaration of taking has been filed and the amount estimated to be just compensation has been deposited.[43]

The complaints correctly allege that the Government has not complied with the procedural requirements of either statute, but it is undeniable that the President acted for the same public purpose for which the two Acts envisage that private enterprises might have to be taken. Section 201, for instance, authorizes the President to acquire property whenever he deems it necessary in the interest of national defense. Execu-

[43] This provision is analogous to the one contained in the Declaration of Taking Act (Act of Feb. 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a).

As originally enacted, the Defense Production Act of 1950 (P. L. No. 774, 81st Cong., 2d Sess.) assimilated real to personal property and provided that both should be compulsorily acquired by the process of requisition, *i. e.*, by an administrative taking to be followed by a suit for just compensation brought by the claimant. For reasons of convenience and efficiency, and in order to follow the traditional practice in the condemnation of realty, the Department of Justice proposed an amendment providing that real property be condemned in accordance with the Declaration of Taking Act and the general condemnation statutes. This change was adopted in the Defense Production Act Amendments of 1951 (P. L. No. 96, 82d Cong., 1st Sess.). The amendment was plainly not intended to hamper or obstruct the acquisition of interests in real property. See H. Rept. No. 639, 82d Cong., 1st Sess., pp. 23–24, 36.

tive Order 10340 (R. 6–9) contains findings to the effect that a work stoppage would immediately jeopardize and imperil our national defense and that seizure of the steel industry was necessary in order to assure the continued availability of steel and steel products during the present emergency. Hence, conditions existed which would have warranted use of Section 201 (b) if that procedure had not been much too cumbersome, involved, and time-consuming for the crisis which was at hand.

Thus, the President had undoubted statutory power to seize the plaintiffs' properties for temporary use. Congress had itself authorized *a* taking by the President, even if it had not provided for this kind or method of taking.

Once it is shown that the seizing officer had such general authority to take, the Court of Claims' just compensation jurisdiction is undeniable, whether or not the statutory procedures were followed. The most common instance is furnished by the Tucker Act flooding cases. In each, instead of bringing an ordinary condemnation suit under the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, a statutory authority similar to Section 201, the government officers proceeded with their rivers and harbors works until the owners' lands were flooded and thereby taken. The owners have repeatedly sued and received just compensation in the Court of Claims for the taking. See the cases cited in fn. 42, *supra,* p. 55.

They have not been defeated by any contention that condemnation proceedings should have been followed. On the contrary, the Court held in *Jacobs* v. *United States,* 290 U. S. 13, 16:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.

And the Court only recently reaffirmed the interchangeability of the two proceedings in flooding cases. *United States* v. *Dickinson,* 331 U. S. 745, 747–748. The same interchangeability exists where dry land is taken. See, *e. g., United States* v. *North American Transp. & Trading Co.,* 253 U. S. 330, 333; *Stubbs* v. *United States,* 21 F. Supp. 1007 (M. D. N. C.); *Tilden* v. *United States,* 10 F. Supp. 377 (W. D. La.). In all of these numerous instances, a statutory method of condemnation was provided, and in many, the

authorizing statute provided that the land be acquired by condemnation proceedings; but instead of using that mechanism the officials appropriated the property by direct invasion. In each case, a suit for just compensation under the Tucker Act was entertained.

Further examples of Tucker Act jurisdiction on the basis of informal eminent domain are the cases in which a normal condemnation suit has been instituted and possession taken, but the suit has later been abandoned by the Government or held not to include certain tracts. The dispossessed owners have their remedy in the Court of Claims or in the District Court under the Tucker Act. *State Road Department of Florida* v. *United States,* 166 F. 2d 843 (C. A. 5); *Moody* v. *Wickard,* 136 F. 2d 801, 803–804 (C. A. D. C.), certiorari denied, 320 U. S. 775; cf. *United States* v. *Merchants Transfer & Storage Co.,* 144 F. 2d 324, 327 (C. A. 9). And this Court has emphatically declared that after a taking has been consummated, the right to recover compensation cannot be defeated because of a technical defect in the authority of the official who took the property. See *International Paper Co.* v. *United States,* 282 U. S. 399, 406, *infra,* p. 71.

Applying these principles and directly controlling is *Hurley* v. *Kincaid,* 285 U. S. 95, in which the Court refused to grant an injunction in circumstances apposite here. Kincaid sought to enjoin Secretary of War Hurley from con-

structing certain flood control work on the Mississippi River which would subject Kincaid's property to flooding, unless the Government first acquired an easement on his property by condemnation. The applicable statutes,[44] analogous to Section 201 (b) of the Defense Production Act, provided that before the United States acquired possession it had to file a condemnation petition in court and deposit an amount of money approved by the court as assuring certain and adequate provision for the payment of just compensation. The Government had complied with none of those provisions. Instead, the officers of the Corps of Engineers were about to undertake construction which, Kincaid claimed, would result in the flooding of his land. He sought to stop the work until the officers complied with the applicable condemnation procedure.[45]

The Court held flatly that Kincaid was not entitled to an injunction. It pointed out (at p. 104) that a taking was authorized by the statutes cited above and that the plaintiff, consequently, had a remedy in the Court of Claims.

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[44] The Mississippi River Flood Control Act of May 15, 1928, sec. 4, 45 Stat. 536, and the River and Harbor Act of 1918, sec. 5, 40 Stat. 911.

[45] Kincaid's brief in this Court urged, as the plaintiffs do here, that the statutory procedure for condemnation was exclusive and had to be followed if a taking was to be effected. See Brief for Respondent, No. 457, Oct. Term, 1931, at pp. 59, 72.

The failure to comply with the statutory direction to condemn prior to the taking did not justify the issuance of injunctive relief. Said the Court (at p. 104):

> The compensation which he may obtain in such a proceeding [under the Tucker Act] will be the same as that which might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle him to be paid in advance of the taking [citing authorities].

In short, the test for the grant of injunctive relief is not whether or not the government has complied with the statutory taking procedure,[46] but whether the plaintiff has a remedy in the

[46] An analogous rule applies in the field of damages. The owner of property, which has not been condemned, has no remedy in damages against a government contractor provided he has recourse to the Court of Claims. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18.

Court of Claims. Such a remedy is available whenever *a* taking is authorized by legislation.[47]

2. It may also be the case that, aside from the *Hurley* v. *Kincaid* principle we have just discussed, the Court of Claims would have jurisdiction of a just compensation suit by the plaintiffs even though no statute existed authorizing the President to take property. It is true that it has often been said or assumed that an action against the United States for just compensation presupposes that the officers who invaded the plaintiff's property rights had authority to do so. But the reach and application of this rule in Tucker Act suits have not been crystallized and the tendency of the recent cases, particularly in the Court of Claims, is to disregard the issue of authority in favor of assuming jurisdiction wherever there has been an actual physical taking and where the Constitution directs that compensation be paid.

(a). The two basic Tucker Act decisions which ground the asserted rule are themselves unclear. *Hooe* v. *United States,* 218 U. S. 322, involved an *express* limitation upon the officer's authority (see *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 701, fn. 24),[48] a factor which is usually absent and is certainly not present

[47] Cf. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 697, fn. 18.

[48] Cf. *United States* v. *Lynah,* 188 U. S. 445, 465–6:

> That which the officers did is admitted by the answer

here. The precedential value on this point of *United States* v. *North American Co.*, 253 U. S. 330, is lessened by the circumstance that it rested on "special facts" (cf. *Jacobs* v. *United States*, 290 U. S. 13, 18, and *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497), including the element that North American's claim would have been barred by the statute of limitations if the officer who originally took the property had been authorized to do so.

A number of recent lower court Tucker Act cases seem to make the right to sue for just compensation dependent not upon the taking officer's authority but upon the consideration that where the Government retains the benefit of seized property the owner may seek compensation without showing that the seizure was valid. In *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, 23, certiorari denied, 341 U. S. 948, the Court of Claims stated "that the Government cannot escape liability by pleading that it lacked authority to take what it did in fact take and retain. * * * If Order L–208 resulted in an unauthorized taking, it was a taking of which the

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to have been done by authority of the government, and *although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government.* [Emphasis supplied.]

Government retained the benefit and for which it would therefore be obligated to pay". In *Foster* v. *United States,* 98 F. Supp. 349, 351–2 (C. Cls.), certiorari denied, 342 U. S. 919, the same court strongly intimated that an action for just compensation would lie in every case in which a person's property is kept from him by the United States for its own use. Only the other day, the court declared that in cases where a regulation or statute is unconstitutional as violative of due process, just compensation may still be decreed "if an actual taking [has] been alleged, proved, and loss established * * *." *Idaho Maryland Mines Corp.* v. *United States,* C. Cls. No. 50182, decided May 6, 1952, slip op. p. 10.[49] See also, for cases disregarding or omitting consideration of the taker's authority but nevertheless awarding just compensation, *Forest of Dean Iron Ore Co.* v. *United States,* 106 C. Cls. 250, 265–7; *Niagara Falls Bridge Commission* v. *United States,* 111 C. Cls. 338, 352–3; *Cotton Land Co.* v. *United States,* 109 C. Cls. 810, 830–832; *International Harvester Co.* v. *United States,* 72 C. Cls. 707; *Thayer* v. *United States,* 20 C. Cls. 137.

The lessened stress which appears to be placed on the issue of authority, and the heightened con-

[49] The court also said (slip op., p. 10):

"A regulation which is unconstitutional as violative of due process, because arbitrary, may well result in a taking of the property effected for which just compensation would be due to the extent of the value of the property rights so taken."

cern with providing a Court of Claims remedy for a taking, is also revealed in recent decisions of this Court. *United States* v. *Causby,* 328 U. S. 256, involved the taking of an easement over property adjoining an airfield by frequent flights at low altitude. This Court held the owner of the land entitled to compensation without discussing the authority of the military to make such low flights or to appropriate the easement. This disposition of the case is in marked contrast with the decision in *Portsmouth Co.* v. *United States,* 260 U. S. 327, which involved the analogous situation of artillery fire over private property. There, the Court expressly indicated that the plaintiff could recover only if it established "authority on the part of those who did the acts" (at 330). Again, in *United States* v. *Pewee Coal Co.*, 341 U. S. 114, this issue which, if material, would be of a jurisdictional nature (see *Hooe* v. *United States,* 218 U. S. 322, 336) was not explicitly passed upon by the Court. It is true that in *Pewee* the Government had not defended on the ground that the taking was unauthorized (cf. *Pewee Coal Co.* v. *United States,* 115 C. Cls. 626, 676), but the Government's brief before this Court disclosed that the seizure had not been based on any specific statutory authority,[50] and jurisdictional issues may be noticed on a court's own motion (*United*

[50] See Government's Brief in No. 168, October Term, 1950, pp. 42–44.

States v. *Corrick*, 298 U. S. 435, 440; *United States* v. *Wheelock Bros., Inc.*, 341 U. S. 319).[51]

Another facet of the same concern with providing, rather than denying, a just compensation remedy is shown by *Cities Service Co.* v. *McGrath*, 342 U. S. 330, 335–6 (affirming 189 F. 2d 744, 747 (C. A. 2), and *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479–480 (affirming 156 F. 2d 793, 797 (C. A. 2)), both of which construed the Tucker Act as available to persons from whom property was taken under the Trading with the Enemy Act but whose remedy under that Act was deemed too narrow. See also *Sherr* v. *Anaconda Wire & Cable Co.*, 149 F. 2d 680, 681–2 (if statute cutting off informer's right of action deprived him of "vested right", suit for just compensation was available in the Court of Claims); *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 697, fn. 18 ("Where the action against which specific relief is sought is a taking or holding of the plaintiffs' property, the availability of a suit for compensation against the sovereign [in the Court of Claims] will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment"); *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21–22 (Tucker Act remedy available instead of suit against Government rep-

[51] As we point out below (pp. 140–141), the *Pewee* decision may also be read as holding that a taking like this one is valid and authorized.

resentatives alleged to have taken the plaintiff's property); *Fay* v. *Miller,* 183 F. 2d 986, 989 (C. A. D. C.)

(b). Whatever may be the ultimate general principle distilled from these latter-day developments in the jurisprudence of the Tucker Act, we suggest that in this case the broad doctrine which plaintiffs proclaim should not be applied. Perhaps the most important reason for insisting that an unauthorized taking cannot subject the United States to liability is to prevent executive officials from violating *express* prohibitions imposed by Congress. See *Hooe* v. *United States,* 218 U. S. 322, *supra,* p. 64. A second purpose is, perhaps, to forestall minor officials from seizing property unnecessarily or for personal reasons or through collusion.

Neither of these ends is served by requiring the President's authority in this case to be fully vindicated before suit can be properly maintained under the Tucker Act. Congress has not prohibited the President from doing what he has done here. And it is the President himself, acting in a grave national emergency and for the most public of purposes, who has seized the plaintiffs' plants, not a minor subordinate acting on his own.

28 U. S. C. 1491 (fn. 41, *supra,* p. 55) may be said to recognize this distinction between executive action founded on a formal order or regulation and independent action taken by subordi-

nates. That section gives the Court of Claims jurisdiction over claims "founded upon any regulation of an executive department" [Sec. 1491 (3)], and it does not add that the regulation must be valid or authorized. Here, the Executive Order would be the basis of the plaintiffs' claim, and since it orders a taking and contemplates just compensation, the Court of Claims would appear to have full jurisdiction under 28 U. S. C. 1491 (3), regardless of the constitutional validity of the President's taking.[52]

3. A further word should also be said as to the practical probabilities of plaintiffs' not having a remedy in the Court of Claims. Government counsel have assured them and the courts that, if an injunction is not issued, no objection will be raised to the Court of Claims' jurisdiction on the ground that the taking was invalid. The *Pewee* case shows that this is not an idle promise, but established Government policy. It is certainly not to the plaintiffs' interest to raise the point of validity in the Court of Claims. Their sole fear is that future Government counsel will make such a defense or that present counsel will change their position. But if that should happen, the

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[52] Conversely, the Tort Claims Act (28 U. S. C. 2680 (a)) exempts from the coverage of that statute a claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or reglation, whether or not such statute or regulation be valid * * *."

courts have a ready answer in the pungent words of Mr. Justice Holmes in *International Paper Co.* v. *United States,* 282 U. S. 399, 406:

> The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

(See also *United States* v. *Georgia Marble Co.,* 106 F. 2d 955, 957 (C. A. 5)). We do not believe that either the Court of Claims or this Court will

have greater difficulty with the future "repudiation of responsibility" which plaintiffs say they fear.

4. The legal remedy which plaintiffs have in the Court of Claims is plainly adequate. There is a short answer to the possible argument that damages in the Court of Claims are an inadequate remedy in view of the uniqueness of the interests taken, the difficulties of assessing damages, and the circumstance that some injuries are incapable of monetary compensation. Plaintiffs' remedy in the Court of Claims is the same as under an award in eminent domain proceedings (*Hurley* v. *Kincaid,* 285 U. S. 95, 104; *Jacobs* v. *United States,* 290 U. S. 13, 16). And it is one of the inherent liabilities of private property that it is always subject to the exercise of the paramount right of eminent domain (*United States* v. *Lynah,* 188 U. S. 445, 465), and that the owner is merely entitled to such monetary compensation as will indemnify him fairly and justly. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Seaboard Airline Ry.* v. *United States,* 261 U. S. 299, 306; *Jacobs* v. *United States,* 290 U. S. 13, 16–17.

Such monetary compensation will clearly be adequate in the present case. The asserted damage which plaintiffs principally allege consists in a trespass or taking, an interference with plaintiff's right to bargain collectively with their employees, and a fear that defendant will impose

some or all of the recommendations of the Wage Stabilization Board.[53] These are usual consequences of the type of taking here involved, for which the remedy of a suit for just compensation has been held adequate. For such a taking to accomplish its purpose necessarily means that the United States "has substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining with the operators." *United States* v. *Mine Workers,* 330 U. S. 258, 287. Thus, in *United States* v. *Pewee Coal Co.,* 341 U. S. 114, 118, this Court sustained an award of monetary damages in respect of a wage increase ordered by the Government during the seizure.[54] See also

[53] Other allegations include asserted interference with the right of management, disruption of customer relations, disclosure of trade secrets, damage to plant and facilities by defendant's agents. See Armco complaint, par. 17, R. 148–152; Jones & Laughlin complaint, par. 16, R. 138–139; Youngstown complaint, par. 14, R. 3; Bethlehem complaint, par. 14, R. 120–121; Republic complaint, par. 12, R. 157–158; U. S. Steel complaint, par. 15, R. 84–86; E. J. Lavino complaint, par. 38, R. 176–177. These are wholly speculative, if not imaginary. Paragraphs 4 and 5 of Executive Order 10341, Secretary Sawyer's Order No. 1 and his telegraphic notice of taking (R. 8, 21, 22) make it plain that the seizure involves no interference with management, the ordinary course of business, or the financial functioning of the seized plants.

[54] That any damages which plaintiffs might suffer as a result of changes in wages or working conditions are measurable and compensable in monetary terms is shown by the Stephens affidavit (R. 99–111), which places a monetary value on each of the recommendations. Pars. 12–18, R. 106–108.

Plaintiffs may assert that the "union shop" is in a different

Wheelock Bros., Inc. v. *United States,* 115 C. Cls. 733, 88 F. Supp. 278.

We think it very doubtful that any real injury will occur to plaintiffs. Cf. *Marion & Rye Valley Railway* v. *United States,* 270 U. S. 280. See *infra,* pp. 75–85. But if any should occur, it would clearly be of the type which can be compensated by suit at law under 28 U. S. C. 1491. *United States* v. *Pewee Coal Co., supra.*[55]

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category. It is difficult to see how the question of the union shop, vital as it is to employees, is of legally recognizable concern to the plaintiffs. Thus the Jones & Laughlin complaint states that the company "cannot, with proper regard for its own convictions concerning principles of Government, agree to the recommendation of a 'union shop'" (R. 136). This hardly states a recognizable interest, cognizable either at law or in equity. The companies have no vicarious standing here on behalf of their employees. And the companies are not eleemosynary corporations or educational foundations with a legally recognizable right to support general principles of government or tenets of political philosophy. In any event, the fact that in a statutory seizure the same result could occur, and would, if it occurred, be compensable only in monetary terms, affords a complete answer to their contention.

[55] The district court's bare statement that "The records show that monetary recovery would be inadequate" (R. 75), unsupported by reasoning or reference to any evidence, does not stand in the way of this conclusion. In any event, since the case was heard on pleadings and affidavits, this Court is in as good a position as the district court to determine the adequacy of monetary recovery.

B. PLAINTIFFS HAVE MADE NO SHOWING OF INJURY SUFFICIENT TO COUNTERBALANCE THE INJURY TO THE PUBLIC INTEREST WHICH WOULD FLOW FROM THE GRANTING OF AN INJUNCTION

Apart from the availability of an adequate remedy at law, plaintiffs have failed to establish a threat of such irreparable injury to themselves as could outweigh the evident irreparable injury to the public interest which would flow from the granting of an injunction. Plaintiffs' obligation in this respect is twofold. They must first make a clear showing of irreparable injury and, second, any such injury must be balanced against the injury to the public. These requirements are applicable to the grant of preliminary and permanent injunctions alike. Notwithstanding the fact that the present case comes up on review of a preliminary injunction, we believe that, on the face of their complaints and affidavits, plaintiffs' showing is so deficient that this Court would be warranted in ordering their actions dismissed forthwith. Alternatively, if this Court deems further proceedings in the district court necessary, we submit that no preliminary injunction should issue.

1. *Plaintiffs have made no showing of irreparable injury.*—The burden on plaintiffs is a heavy one. As this Court said, in a case denying injunctive relief against a taking for which a remedy of just compensation was available:

> Even where the remedy at law is less clear and adequate, where large public in-

> terests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury. [*Hurley* v. *Kincaid,* 285 U. S. 95, 104n.]

Plaintiffs have made no such clear showing. Their general allegations as to interference with their power of management, etc., by the seizure are, on the facts alleged and on every reasonable probability, speculative in the extreme. See n. 53, p. 73, *supra.* And compare *Marion & Rye Valley Ry.* v. *United States,* 270 U. S. 280, 282, holding in respect of a similar seizure that "nothing of value was taken from the company".[56] The gravamen of their complaints is that the defendant threatens to impose new wages and conditions of employment. But the assertion that such threatened action exposes them to irreparable injury disregards several highly pertinent considerations.

a. Plaintiffs ignore the fact that the *status quo* which existed at the time the President acted was that the union had called a strike and workers had started to leave the plants. The President's action thus conferred a great benefit on plaintiffs, by averting a strike which would have caused

[56] See also *Pewee Coal Co.* v. *United States,* 115 C. Cls. 626, 671, 678, 88 F. Supp. 426, 427, 430–431.

them enormous damages. Plaintiffs' position apparently is that they may ignore the benefit conferred upon them by the President's action while obtaining relief in respect of any damages assertedly flowing from that action. A comparable position was rejected in *United States* v. *Sponenbarger,* 308 U. S. 256.[57] Undoubtedly, the plaintiffs would like to have it both ways. They would like to have the benefits of a guaranty against strikes without having to pay any price, in terms of increased wages and changes in working conditions, for the achievement of those benefits.[58] But we do not see how, in good conscience, they can do so.

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[57] "The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty." [308 U. S. at 266-267.]

As indicated below (pp. 81 ff.), we do not believe that the proposed imposition of different wages and working conditions would result in recognizable legal injury. Even if it could be said, however, that that injury was recognizable and substantial, the principle of the *Sponenbarger* case would seem to require that any such injury must be measured against the benefit conferred by the governmental action.

[58] This is clearly reflected in the "oral amendment" to United States Steel Corporation's prayer for an injunction, by which it suggested that the seizure be left undisturbed but that the defendant be enjoined from making any change in wages or working conditions. (R. 76, 311, 313.) Such an order would, of course, have left the plaintiffs in an enviable situation under which they would have continued to operate their mills with a minimum of interference from the United States, with an assurance of no strike for the

The plaintiffs' allegations here are of the same sort which were made in *United States* v. *Pewee Coal Co.*, 341 U. S. 114. There, the dissenting judge in the Court of Claims, whose opinion was adopted in this respect by four judges of this Court, concluded, as to a precisely comparable seizure by executive authority followed by an imposition of changed working conditions which allegedly resulted in an increased cost to the company, that:

> The court has not found that the plaintiff [company] could have operated its mine without making the concessions directed by the War Labor Board, nor has it found what the losses to the plaintiff would have been if the Government had not intervened and the strike had continued. I think that the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts. [88 F. Supp. at 431, quoted in 341 U. S. at 122]

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indefinite future, and with no pressure whatever on them to grant any concessions in an attempt to resolve the underlying labor dispute. We suggest that it is not unfair to assume that this is the relief which all of the plaintiffs really desired, and that the other plaintiffs refrained from joining in the oral amendment made by the United States Steel only because they recognized the impossibility of contending in equity for such a one-sided result.

Mr. Justice Reed, as we read his opinion, failed to go along with this conclusion only because he felt that the finding of the majority of the Court of Claims "that a certain sum was expended without legal or business necessity so to do," 341 U. S. at 121, could not be attacked, the Government having failed to bring up the entire record. And the other four judges in that case rested their approval of the award of damages in large part on the finding that the plant had operated at a loss during the period of Government possession; whereas here, for reasons which we shall develop, there is no reasonable possibility of operation at a loss.

b. Plaintiffs' asserted injuries from the granting of a wage increase and other changes in conditions of employment are grossly overstated. They ignore, for example, the fact that some increase in wages and change in working conditions was almost inevitable. This was the first occasion since 1947 for thorough review and revision of the collective bargaining agreement. (p. 7, n. 3, *supra*). Moreover, the fact that the Wage Stabilization Board had recommended substantial changes, which it described as in the nature of a "catch-up", designed to equate the position of steel workers with workers in comparable industries, made it practically certain that the union would never enter into an agreement calling for no change. Indeed, the steel companies had indicated their willingness to agree to a "pack-

age" deal of more than 20¢ per hour, an offer which included all of the Board's recommendations intended to be presently effective. (Testimony of John A. Stephens before Senate Committee on Labor and Public Welfare, April 22, 1952, stenographic transcript, volume 3, p. 274; R. 361).[59]

c. Finally, plaintiffs ignore the effect of any price increase which might be allowed. That such

[59] Stephens, a vice-president of U. S. Steel, signed the principal affidavit submitted by U. S. Steel in support of its application for a preliminary injunction (R. 99). Stephens' affidavit, the most detailed and specific submitted by any of the plaintiffs, substantially overstated their damages in several other respects. Thus, it assumes that Mr. Sawyer would order adoption of the Wage Stabilization Board's recommendations in full, although there is no present indication of any such proposal, and it argues (pars. 19–20) that the company's total costs would increase by twice the amount of any rise in employment costs, despite the absence of any showing—other than a process of reasoning *post* (or even *prior*) *hoc ergo propter hoc*—that there is any causal relationship between an increase in the wages a steel company pays and the cost of other things it must buy (see Statement of Ellis Arnall, Director of Price Stabilization, before Senate Committee on Labor and Public Welfare, April 16, 1952, Sen. Doc. No. 118, 82d Cong., 2d Sess., p. 6).

As for the asserted damage alleged to follow from possible imposition of the union shop, see fn. 54, *supra*, p. 73. In this connection, the actual position taken by the Board on the union security issue should be noted. The Board recommended that the parties determine which of a variety of forms would be adopted. Under a system such as the Rand formula, union security would simply eliminate the "free ride" now enjoyed by nonunion employees. Report and Recommendations of the Wage Stabilization Board, March 20, 1952, pp. 16 ff.

a price increase would compensate, in part or in whole, for any wage increase was clearly recognized in the complaints of United States Steel Co. (par. 15 (c), R. 85) and Armco Steel Co. (Par. 17 (c), R. 149). Both of these complaints, after referring to the threatened wage increases, allege, in identical language:

> These products are subject to price regulations imposed by the United States and the governmental agency regulating such prices has failed and refuses to permit increases in the prices of such products so as to enable plaintiff to attempt to recoup such increased costs.

Indeed, the steel companies have made it clear that they might not object to the proposed wage increases, if price increases, deemed by them adequate to compensate for the wage increases, were also granted. (Panel Report in Steel Wage Case, March 13, 1952, p. 2; Statement on Steel by Ellis Arnall, Senate Committee on Labor and Public Welfare, S. Doc. 118, 82d Cong., 2d Sess., *passim.*)

We do not mean to suggest that substantial price increases will or should be granted.[60] But the fact that plaintiffs have thus tied together the issues of wage increases and price increases indicates, we believe, that their real complaint is with the denial of a price increase.

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[60] An increase under the Capehart amendment (estimated at $3 per ton) has been definitely offered. Statement of Ellis Arnall, *supra*, p. 2. Such an increase would, of course, materially diminish any damages suffered through an increase in labor costs.

What plaintiffs are claiming, accordingly, is a right to profits greater than those permitted by the present price stabilization program. Section 402 (b) (2) of the Defense Production Act requires that price ceilings be "generally fair and equitable." To carry out this direction, the Office of Price Stabilization, with the approval of the Economic Stabilization Administrator, has adopted the "Industry Earnings Standard."[61] That standard requires OPS to raise prices for industry if and when its return on investment, before taxes, falls below 85 per cent of the level enjoyed in the best three of the four years 1946 through 1949.[62] In the event that, as a result of any wage increase that might be directed, profits for the industry should fall below this figure, the plaintiffs would have ample opportunity to apply to the Office of Price Stabilization for an appropriate price increase. The decision of the Office of Price Stabilization would be entered in accordance with the requirements of due process, and

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[61] Statement of Ellis Arnall, *supra*, p. 80. See Press Release, OPS, dated February 19, 1952, "Re: Application of OPS Industry Earnings Standard", particularly Price Operations Memorandum No. 25, Subject: "Industry Earnings Standard".

[62] The steel industry cannot complain of the use of this level; the years 1947–1949 were the most profitable which the steel industry has experienced since World War I. See Statement on Steel by Ellis Arnall, Director of Price Stabilization, before the Senate Committee on Labor and Public Welfare, April 16, 1952, Senate Document 118, 82d Cong., 2d Sess., p. 3.

would be subject to appropriate judicial review.[63] On its face, therefore, plaintiffs' contention that they will be subjected to increased costs which cannot otherwise be compensated comes to a contention that plaintiffs have a constitutionally protected and judicially recognizable right to profits greater than those permitted under the Defense Production Act. This contention cannot be sustained. The constitutional validity of a system of price control during a time of emergency is no longer subject to doubt. *Yakus* v. *United States,* 321 U. S. 414. Nor do we think it can be questioned that the basing of ceiling prices on a standard related to past profits is permissible. See, e. g., *Gillespie-Rogers-Pyatt Co.* v. *Bowles,* 144 F. 2d 361 (E. C. A.); *315 West 97th Street Realty Co., Inc.* v. *Bowles,* 156 F. 2d 982, 985 (E. C. A.), certiorari denied, 329 U. S. 801; *Curtiss Candy Co.* v. *Clark,* 165 F. 2d 791, 795 (E. C. A.), certiorari denied, 334 U. S. 820. See

[63] Steel prices are now being maintained under a voluntary agreement, entered into under Section 402 (a) and 708 of the Defense Production Act, and no maximum price regulation covering steel has been issued. However, the companies are free at any time to withdraw from that voluntary agreement and to set their own prices, thus impelling OPS to issue a price regulation. Accordingly, if OPS refused a request by the companies for a price increase, they would be able to obtain administrative and judicial review (in the Emergency Court of Appeals) by withdrawing from the voluntary agreement and protesting and appealing the price regulation or order which would undoubtedly follow. See fn. 64, *infra*, p. 84.

also Cavers, et al., *Problems in Price Control: Pricing Standards,* Office of Temporary Controls, Office of Price Administration (Historical Reports on War Administration: Office of Price Administration, General Publication No. 7) (1947), c. 2, "Industry Earnings Standard," pp. 27–89; Nathanson, *Problems in Price Control: Legal Phases,* Office of Temporary Controls, Office of Price Administration (Historical Reports on War Administration: Office of Price Administration, General Publication No. 11) (1947), pp. 5 ff.[64] Since this is so, we do not perceive how an imposition of additional labor costs whose effect, if any, on plaintiffs' profits is merely to reduce them to the maximum permissible level, can be said to work the kind of irreparable injury which would warrant a court of equity in interposing its hand to enjoin action taken by the President to meet a grave national emergency.

We do not mean to suggest that this Court need pass on the present controversy between the plaintiffs and the Office of Price Stabilization. But the fact that plaintiffs would have been willing to agree to wage increases such as those which they now complain are threatened to be

[64] In any event, plaintiffs have an adequate procedure by which any attack on that method of fixing prices could be made. Sections 407 and 408 of the Defense Production Act; *Yakus* v. *United States*, 321 U. S. 414. See fn. 63, *supra*, p. 83.

imposed on them, provided only a substantial price increase were allowed, certainly sheds light on their claim that imposition of those terms would result in enormous and irreparable injury. Just as, in the event of a taking, compensation for any amount in excess of the established lawful ceiling price cannot be allowed save in exceptional circumstances, *United States* v. *Commodities Trading Corp.,* 339 U. S. 121, so we think that in the present situation a threatened loss of profits, which leaves those profits at or above the level at which plaintiffs' ceiling prices are certainly "generally fair and equitable to sellers and buyers of such material or service and to sellers and buyers of related or competitive materials and services," (Defense Production Act, Sec. 402 (b) (2)), can hardly be said to result in such irreparable injury as would justify the issuance of an injunction nullifying the President's act. Cf. *Lichter* v. *United States,* 334 U. S. 742. And to the extent that plaintiffs' ceiling prices may, as a result of increased costs, become less than "generally fair and equitable", they have an adequate remedy by application to the Office of Price Stabilization for a price increase. See *supra,* pp. 82–84.

2. *Any injury to plaintiffs is more than counterbalanced by the injury to the public from the granting of an injunction.*—Assuming, however, that plaintiffs' showing, by itself, is sufficient to establish irreparable injury to them, that show-

ing must be balanced against the showing of injury to the public from the granting of an injunction. The rule is well settled that "an injunction is not a remedy which issues as of course," *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334, 337–338. Particularly where great public interests are involved, it is established that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 552.

In accordance with these principles, we think it clear that the district judge erred in granting a preliminary injunction here. As this Court has said in *Yakus* v. *United States,* 321 U. S. 414, 440, the award of an interlocutory injunction even in private cases "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." See opinion of the Court of Appeals below, 448–449. See also *Tennessee Valley Authority* v. *Tennessee Electric Power Co.,* 90 F. 2d 885 (C. A. 6), certiorari denied, 301 U. S. 710; *Eighth Regional War Labor Board* v. *Humble Oil Co.,* 145 F. 2d 462, 464–465 (C. A. 5), certiorari denied, 325 U. S. 883; *Communist Party of United States* v. *McGrath,* 96 F. Supp. 47 (D. D. C.).

The injury to the public interest from any return to the *status quo* which existed on the night

of April 8, 1952, would be enormous and irreparable, affecting our national safety, our discharge of international commitments, and the lives of our soldiers. See pp. 9–15, 28–49, *supra*. Unlike the allegations of petitioners' affidavits, many of which we are prepared to controvert, the showing of damage to the public interest from any stoppage of production is not, and cannot be, controverted.[65] The district judge erroneously rejected that showing. He doubted whether he should balance the equities at all (R. 74). Moreover, in attempting to do so, he assumed, contrary

[65] In this connection, we wish to point out that many of plaintiffs' affidavits were not served on counsel for defendant until the hearing on preliminary injunction. Thus, the Stephens affidavit and others submitted by the U. S. Steel Company were filed April 24, 1952 (R. 96, 99), the day of the hearing on preliminary injunction. Excerpts were read at the hearing (294–299) but defendant's counsel did not receive copies until the lunch recess.

On the other hand, defendant's affidavits were actually served in two of the cases, Republic, No. 1539, and Youngstown, No. 1550, on April 15 and in fact, counsel for all the plaintiffs also obtained copies at or about that time, although in some of the other cases they were not formally served until shortly before the hearing.

In the event this case should be remanded for final hearing, we, of course, reserve the right to put plaintiffs to their proof, and to offer contrary proof, on all issues relating to the injury assertedly anticipated by them. We, accordingly, would not agree that "nothing that could be submitted at * * * trial on the facts" (R. 74) could alter this case. We feel that the complaints can properly be dismissed now on any of the grounds here urged. But if this Court is not willing to order them dismissed, then the preliminary injunction should be vacated and the case remanded for trial.