It should be April 8th.

[fol. 1239] "—advising that you have appointed me as operating manager on behalf of the United States of the properties of the United States Steel referred to in your telegram. Although under protest I shall act in that capacity. I must advise you that the United States Steel Company has been advised by counsel and believes that neither you nor the President of the United States has any authority under the Constitution or the laws to take possession of any of its property. On behalf of that company and myself I hereby protest against the seizure as unconstitutional and unlawful, and inform you that neither the company nor myself is acquiescing in this seizure in any respect whatever, and we intend promptly to vindicate our rights in court."

It is signed Benjamin F. Fairless.

Now on April 11th, two days later, the Secretary of Commerce issued a notice entitled "The Organization of the Steel Industry".

The Court: What was the date of Judge Holztoff's decision?

Mr. Kiendl: April 9th. Wednesday, April 9th, 1952.

This notice issued by the Secretary of Commerce was to be effective April 11, 1952. It is referred to fairly fully [fol. 1240] in one of the affidavits of the United States Steel Company that is before your Honor, the affidavit of Mr. Stephens. I am reading from a copy of it that I have and not from the affidavit.

In that circular the Secretary of Commerce advises of the establishment of an internal organization under this order for the seizure and operation of the steel mills.

It provides, among other things, for a Controller to establish systems of financial reporting and analyses; a Controller who shall see that the affected companies maintain such records and make such reports as those systems and those analyses require.

It set up a Production Division to review and analyze reports from the operating managers to supply information relative to the materials and conditions of employment,

and to furnish the Secretary with data necessary for him to report to the President on the actions he is taking, and the results of these actions.

It set up a Compliance Division; a division that was authorized and directed to audit compliance with all orders and regulations issued by the Secretary; to make such investigations and inspections as are necessary; and to formulate and recommend such corrective enforcement measures as are necessary.

[fol. 1241] Finally it set up a Solicitor of the Department of Commerce as the chief legal officer for steel industry operations; to furnish legal advice and to provide necessary public orders and regulations.

After that announcement on April 12th, the Secretary publicly announced—and this is somewhere in the moving papers, and for the minute I can't put my finger on it, your Honor, but I hope you will take my word for what I am saying in this and every other respect. It is contained somewhere in the application before you. The defendant made an announcement there that he would take no action on any change in the terms and conditions of employment while negotiations, collective bargaining negotiations, were going on, under the aegis of Mr. Steelman, that nothing would be done while negotiations were pending until they were terminated.

Three days later, negotiations had been terminated, and on Friday, April 18th, there was an announcement, public announcement, by the Secretary of Commerce that on Monday or Tuesday the following week he would undertake to consider terms of employment in the steel industry.

That is all embodied in Mr. Stephens' affidavit.

That was Friday.

On Sunday, April 20th, the Secretary of Commerce went on television, and in the course of his remarks on the Meet [fol. 1242] the Press program, he is not only reported to have said, but the record shows actually, that he said the things that I am about to read to your Honor. We have the phonographic recording of what transpired at that, and I doubt if there is even the remotest possibility of the Government contending that it is inaccurate.

This question was addressed to him by one of the members of the press:

> "Are you saying then that there is a chance that you may not grant any increase at all, Mr. Sawyer?"

And he answered:

> "No; I am not saying that. On the contrary there will certainly be some wage increases granted."

And the next question was:

> "There will be some wage increases granted?"

And he answered:

> "There will be; yes."

And then the question:

> "But you haven't yet decided how much?"

And he answered:

> "That's right."

Now, we say the mere recital of that chronological outline is distinctive and strongly persuasive of the fact that action, immediate, imminent, irremediable, and irreparable, is about to be taken by the Secretary of Commerce to [fol. 1243] change the wages and other terms and conditions of employment in the steel industry. It affects this particular company, whose property has been seized to the tune of hundreds of millions of dollars; whose properties are scattered in six or seven states of the United States; and which now employs over 200,000 employees.

Now the effect of that action we think is vitally important for the consideration of this Court of equity in ascertaining whether or not this illegal and unconstitutional action on the part of the Secretary of Commerce must cease so far as these terms of employment are concerned.

I come to what I consider to be one of the most important documents in this case, the affidavit prepared and executed by Mr. John A. Stephens, the Vice President of United States Steel Company in charge of its industrial relations.

I do not think that there is real likelihood that any of the allegations in this Stephens affidavit will be or can be seriously controverted by the attorneys for the Government.

Among other things, Mr. Stephens alleges——

The Court (Interposing): Where would I find that?

Mr. Kiendl: It is in the file.

The Court: Mr. Kiendl, apparently there are a great [fol. 1244] many affidavits and many of them have not gotten into the file that is before me.

The Clerk tells me that they have volumes of material out there and I confess at this point that I do not have the affidavit before me and the Clerk has not been able to find it.

Mr. Kiendl: I do not know how I can help him, your Honor.

The Court: I want to make sure when I take this case that I take what is filed and not something else.

Mr. Kiendl: Of course.

May I suggest that when I read from an affidavit that I will call your Honor's attention to the exact page of the affidavit where the material I read is to be found, as far as I can.

The Court: May I take a copy and mark it up?

Mr. Kiendl: Certainly, I am sure that would be helpful.

May I proceed?

The Court: Yes.

Mr. Kiendl: He discusses the effect that this contemplated action of the Secretary of Commerce will have upon collective bargaining and what collective bargaining means, and, if your Honor please, I am referring to Pages 6 and 7 of the Stephens affidavit where he says:

> "I have represented plaintiff and its predecessors in negotiations with the Union since 1942. I have never made an offer to settle any single issue except on con- [fol. 1245] dition that all the issues under negotiation be resolved."

And, on the next page, Page 7 of the Stephens affidavit, beginning with the fifth line, he says:

> "The process of collective bargaining is the process of the settling of all issues as a 'package'. This is a

principle of collective bargaining that cannot be violated."

And we ask counsel for the Government to state whether he disagrees with the *ascertain* of that principle of that affidavit.

The affidavit goes on:

"The placing into effect by defendant of increased wages and other benefits demanded by the Union would deprive plaintiff permanently of the use of concessions in these matters as a means of settling other issues in dispute."

Now, on the question of incalculable damages that this plaintiff will sustain if any action is taken comparable to the recommendation of the Wage Stabilization Board in its report, I have summarized Mr. Stephens statements in the affidavit from Pages 10 to 14 of the affidavit and it shows—and I do not think this can be seriously denied in any essential fact—that the recommendation for the increase in wages is a matter to be seriously weighed and considered by the [fol. 1246] Court.

Paragraph 12 of the Stephens affidavit says that:

"The Wage Stabilization Board recommended increased wage rates of 12½ cents an hour as of January 1, 1952, 2½ cents per hour as of July 1, 1952, and a further 2½ cents per hour as of January 1, 1953. Such increases in wage rates would result in still greater increases in direct employment costs as a result of the componding effects of other factors. The annual cost to plaintiff of increases directed by defendant and the resulting compounding effect of four of these factors, namely, overtime premium, vacation costs, payroll taxes and pensions for plaintiff's production and maintenance employees alone would total $54,900,000 in 1952 and at rates effective January 1, 1953, $69,800,000 in 1953. Comparable increases in employment costs for plaintiff's other employees would increase the total annual cost of the increased wage rates put into effect by defendant to $79,700,000 in 1952, and at rates effective January 1, 1953, $101,400,000 in 1953."

That is down toward the end of the paragraph, about six or seven lines from the bottom of Para-
[fol. 1247] graph 12.

If the Wage Stabilization Board recommended that three-week paid vacations be granted to employees of fifteen years' standing instead of the present requirement of twenty-five years' employment for such vacation as to be made effective that would run into some $3,000,000 and over.

If the Wage Stabilization Board's recommendation that employees be granted six paid holidays per year and that employees who work on such holidays be paid double time for time worked, it will cost this plaintiff, according to Mr. Stephens' affidavit, as set forth in Paragraph 14, over $12,000,000 in 1952, and $13,000,000 in 1953.

If the Wage Stabilization Board's recommendation that the plaintiff increased its shift differential of 4 cents for the second shift to 6 cents per hour and the differential of 6 cents for the third shift to 9 cents per hour is granted, such increased shift differentials, according to Paragraph No. 15 of Mr. Stephens' affidavit, would cost the plaintiff nearly $5,000,000 annually for production and maintenance employees, or $5,700,000 including other employees.

Now, your Honor, Paragraph No. 16, of the Stephens affidavit shows that if the recommendation of the Wage Stabilization Board is carried out, this plaintiff would pay, effective January 1, 1953, time-and-one-quarter for work performed on Sundays. Sunday work is now compensated at
[fol. 1248] the same rate as is work for other days of the week and this increase would increase plaintiff's employment costs annually some $13,000,000, beginning January 1, 1953, and, including Plaintiff's other employees, the annual cost of this benefit would total practically $15,000,000, or to be more nearly exact, $14,900,000.

For the southern operation differential, reducing it from 10 cents per hour to 5 cents per hour, would cost this plaintiff over $2,600,000; that is shown in Paragraph 17 of the Stephens affidavit.

Now, in Paragraph 18, Mr. Stephens summarizes the items shown in Paragraphs 12 to 17 and shows that these items would cost some $100,400,000 in 1952, and $141,000,000 in 1953—that is at the bottom of Page 11 of the affidavit.

It is shown in that same pargraph, Paragraph No. 18, that the added employment costs which the defendant threatens to impose on the plaintiff would average 29.8 cents per employee hour.

Now, he goes on to point out that that is not all. This $100,000,000 for one year and $140,000,000 for the next year, is not all by any means, because the plaintiff, of course, has to buy products and services and the cost of those products and services run about the same as does its employee cost, that is, the cost of the products and services go up as is shown in the affidavit or when wages are in-
[fol. 1249] creased in the steel industry they have always been similarly increased in other industries whose products the steel industry must buy, with the result that plaintiff's costs of products and services have, as I say, advanced about the same dollar amount. The cost of the products and supplies closely parallel the cost of wages and employment costs and costs of purchased products and services together represent approximately 80 per cent of all costs of plaintiff's operations, and, if Mr. Stephens' allegations are correct—and they cannot be denied—the cost of the wage increase is double and, instead of being $100,000,000 for 1952 would be $200,000,000 for 1952 and, in 1953, would be $280,000,000 instead of $140,000,000.

Now, Mr. Stephens, at Page 14 of his affidavit, makes the unequivocal statement that the plaintiff will be unable to procure a price increase based on increased wages, and he points out in Paragraph 21 of his affidavit, that Mr. Ellis Arnall, the director of Price Stabilization, testified before the Senate Labor and Public Welfare Committee, and asserted, or reasserted, his position that even if the wage increases recommended by the Wage Stabilization Board were put into effect he would not approve a price increase for steel products based upon the increased wages and other additional costs resulting from granting the benefits in issue.

[fol. 1250] If Mr. Arnall has not been correctly reported in his testimony, we would like to hear Government counsel tell us so right now.

In his conclusion Mr. Stephens states as a practical and realistic matter that once a wage increase is granted to a

Union of this size, once such increased benefits are granted to plaintiff's employees, they cannot be taken away; and that there is, in fact, no possibility of ever taking away that wage increase. You will find that averment at Pages 15 and 16 of the affidavit.

Mr. Stephens concludes his affidavit with the statement, the last clause in the final paragraph of the affidavit, but one, that:

> "During the past 15 years there has not been a single general reduction in the wage scale of plaintiff's employees or in fringe benefits."

I think no one can question the accuracy of that statement.

That affidavit of Mr. Stephens is one affidavit that the plaintiff has submitted in this case.

There is another affidavit, an affidavit by Mr. Lewis M. Parsons, the Vice President of United States Steel Company.

Without reading Mr. Parsons' affidavit or referring to it in detail, I would like to say to your Honor that he points out very clearly and persuasively that the increase in terms [fol. 1251] and conditions of employment divest his company of the absolute freedom of direction on the part of its management, a freedom of direction which is essential to the operation of the company with the greatest possible effectiveness, and he states in his affidavit that that freedom of management will be very substantially and unquestionably impaired.

Mr. Parsons states in his affidavit that the program of the company for property improvement is now very extensive, and will run into many millions of dollars.

Mr. Parsons also states that the program for capital expenditure will be interfered with and will be impossible to carry that program out.

Mr. Parsons points out in his affidavit, in a manner which is not just general but is convincing, that the pecuniary loss to his company in this situation is immeasurable.

Now, we would like to point out to your Honor that this seizure is not only clearly unconstitutional and illegal but it flies squarely in the face of the provisions of the Labor Management Relations Act of 1947.

This situation was thought unanticipated, however. Congress considered it at great length and Congress adopted the Labor Management Relations Act of 1947, and your Honor, although you are familiar I have no doubt with the [fol. 1252] provisions of the Act will be somewhat astounded when I read the language enacted because of the close parallel that it bears to the question here involved.

I have before me the United States Code Annotated, Section 176, and I am reading that paragraph:

> "Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, . . ."

which is exactly the situation the Government dsescribes in the affidavit it submits in support of this motion,

> ". . . he . . ."

that is the President,

> ". . . may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations."

[fol. 1253] And then, Section 178 of that same statute:

> "Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out——"

Mark that, that is the court:

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

It then goes on, in Section 179, your Honor, to provide for this eighty-day breathing spell and says:

> [fol. 1254] "(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to this dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public."

Then, continues the Act,

> "The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter."

Now, that statutory provision giving that specific authority to the President to meet a situation which the Government says now arises was ignored and flouted completely

in what was done here, and this action was taken by the President, by the Secretary of Commerce, despite the fact [fol. 1255] that in the very extended debate on that bill a resolution was introduced in Congress providing for an amendment of the bill in order to give the President precisely the power to seize industrial plants, and that amendment that would have given the President that power which he now seeks to exercise, was overwhelmingly voted down.

So there can be no doubt that the Labor Management Relations Act never intended, nor did it contemplate or authorize the steps that have been taken in this seizure of these steel mills.

Now, your Honor, it may be suggested that this is a suit against the President of the United States——

The Court (interposing): Before you get to that point may I ask one question?

Mr. Kiendl: And, therefore, the court has no jurisdiction.

Yes, your Honor—I will be glad to answer any question.

The Court: You have argued that the Taft-Hartley Act anticipated this situation and that its provisions are applicable to this situation and that the Taft-Hartley Act was ignored; that a constitutional remedy as well as a statutory remedy was provided by the Congress, and you have referred me to the eighty-day breathing spell.

[fol. 1256] Mr. Kiendl: Yes.

The Court: The eighty-day breathing spell to take care of the emergency—that is what it was for?

Mr. Kiendl: Nothing more.

At the end of the eighty-day breathing spell, the injunctive order comes to an end and all that follows thereafter would be the reporting by the President to the Congress as to what had transpired if Congress, if it saw fit, the opportunity to legislate in connection with the controversy.

The Court: So, there is no statutory provision after the expiration of the eighty-day period as you see it?

Mr. Kiendl: I think that is literally correct.

Now, on the question of whether this is a suit against the President and the Court has jurisdiction to grant the requested injunction:

Our point VII of our brief points out or refers to, a number of cases.

We refer to two cases in the Supreme Court, one, particularly, that was decided in the year 1949 and is reported in 330 U. S. 682, the case of Larson vs. Domestic and Foreign Commerce Corporation.

The Court: In what branch of your brief is that?

Mr. Kiendl: That is in our Part VII, and the first reference to the Larson case is on Page 2 of Part VII.

[fol. 1257] The Larson case is the first case cited. There the Supreme Court said this:

> ". . . the action of an officer of the Sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if not within the officer's statutory power, or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."

Then, in the case of Land vs. Dollar, also reported in 330 U. S. at Page 731, the Court said:

> "But public officers may become tort-feasors by exceeding the limits of their authority, and where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law, or in equity, he is not relegated to the Court of Claims to recover a money judgment."

On that same page of our brief we refer to the case of Ickes vs. Fox, at the bottom of the page, reported in 300 U. S. 82, (1937). We refer to that case following our statement that the principles which are followed in determining whether a suit will lie against a Federal officer are necessarily those which govern the problem of indispensable [fol. 1258] parties.

In the Ickes case the Supreme Court had for consideration the question whether the Secretary of the Interior could be enjoined from enforcing an order issued under the Reclamation Act of 1902. The Court asserted that if the United States was an indispensable party-defendant, the suit must fail, regardless of its merits, but held that the United States was not an indispensable party in a suit to

enjoin enforcement by a Government official of an order which would illegally deprive the plaintiff of vested property rights. The Court granted relief on the recognized rule set forth in the case of Philadelphia Company vs. Simpson, 223 U. S. 605, at 619, reported in 1912.

The next case is the Williams case, the case of Williams vs. Fanning, 332 U. S. 490, a case reported in 1947. This was a suit to enjoin a local postmaster from carrying out the postal fraud order of the Postmaster General and the Supreme Court there reaffirmed the rule that:

> "The superior officer is an indispensable party if the decree granting the relief sought will require him to take action either by exercising directly the power lodged in him or by having a subordinate exercise it for him."

[fol. 1259] In language peculiarly pertinent to the present situation the Court stated that equitable relief could be granted against the subordinate without joining his superior in situations where:

> ". . . the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the Court."

Counsel for the Government point out in their memorandum and rely on exhibits with particular reference to the case of Marbury vs. Madison reported in 1 Cranch. 137 (U. S. 1803). What we point out in answer to that, on Page 5 of Part VII of our brief, or commencing at the bottom of Page 4, that the quotation from Marbury vs. Madison is similarly directed towards the discretion of the President in the exercise of the specific political powers with which he is invested by the Constitution. It has no bearing on the power of the Federal Courts to restrain an Executive officer whose actions are completely beyond the constitutional powers of the Executive. We quote on page 5 of Part VII of our brief from the Marbury case where the Court observed:

> "Is it to be contended that the heads of departments are not amenable to the laws of their country? What-

> ever the practice on particular occasions may be, the theory of this principle will certainly never be main-
> [fol. 1260] tained."

Now, your Honor, we have contended—and we think it important to persuade your judicial mind that there is a very serious basis for our contention—that this seizure is entirely unlawful and is wholly unconstitutional.

So far as we are aware, and so far as our research is concerned, the doctrine of unlimited power in the Executive has never been recognized or accepted in this country anywhere. If it were recognized and accepted in this country, then the unlimited, definite, all embracing power on which the Government is so nebulously relying would put us in a position where we in this country would be on the high road over which some executive at some time would go and would go on and on to despotism, dictatorship and tryanny.

Indeed, there is a limit on the powers on even the Executive of this nation that must be found within the four corners of the Constitution of the United States, and that Constitution of the United States provides explicitly for the powers of both Congress and the President of the United States.

I should like, for the purpose of this record, to briefly call your Honor's attention to some of the most important:

[fol. 1261] Article I, Section 8, of the Constitution, describes the powers of Congress, and we think that these are particularly interesting and significant respecting the argument which we are making:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;"

That is the first part of Section 8, of Article I of the Constitution.

Then, further down in Section 8 of Article I we find that the Congress shall have the power:

> "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
> To establish an uniform rule of naturalization, . . ."

et cetera;

> "To declare war, * * *
> To raise and support armies, * * *
> To provide and maintain a navy;
> To make rules for the government and regulations of the land and naval forces;"

and:

> "To make all laws which shall be necessary and [fol. 1262] proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

By contrast, the Executive is given these powers by the Constitution in Article II, Section 1:

> "The executive power shall be vested in a President of the United States of America . . ."

Then, Article II, Section 2:

> "The President shall be commander in chief of the army and navy of the United States, . . ."

and, may I point out, not at all facetiously, that that language "shall be commander in chief of the army and navy of the United States" is just that: Commander in chief of the Army and Navy of the United States, and not "Commander in chief of the economic resources of this country".

Section 3 of Article II of the Constitution states the executive and other duties of the President and says:

> ". . . he shall take care that the laws be faithfully executed, . . ."

And it is from those express powers that I have read, and those alone, from which the Government would derive this power that the President has attempted to exercise in this situation.

[fol. 1263] Now, we say that that interpretation of the Constitutional provisions runs counter to its express language and runs counter to the express intent of the found-

ers of this republic and it runs counter to English history and runs counter to what was contemplated in the Magna Carta.

In the Magna Carta it is provided, your Honor, that:

> "No free man shall be taken or imprisoned, or disseised . . ."

except on lawful judgment of his peers or by the law of the land.

That is an enactment preventing public officers from taking property from citizens without the lawful judgment of his peers.

Now, I skip over four centuries to the famous *case of Ship Money* (the King vs. John Hampden). That case came on before the Court on three grounds of common law, and before a great many judges before its conclusion and it is significant that the lawyers for the King, for the Crown, in that case presented a defense almost identical to the argument presented here in his defense the Attorney General and his associates. They relied there on the claim of "National emergency", "common defense", and "inherent powers of the Commander-in-chief", as I shall proceed to try to point out to your Honor.

In Point IV of our brief, your Honor, you will find a [fol. 1264] rather extensive discussion of that case. There we recite the facts:

There had been proclamations made reciting that although England was then at peace with the world there were wars raging on the continent of Europe, that the seas were unsafe, and that England was in danger of losing control of the sea and of invasion, and the King in that emergency situation took it upon himself to require the various counties forthwith to provide ships for the common defense of Great Britain.

The case came on before a number of judges, as I said, and the King, the Crown won, but the judges were subservient to the King and the Crown, for reasons that were clear, prevailed.

In the argument of the case the Attorney General there rested on the inherent powers of the King as Commander in Chief, and argued even that in time of emergency Magna

Carta and statutes must give way to that inherent power possessed by the King, by the Crown itself.

A great majority of the judges accepted the King's views.

Mr. Justice Crawley—I mention him now and I will again, said then:

> "It doth appear by this record, that the whole king-[fol. 1265] dom is in danger both by sea and land, of ruin and destruction, dishonor and oppression, and that the danger is present, imminent and instant, and greater than the king can without the aid of his subjects, well resist. Whether must the King resort to Parliaments? No. We see the danger is instant and admits of no delay."

Within three years Mr. Justice Crawley who wrote that opinion and a number of other judges in favor of the Crown, were impeached and removed from office for having —and I read the language:

> ". . . traitorously and wickedly endeavored to subvert the fundamental laws and established government of the realm of England and instead thereof to introduce an arbitrary and tyrannical government against law,"

and the judgment in that very case was cancelled as being against the laws of the realm, and the King as the eventual sequence of that and other actions lost his head—that was Charles I.

Not long after, James II, came in——

The Court: Do you think this argument is serving a useful purpose?

Mr. Kiendl: Your Honor, I would not be making this argument unless I thought it did serve a useful purpose and unless I thought that that purpose was one definitely [fol. 1266] tending to show your Honor that the constitutional power here concerned and asserted is absolutely non-existent, and I cite what happened under the reign of Charles I, your Honor, and point out that the Constitution was enacted with knowledge of what transpired in England, and, in spite of that, we are faced with the same

attempt now to make operative that which was then condemned.

Let me point out that in the *case of the Seven Bishops* what transpired.

I will jump many centuries in a hurry:

In 1688 when King James II had claimed the power to dispense with the laws, seven bishops had the courage to file a petition asking him to change his position and they were first indicted, and the case came on before the famous jurist, Mr. Justice Powell, and he declared that the claimed prerogative:

> ". . . amounts to an abrogation and utter repeal of all the laws . . ."

and that:

> "If this be once allowed of, there will be no need of Parliament; all the legislature will be in the King, which is a thing worth considering."

Now, a decision under the Constitution, in the year 1804, [fol. 1267] which we think is particularly apt and appears to show the illegality of this action, is the case of Little vs. Barreme, reported in 2 Cranch 170 (U.S. 1804).

In the Little vs. Barreme case there was an act of Congress which authorized, during the existence of an undeclared war with France, the seizure of vessels going into French ports. The President issued an order directing the seizure of vessels going into and coming from a French port. Such vessels were seized. The owner sued for damages and restoration, and, in the United States Supreme Court, the Chief Justice held the action of the President was unauthorized, and the vessel was restored to its rightful owner and the captain was held liable in money damages.

Now, the Government may attempt to justify this seizure under some construction of the power of the Executive as Commander in Chief of the Army and Navy. I do not think that they stress that too strenuously; they shy away from the argument, but if it be made and pressed, we point out in Point IV of our brief some of the cases that hold that the exercise of this power of the Commander in Chief

is only possible where there is an imminent emergency and a danger so pressing that the slightest delay will prove disastrous. I will not burden the Court with further argument on that but refer you, particularly, to Section IV of our brief.

[fol. 1268] We submit that the minimum that the plaintiff is entitled to is a preliminary injunction against this threatened change in working conditions, terms of employment, and so forth.

We point out in our brief a very significant case decided in this very court by your colleague Judge Schweinhaut, Publicker Industries, Inc. vs. Anderson, 68 Fed. Supplement 532 which was decided September 22, 1946.

There, in the Publicker Industries, Inc. case an action was brought by the plaintiff to enjoin the Secretary of Agriculture for using the historical basis for granting allocations on grain, and held that he had disobeyed the Congressional mandate against allocations, and so forth. It was held that the suit was not one against the United States and he denied the motion to dismiss and issued a preliminary injunction restraining the *the* defendant Secretary of Agriculture from using that basis for making allocations.

Also, in 279 U.S., at Page 813, is to be found the case of Ohio Oil Company vs. Conway. This is particularly apt in considering the matter that we have here, and you will find reference to it with a quotation starting at the bottom of Page 7 of Section 6 of our brief:

> "Where the questions presented by an application [fol. 1269] for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted."

I say here, parenthetically, that the questions are grave and certainly the damage that will occur will be irreparable.

The situation in the Ohio Oil Company case is exactly the situation here.

Now, I want to go back to this question of the balance of convenience argument which was argued before Judge Holtzoff, and he decided this case rather forceably, and we treat this question of the balance of convenience at Page 8 of Section 6 of our brief, in a manner which we say supports the issuance of a preliminary injunction.

The only argument that the defendant could make against the issuance of an injunction pendente lite, restricted to the prevention of a change in the terms and conditions of employment imposed by the defendant, would be that the production of steel would be interrupted by a strike called by the Union, because of its refusal to permit the employees [fol. 1270] to work unless the employment conditions are changed. This amounts to an assertion that an injunction should not issue because the Union will strike against it. But, if they do, they violate the law of the land; their acts would be unlawful, and they are not permitted to strike against the Government as we all well know.

Here, all the decisions are clear on the proposition that the employees of this plaintiff are the employees of the Government, and that is succinctly stated in United States vs. United Mine Workers, 330 U. S., at Page 204.

The Court: Are you not guilty of enunciating a non sequitur there?

Mr. Kiendl: Probably I am guilty of many.

The Court: If I should grant a preliminary injunction, the position of Mr. Sawyer would cease to exist in respect the steel industry.

Mr. Kiendl: Not with what we are asking.

The Court: I thought you were asking for an injunction enjoining Mr. Sawyer from continuing in possession and control of your property.

Mr. Kiendl: Our point is clear on that.

I state unreservedly now that what we are trying to accomplish by this motion is to obtain a temporary injunction restraining the Secretary of Commerce from changing the terms and conditions of employment.

[fol. 1271] The Court: Your moving papers in the United States Steel Company case, Civil Action No. 1625-52 are predicated on the fact that you are moving the Court for an order granting a preliminary injunction against the de-

fendant Sawyer until the further order of the Court upon the grounds stated in your bill and in accordance with the prayer in the complaint.

Mr. Kiendl: Yes; and the prayer in the complaint is all-inclusive, your Honor, but we submit, under accepted practice, that we are asking here only for one branch of that general relief and the only branch we are asking your Honor to issue a temporary injunction on is that branch dealing with the wages and terms of employment.

The Court: All you ask us, then, is the preservation of the status quo?

Mr. Kiendl: Exactly.

The Court: Is that what the others are asking?

(There was a response by several made contemporaneously in the affirmative.)

Mr. Kiendl: Of course, that is what the others are asking.

The Court: Your moving papers ask for everything.

Mr. Kiendl: I know that our moving papers ask for anything and everything, and in stating what I have stated we are not waiving our rights in any way, shape or manner. [fol. 1272] But all that we are asking presently is that you prevent the irreparable damage that flows and will flow from the change in the terms of employment and which will flow by the additional wages—those are the benefits we are asking at this time. The granting of that will not stop the operation of the mills.

The Court: Well, the reason I thought that you were guilty of stating a non sequitur was because I thought that you were asking for a preliminary injunction restraining the defendant from continuing in possession. If that were done the employees would not be employees of the United States, and your cases in that respect would not be in point.

Mr. Kiendl: I had hoped that I had made my reservation clear: We are asking to have the status quo continue until we have a full trial on the merits—and the sooner that can be had and the case decided the happier we will all be.

We are asking your Honor to issue a preliminary injunction immediately restraining this defendant from changing any of the terms and conditions of employment so far as the employees of the United States Steel Company are concerned.

The Court: Well, the representatives of the other defendants arose and said: Yes; that was all that they are [fol. 1273] asking.

Mr. Bromley: That is not all that Bethlehem Steel is asking for, your Honor: We have filed a motion for a preliminary injunction and our position is "the whole hog."

The Court: If I should hold that the defendant acted without authority of law, as I understand the law, I should grant a preliminary injunction unless, in weighing convenience and balancing the equities, I find it would not be equitable to do so.

All right, gentlemen, the Court will recess for a few moments.

(Thereupon at 11:25 o'clock a.m. recess was taken following which this occurred:)

[fol. 1274] Mr. Kiendl: If Your Honor please——

The Court: Wait just a minute.

You have an announcement to make before you go on your next point?

Mr. Kiendl: No; Your Honor, I have no announcement to make.

The Court: Before you go on to your next point, I want to ask you to state clearly and succinctly what you are asking for, because the moving papers are broad enough to ask for everything that you pray for in your complaint.

Then I want to have the other plaintiffs stand up and be counted and identified if they agree with that, so the record will be clear on that point.

Mr. Kiendl: I would like to have it clear, Your Honor. I am sorry I didn't make it clear before.

We are asking Your Honor to issue a preliminary injunction immediately restraining this defendant from changing any of the terms and conditions of employment so far as the employees of United States Steel Company are concerned.

The Court: Will the other plaintiffs rise and state whether that is all they are asking for?

Mr. Bromley: May it please Your Honor, that is not all Bethlehem is asking for. We have filed a motion for preliminary injunction asking that the seizure be enjoined. [fol. 1275] We thought the prayer was broad enough to

include as alternative relief, if Your Honor did not desire to go so far, the precise relief against any change.

So our position is the whole hog. If not that, an injunction against any change in our rates of pay or terms of the conditions of employment.

The Court: Well, if I should hold that the defendant acted without authority of law, as I understand the law I should grant a preliminary injunction, unless in weighing convenience and balancing the equity, that would be inequitable.

Mr. Bromley: That is right; sir.

The Court: Perhaps the law is, I am not sure, that if I find that he acted without warrant of law, I shouldn't weigh the equity.

I am not sure about that.

Mr. Bromley: I think that is the law.

The Court: But I can't understand Mr. Kiendl's position when he asks me to find the act illegal, and yet he wants to continue the illegality. That is the reason I was astonished when he told me that that was all you were asking, because it seems inconsistent to me.

Mr. Kiendl: That is all we are asking for at this time; I am trying to make it clear that we are not waiving the right to a full hearing of the whole thing.

[fol. 1276] I feel the mills must be restored to their rightful property owners.

Mr. Bromley: May I say, Your Honor, because I feel compelled to do so, that does not involve any non-sequitur to which Your Honor averted because if you do, and Taft-Hartley immediately springs into action, there is no danger of interruption of steel production because the Taft-Hartley can still be availed of immediately by the President of the United States.

The Court: If I do what?

Mr. Bromley: If you order our properties returned to us.

The Court: All right.

Mr. Bromley: All right.

The Court: The non sequitur is the one which I alluded to with reference to the argument about the nature of employment.

Mr. Bromley: I understand that. I thought Your Honor was suggesting that if you ordered the return of the prop-

erties the strike would immediately follow, and the Government would be helpless. That is not so.

The Court: How about the other plaintiffs?

Mr. Day: Republic takes the same position as was just stated.

Mr. Warner: Speaking for Jones & Laughlin Corpora-
[fol. 1277] tion, I would agree with Mr. Bromley's position for Bethlehem.

Mr. Wilson: If Your Honor please, speaking for Youngstown I too agree with Mr. Bromley.

I think that this explanation might be made at this point: On the application for temporary injunction, I hoped that we might raise a sufficiently serious doubt in Your Honor's mind about the legality of the seizure so that Your Honor would then pass to the question of irreparable injury and to the question of balance of equity; thus give us the immediate relief which is exemplified and portrayed in the late affidavits which have been filed only this morning and served yesterday.

But of course if in the course of the arguments today or before they are concluded we may have time of Your Honor to consider the ultimate legal question, we certainly want that opportunity to convince you that the action of the President is illegal; the action of the defendant is illegal; and that——

The Court: If you should convince me of that, you wouldn't want me to perpetuate the illegality, would you?

Mr. Wilson: I never look a gift horse in the face, Your Honor.

The Court: I am not speaking facetiously.

Mr. Wilson: I am not either.

As I say, of course we want that relief.

[fol. 1278] The Court: I think it is an inconsistent position you are taking.

Mr. Wilson: For us not to want the ultimate relief?

The Court: Yes; I think because unless you ask for it you admit the legality.

Mr. Wilson: We ask for it and of course we argue the act is illegal, but whether a Judge on an application for temporary restraining order will give the time and have the opportunity to give the time to resolve the ultimate question is a matter which occurred to me.

Naturally if all we can do today in the time that is allowed us is to raise a reasonable and serious doubt in Your Honor's mind about the legality of the situation, then we are entitled to the lesser relief, to the temporary relief, as Your Honor calls it, maintaining the status quo.

But of course if Your Honor is going to have the patience to listen to the ultimate legal question, we are ready to argue it.

The Court: I have the patience.

Mr. Peacock: Speaking on behalf of E. J. Lavino & Company, we press for the ultimate relief. That is, we want our properties restored to us.

The Court: Who hasn't spoken?

Mr. Tuttle: I haven't, Your Honor. On behalf of the [fol. 1279] Armco Corporation and Sheffield Steel Corporation, the immediate relief we are asking for here is to prevent commitments which will be beyond the power to recall and will change the situation in such wise we can have no remedy.

As part of the argument on which we base that application of that immediate relief we are contending that the seizure that has been made is illegal, and we believe that that is part of the situation which produces the lack of power.

But whether we are right or wrong in that, and we think we are very right, we would still contend that the immediate relief that we are asking for should be granted because, even assuming the power under any circumstances to have some seizure we contend that our monies and our rights cannot be committed in such wise that we can have no remedy.

The Court: Who hasn't spoken?

(No response.)

The Court: Is that all that are before me?

Mr. Bane: It is, Your Honor.

The Court: Mr. Kiendl, all you want is the preservation of the status quo?

Mr. Kiendl: At this time that is all we are asking Your Honor to do.

[fol. 1280] The Court: That includes wages, working conditions, union shop, and increase in price of steel?

Mr. Kiendl: Increase of price of steel. It is a question of

wages and materials, of employment, terms and conditions of employment.

The Court: What?

Mr. Kiendl: It is a question only of the terms and conditions of employment.

The Court: Louder. Your voice dropped when I asked you about the price of steel.

Mr. Kiendl: I know I did, Your Honor. I hope Your Honor doesn't draw any legal conclusion from that lowering of my voice.

The Court: Well, I didn't understand you.

You feel that the status quo should be maintained in respect to the price of steel as well as all these others?

Mr. Kiendl: I think so. If we are going to maintain the status quo we must do it both ways.

I don't want you to have any apprehension that we are not interested in getting our property back. We are. But all we are averting to do this morning is that at least there is a very serious doubt about the seizure, sufficient to warrant your court now presently issuing this temporary injunction that we ask for.

The Court: And if you should prevail, you would submit [fol. 1281] an injunction which would preserve the status quo with reference to wages, working conditions, union shops and price of steel?

Mr. Kiendl: Yes, Your Honor.

The Court: And would not take advantage of any benefits under the Capehart amendment?

Mr. Kiendl: Certainly not, Your Honor.

The Court: I see.

Mr. Kiendl: Now, Your Honor, I was discussing this question of the balance of convenience, requiring the granting of the type of injunctive relief we are asking here.

The Court: Is the Government opposed to that, what he asks for?

Mr. Baldridge: Yes, Your Honor.

The Court: All right. You are opposed to maintaining the status quo?

Mr. Baldridge: Our position is, Your Honor, that Mr. Sawyer has the job of running the steel plants as long as they are in Government possession.

The Court: Well, then, the answer is "No."

Mr. Baldridge: That is right.

The Court: All right.

I thought if you were in agreement we might terminate this hearing so far as Mr. Kiendl was concerned.

[fol. 1282] Mr. Kiendl: Your Honor, I was discussing the problem as to whether or not the present employees in this industry, and particularly in our mills, were governmental employeees or whether they were employees of the United States Steel Company. I draw Your Honor's attention to the United Mine Workers case.

Here is what the Supreme Court had to say on that subject:

> "Defendants contend, however, that workers in the mines seized by the Government are not employees of the Federal Government; that in operating the mines thus seized the Government is not engaged in a sovereign function; and that, consequently, the situation in that case does not fall within the area which we have indicated as lying outside the scope of the Norris-LaGuardia Act. It is clear, however, that the workers in the mines seized by the Government under the authority of the War Labor Disputes Act, stand in an entirely different relationship with the Federal Government with respect to their employment from that which existed before the seizure was effected. That Congress intended such to be the case is apparent both from the terms of the statute and from the legislative [fol. 1283] deliberations. Section 3 of the War Labor Disputes Act calls for the seizure of any plant when the President finds the operation is threatened by a strike.
>
> "Congress intended that by virtue of government seizure a mine should become, for purposes of production and operation, a government facility in as complete a sense as if the government had full title and ownership."

And in the very recent case of U. S. v. Brotherhood of Locomotive Firemen in the Northern District of Ohio, Judge Freed on this very subject had this to say:

> [fol. 1284] The Brotherhood has cited that the seizure was a mere token or sham seizure and that the

railroad workers therefore were not employees of the United States Government, and he observed the unions are inviting this Court to distinguish or disagree with the holding of the Supreme Court in the United Mine Workers case.

And the injunction there was issued.

One other statute and I am through with that subject. The Labor-Management Relations Act of 1947, toward the end of it in Section 188, states specifically: "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly-owned Government corporations to participate in any strike."

Consequently we contend that the threat of work stoppage, the threat of a strike, would be entirely illegal and would not enter into this picture. The balance of equities of the kind of stay, the kind of temporary injunction, that we are asking for, the balance of those equities clearly outweigh in favor of the plaintiff.

Now, may I devote just a few minutes to the consideration of the Government memorandum? It is an extensive document. They start with the proposition at page 7, if it appears the same in this brief as it was in the Youngstown brief. They contend the controlling principle is the bal-[fol. 1285] ance of relative interests of the parties. Then they proceed to demolish that entirely by stating a few paragraphs later on that it is almost impossible to envisage a showing of the private interest which would prevail. And in the footnote they say that it would adversely affect the public interest and equitable relief will be denied.

Consequently they say that the balance of relative interest in every case where the Government asserts an adverse public interest, there can be no such thing as a preliminary injunction. They say our fears are all imaginary, in page 13 of the brief. That the Executive Order provides that there shall be no interference with management in the ordinary course of business and the financial operation of the seized plants; that the management shall continue their functions; that the managerial powers and beneficial interests in them have remained unchanged.

We say that they don't remain unchanged, for the rea-

sons we have already assigned in great detail in our chronological outline and in the affidavit of Mr. Stephens.

They treat the compulsory unionization of our shops very cavalierly at page 15 of their brief. They say in that connection:

> "Plaintiffs' position with respect to the union shop is (a) that it is unnecessary since the union is firmly [fol. 1286] established in the steel industry and (b) that it is undemocratic to force an employee to join a union against his will."

Hence they draw the conclusion that:

> "It appears that the question of the union shop, vital as it may be to the worker who does not wish to join a union, is of little concern to the plaintiffs."

Contrast this, if Your Honor please, to that argument in the brief with the affidavit of Mr. Stephens in which he asserts unreservedly about a union shop and I now read from page 6 of his affidavit:

> "Such action—" that is threatened action to do certain things—"Such action would also leave unresolved the demand of the Union for a Union Shop Provision. Such a provision would affect thousands of present employees who are not members of the Union, and such new employes as do not choose to join the Union, would impair the efficiency of plaintiff's entire operation, and would defeat plaintiff's traditional insistence upon freedom for its employees to choose whether or not to become Union members."

That is all washed aside with a wave of a hand that says that compulsory union shop problem is of no concern to [fol. 1287] this plaintiff.

Now they take quite some space in their brief to advance two other contentions that I would like to refer to very briefly. One is that under the Executive construction the powers that they claim in here in the Executive have been demonstrated by history. Most of the incidents that they cite concern steps taken during actual war. They point to one during the administration of President Theodore

Roosevelt, and then they insist that that shows in his memoirs or his writings he considered the power to be exactly what the Government is claiming the power is today.

But in this book, Corwin, The President: Office and Powers, a textbook that the Government refers to and cites as authority, at least four times in their brief, Professor Corwin makes this statement about President Theodore Roosevelt's views:

> "One fact 'T. R.' omits to mention, and that is that the Attorney General Knox advised him that his 'intended step' would be illegal and unconstitutional. For some reason the opnion is still buried among similar arcana of the Department of Justice."

Now they point to some of the acts taken by a later President, President Franklin D. Roosevelt, and there were [fol. 1288] some acts he took before Pearl Harbor that might be pointed to as indicating that they thought he had the power to do these things.

The answer to that is, as we see it, that if his acts were illegal, the fact that he took them doesn't make any precedent for a subsequent executive to do similar illegal acts. And those things that they cite in their brief were never tested in court, as this one is being tested here.

Now, so far as the legislative construction is concerned, they point out the numerous incidents of statements made in debates in Congress which Senators and Representatives made indicating that some of those legislators had the same idea about this indefinite and nubulous inherent power that the Government now presses on the Court.

The answer to that we think is extremely simple. We refer Your Honor to the Congressional Record that has been made since April 8th of 1952. There you will find a contemporaneous expression of the views of legislators on the subject of the power of the President and the power of the Secretary of Commerce to do what was done in this case.

Now, if the defendant's contention prevails before this Court and our application is here denied, we submit that inevitably and necessarily we come to a situation where [fol. 1289] it might be said that this is a Government

of men and not a Government of law; a situation where an Executive by his own fire can become a dictator and a tyrant; where there is every indication of the possibility of a despotic use of power, and the permanent loss of individual liberty and freedom.

In conclusion, I would like to read to Your Honor very briefly from the writing of President Madison and from the Lichter case these statements.

In the writings of President James Madison, he said with respect to the inherent powers theory, the one we are discussing:

> "pregnant with inferences and consequences against which no ramparts in the Constitution could defend the public liberty or scarcely the forms of republican government * * * No citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogatives."

And in 1948 the Supreme Court in the Lichter case, 334 U. S., said this:

> "In peace or in war it is essential that the Constitution be scrupulously obeyed, and particularly the respective branches of the Government keep within [fol. 1290] the powers assigned to each by the Constitution."

We think if your Honor believes we have demonstrated and made a showing, that the relief that we are seeking in our motion we are entitled to, and we ask your Honor to issue an order accordingly.

Oral presentation on behalf of Bethlehem Steel Company.

By Bruce Bromley, Esquire:

Mr. Bromley: May it please your Honor, when I appeared before Judge Holtzoff the other day I asked him to issue a temporary restraining order against the seizure. That is what I am asking today on this motion for temporary injunction. I wanted him to prevent the Secretary of Com-

merce from keeping our properties. That means I wanted them returned. That is what I want today.

But like many another lawyer, I also ask your Honor, that if for some reason which escapes me, you feel that should not be done, that you should alternatively enjoin the Secretary, imposing upon our employees terms and conditions of employment, the effect of which would be irreparably to destroy or at least impair our bargaining position in the future with our employees.

Now, the tremendous public interest which has been exhibited in the question of the extent of the President's power, I think, is a heartening thing. It shows that our citizens are alert and alive to their rights and responsibilities. But we do not need to indulge in a law school debate to solve the problem which is presented to Your [fol. 1291] Honor, because it is really a very simple one.

Chief Justice Hughes put it I thought beautifully when he said this:

> "The constitutional question as to Presidential powers presented at a time of emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."

Now, the President has some power. Emergency never creates power in anybody. It is but the occasion for the exercise of a power given by the Constitution. So it is impossible and unnecessary to envisage all the many emergencies which might face this nation, which might enable the President either as the Chief Executive or as the Commander-in-Chief in so doing.

We don't have to stop and philosophize about what would happend if an atom bomb were dropped on us. What we are confronted with is a labor dispute and threatened strike which would have serious effects, of course. A strike in almost any industry would have today.

Congress has passed a law, the Taft-Hartley Act, in which it has set forth the path to be followed to solve just such a dispute as this. The President has seen fit to disregard what the Congress has laid down for him to do, and has turned to what he says is his inherent power

to seize private property, a power which he might possess [fol. 1292] in some other set of circumstances, as Judge Hughes indicates, but which he certainly does not possess in this so-called emergency.

And that is why I thought Your Honor's inquiry to Mr. Kiendl was of great significance when you said: "Does the Taft-Hartley Act provide anything else after the 80-day period?"

Well, it does. It does provide for something else, and we can find it in Section 180.

To step back just a moment to remind Your Honor that after the 60-day period there is to be an election in each one of the plants of the affected industry under the supervision of the Labor Board, and the employees are given an opportunity by Section 179 of the Taft-Hartley Act to vote on the question.

One, to accept the final offer of settlement made by their employers. And after they have so voted and of course some of them might accept it, after they have voted and the results shall be certified to the Attorney General within a five-day period—the election takes fifteen days. Then the result must be certified within five days.

Then Section 180 comes into operation, and that provides, and it is a brief section:

> "Upon certification of the results of such ballot or [fol. 1293] upon a settlement being reached, whichever happens sooner, the Attorney General shall move the Court to discharge the injunction——"

That is the Taft-Hartley Act injunction.

> "—which motion shall then be granted and the injunction discharged. When such motion is granted the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry, and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action."

That is what the law says should be done.

What Senator Taft said about it on the floor of the Senate has fortunately been reproduced in Mr. Kiendl's brief, Section 3, page 4. Senator Taft said about that:

> "We did not feel that we should put into the law as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through [fol. 1294] such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bonafide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.
>
> "We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose."

So I say to Your Honor that the Taft-Hartley Act does provide for something to be done after the 80 days. That statute is available today if Your Honor should give our properties back, and would stand as a bulwark against any so-called emergency. Now, I think Your Honor was right in your suggestion that you don't have to consider the question of irreparable damages, as I understand Your Honor, if this seizure is unlawful.

The Court: No; I said that I thought perhaps the law was that I didn't have to weigh the equities, balance the convenience and the injuries if it was an unwarranted exercise of purported power.

I think that is what I said.

Mr. Bromley: Precisely what you said, of course. Yes; [fol. 1295] Your Honor. And I think that is entirely sound, and I don't propose to argue it further.

The Court: I don't know. I would like to hear you argue that. I want assistance on that.

Mr. Bromley: I think it is perfectly true that the seizure of the properties of a citizen, and the control and domina-

tion which must subsequently be exercised over them, necessarily, and the fact that our free right to manage our properties is interfered with, creates such a legal right of so serious a nature that without more, without a single added overt act, a court of equity is compelled to grant an injunction. And there is no question of weighing the inequities in the sense of a suit or an initial injunction in usual circumstances.

But I don't think Your Honor has to approach that problem and dispose of it because I think that it is now apparent since the Taft-Hartley law stands there for all to see and to be made use of by the President, that it is nonsense to say that the public would be disastrously affected in such fashion as to outweigh the invasion of our right of property, if you should return our properties, because there would be no strike, there would be no interruption of steel production, there would be no injury, because Taft-Hartley stands there as a bulwark of protection. But our rights and [fol. 1296] the serious invasion of our properties contrary enough to our fundamental law and our Constitution would be immediately remedied and protected.

Mr. Kiendl referred to the Congressional power which the Constitution grants in these circumstances, and I thought that it was always important to remember how broad the legislative powers are which are given to the Congress. And he omitted to refer to one phrase which seems to me, in this context, to be the most important of all, and that is Section 8 in Clause 18: "To make all orders which shall be necessary and proper for carrying its execution of the foregoing power,—" He read that to Your Honor, but that goes on:

> "—and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."

That is what Congress has done. It has passed a law to carry into execution the power of its President or Chief Executive in this and similar economic and labor emergencies.

And under the Constitution, I submit, he is obliged to have recourse for that before he can pull himself up by his

own bootstraps and say: "I am confronted with an emergency. Why? Because I don't like the Taft-Hartley law."

I don't think any President can create any emergency [fol. 1297] in that fashion by a disregard of what Congress has seen fit to authorize, if not direct, him to do.

The Court: May I interrupt you there?

Mr. Bromley: Yes, sir.

The Court: As I hurriedly read the defendant's briefs, I gathered—if I am wrong I am sure counsel will correct me—that he did not depend upon any express statutory power, that he did not depend on any express constitutional power, but that he depended so far as power is concerned solely upon inherent power. I assume he means that to be the same as implied power.

Mr. Bromley: Yes, sir.

The Court: Now, my recollection is that the Supreme Court has held that Congress has certain implied powers, but they are limited to implementing express powers.

Do you have any authority on the implied powers, if any, of the President, and are they likewise so limited?

Mr. Bromley: I believe that Mr. Kiendl's brief establishes the affirmative of that proposition, that they are limited.

The Court: I didn't think he mentioned it.

Mr. Bromley: He did not; sir.

The Court: I will let him speak again if he will help me on that point.

Mr. Bromley: I think that question can be answered [fol. 1298] by referring to what Chief Justice Taft wrote in his book, that there were no residual powers—and the word residual or residium occurs throughout Mr. Baldridge's brief——

The Court: You don't contend that Congress has no implied power?

Mr. Bromley: No, sir.

The Court: You contend the President has no implied power?

Mr. Bromley: I contend that he has no separate implied powers.

The Court: Then you think the criterion is the same as I am sure has been applied to Congress?

Mr. Bromley: I do; yes, sir.

The Court: That it is limited to implement those that are expressly given?

Mr. Bromley: Yes, I do.

And there is a section in Mr. Kiendl's brief which treats that, because the Government has said, "Oh, well, Chief Justice Taft withdrew that when he wrote a subsequent opinion in the Morris case." The brief points out whether he did or not. I think he did not.

There is a subsequent decision of the Supreme Court which says if he did he went too far.

I think the brief—I think we can find it in a moment—[fol. 1299] will demonstrate to Your Honor the correctness of the proposition which I have just asserted.

Now, there is only one other thing, and I am not sure this is at all appropriate. But Your Honor mentioned something about the price situation.

I want to make sure Your Honor understands that so far as the Capehart amendment is concerned, it is the position of the Government and of the O. P. S. specifically as follows:

> "It should be noted that this amendment (Capehart amendment) became law long before the present dispute arose, and any price adjustments due under it are entirely apart from the present controversy."

So that in speaking about maintaining the status quo, I wanted to put in Your Honor's mind that the Capehart amendment and relief under it has no relation to the present dispute or any subsequent wage increases, and therefore no relation to the status quo.

The Court: That wouldn't compensate in part for the wages?

Mr. Bromley: Not the wages.

The Court: Why hasn't it been given to you before if you are entitled to it?

Mr. Bromley: Well, I don't understand why it hasn't been given to us. Maybe it is because we didn't ask for it. [fol. 1300] But it has not been taken advantage of. I think Mr. Stephens said it was because of the pendency of the negotiations.

The Court: Mr. Kiendl said that he wouldn't take advantage of it.

Mr. Bromley: Well, I don't think there is any present intention to take advantage of it. I don't know what that situation is, but I want to make it clear that it hasn't any relationship to the present controversy, any future wage increases.

The Court: But it would show good faith.

Mr. Bromley: Yes, yes, it might very well. Yes, your Honor.

The Court: That is important in equity.

Mr. Bromley: That is important in equity. And I stand with Mr. Kiendl in his position.

Mr. Baldridge: Would you permit an interruption, Mr. Bromley?

Mr. Bromley: Are you Mr. Baldridge? Certainly.

Mr. Baldridge: I think I might help the Court on that point.

It is my understanding that most of the steel companies had asked some time in November or December for a Capehart adjustment; that subsequent to the request they asked that Government action on it be held up until the outcome [fol. 1301] of the then wage negotiations was determined.

The Court: Thank you very much.

Mr. Bromley: That is right, sir. Nothing since has been done.

And now will your Honor hear Mr. Luther Day from Cleveland, for Republic?

Oral Presentation on Behalf of Republic Steel Corporation

By Luther Day, Esquire:

Mr. Day: If the Court please, I have canvassed the situation as to our position with associate counsel and what we are asking for as of this time.

We would like to have an injuction to enjoin the seizure, and we are asking for that on this application for preliminary judgment. But we want also, and particularly now, immediate relief preserving the status quo until we can have a hearing on the merits, and an answer is filed by the defendant in this case and the issues joined, which should not be at any very great late day.

Now, if your Honor believes that in passing on this application for preliminary injunction, you should consider and decide the ultimate question of the President's power in directing the Secretary of Commerce to seize our mills, or course, we believe——

The Court: How can I avoid it?

Mr. Day: Well, the only way——

The Court: That is the gravamen of your complaint.

[fol. 1302] Mr. Day: I don't think you can avoid it, but our position is that if Your Honor desires at this time to go into the ultimate question in this case, and to decide that this seizure was unlawful and without authority, then, of course, if Your Honor please, that would be all right with us. But what we are——

The Court: Don't we have to determine the legality or illegality of the seizure?

Mr. Day: I don't think so at this time, for this reason, as I understand the rules of law and procedure applicable here: If Your Honor reached the conclusion that there is a probable and discernible showing here of a lack of power upon the part of the President to issue the order, then you could grant the temporary injunction, preliminary injunction prayed for, to the extent of preserving the status quo pending the final determination of this case.

The Court: I see your point.

Mr. Day: I think the facts, if Your Honor please——

The Court: Well, on a hearing on the merits, what would be argued that isn't being argued today? Anything?

Mr. Day: I don't know.

When this matter was before Your Honor some weeks ago when we all came in, as Your Honor will recall, and asked that the case be advanced for immediate hearing, [fol. 1303] Your Honor said, and properly said, that it was not within your power to compel the filing of an answer by the defendant here until the answer day came by. And there was some discussion at that time whether the answer day was within 20 days or 60 days.

It would seem to me that the ultimate question before the Court on the hearing on the merits is the basic question presented at this time. And that is——

The Court: I feel the same way, but I have no power to compel the premature filing of an answer.

Mr. Day: We all recognize that. I think we were more or less helpful at that time, that our property having been seized by the Secretary of Commerce, we think acting as an individual, but however that may be, by order of the President, when we came into court and challenged the validity of that order and challenged the authority and power, and I might say right, of the President to issue that order, perhaps we were a little too hopeful that the defendant and his counsel might be willing to have that litigated at that time. But they did not see fit to do so.

Now we come before this Court on this application for preliminary injunction. I am not going into the damages that will happen to us because that has already been discussed. I will say it is about the same with regard to [fol. 1304] Republic as stated here with regard to the United States Steel Corporation, although Republic is not a large corporation as is U. S. Steel Corporation.

The nature of the damage, the questions with relation to the irreparable injury, they are about the same. So if Your Honor wishes at this time to consider the merits, that is perhaps not the ultimate merits, because you can't do that on this application for preliminary injunction, but to consider at this time the question as to whether or not the President had any power or right or authority to issue the order, very well and good. But we do not have to ask Your Honor to do that at this time because if we make——

The Court: Well, I have been doing it for two hours and a half.

Mr. Day: If we make a showing here that there will be irreparable loss and damage and a probable showing that the Secretary of Commerce, the defendant here, whether he be an individual or otherwise, we say he is an individual and is acting clearly without power, we are entitled at this time in any event in representing the least relief which we can ask, to an injunction preserving the status quo pending the final determination of this case.

Now, if Your Honor please, there are a great many plaintiffs before this Court. And what Mr. Kiendl has said [fol. 1305] speaking in behalf of the steel corporations has application to Republic's case.

There are a great many counsel who are already scheduled to address Your Honor after I am through.

The legal questions are presented on briefs filed by the two sides.

I appreciate the opportunity of saying anything at this time.

I am not going to discuss the case generally. I am not going to talk about in many of its phases, but I think I would be derelict in my duty to my client, Republic Steel Corporation, if I did not challenge at the first opportunity presented to counsel the power and the authority of the President of the United States to issue the authority he did issue to Mr. Sawyer.

I wish in the short time I am going to take to call Your Honor's attention to what that order is, and what it means. The order was issued by the President to the Secretary of Commerce, so far as Republic was concerned, to seize Republic's properties.

After the seizure had been accomplished, as it has, for the Secretary to operate the plant in the various respects set forth in the order.

We challenge—I would rather say we assert here. I don't like to say challenge. We assert here that the President [fol. 1306] had no power to issue that order. We have examined into the position of counsel for the defendant, the representatives of the Department of Justice, to try to ascertain upon what basis and legal principle they claim that that power exists.

They say they are not making the claim that the power exists upon the basis of some broad inherent power. They are not claiming that. They say that the President has a residuum of inherent power outside of the express provisions of the Constitution.

In other words, they are not claiming, as I understand it, that the President possesses all the powers or any powers unexpressed and unprovided for in the Constitution, powers which it might be said were in the people, in the Government as a whole, but they are basing their claim upon the ground that the President has this power either as Chief Executive or as Commander-in-Chief, or upon the basis of some other power provision in the Constitution conferring express power upon him.

I am not going to take the time to argue at this juncture of the case whether or not there is any basis for those contentions. I think there is none. I think Mr. Kiendl has very clearly pointed out, and I think the briefs clearly demonstrate, and the decisions to which those briefs refer, that there is nothing in the power of the President or the [fol. 1307] Chief Executive or as Commander-in-Chief of the Army and the Navy, in the situation here disclosed which would give him the power to seize our property.

The contention of the defendant here seems to be that the President has powers that they seek to ascribe to him, regardless of any action by Congress, regardless, as I understand the contention, whether Congress has acted or sees fit to act with relation to the matters herein involved. In other words, that the President as Chief Executive or as Commander-in-Chief of the Army and the Navy, has the power that they are seeking to have endorsed here judicially by this Court, altogether regardless of what Congress may see fit to do in the premises.

The Court: Is that a good place for you to stop?

Mr. Day: It is; yes. But I am going to get through in a very few minutes.

The Court: This is the usual time we recess for lunch, so we will recess now until 1:45.

(Thereupon a recess was had until 1:45 o'clock p.m., this date.)

[fol. 1308] After Recess

(Pursuant to the recess heretofore taken, the consideration of the above-entitled matter was resumed at 1:45 o'clock p.m., this date, when the following occurred:)

The Court: You may proceed, Mr. Day.

Mr. Day: If the Court please, at the adjournment time I was trying to point out that the claim of the defendant here advanced by the Department of Justice as to the power and the authority of the President to act in a situation of the character here disclosed is so broad that there is nothing that Congress can do to diminish it in any way.

I now want to call attention to another claim which, as I understand the memorandum of the Department, is

made in behalf of the defendant Secretary Sawyer. It is to the effect that the finding of the President that such an emergency exists here as calls upon him to act and empower him to act by seizing the mills, is final and not subject to judicial examination or review.

On Page 59 of their brief they say:

> "This is a finding of serious emergency. Abundantly supported by the facts, it is certainly all the finding that could be required to sustain the exercise of the President's power in the nature of imminent domain. And, we submit, it is a finding which is not [fol. 1309] subject to judicial review." Citing cases.

So that the defendant here through the Department of Justice is claiming such a broad power, such an uncontrollable power, in the President, and the situation here presented that we cannot find in any of the cases a precedent for it. If the President upon a finding that he makes as is set forth in his order to the Secretary of Commerce, decides that a situation is presented which calls upon him for the public safety on behalf of the war effort or defense effort, because there is no war now, to seize our mills, if they are right, we are almost powerless in this situation.

The one think that prompted me, if I may say so, your Honor, to speak at this time is that claim that is made by our distinguished adversaries is the sweeping effect of it pursuant to that interpretation of his power.

The President has issued an order to the Secretary of Commerce seizing a large portion, the important portion of the steel industry, one of our leading industries. If he can do that with relation to steel, and there is no way to question it, there is no way to control it, it is not difficult to see or predict that he seize almost any other industry. He can seize oil. He can seize coal. He can seize any other important industry, as he has seized the steel industry.

Well, it is suggested here and probably will be contem- [fol. 1310] plated that the President's action in seizing the steel mills should not be carried out without compensation being paid to the owners of the steel mills for the property taken. But I respectfully submit that does not meet the situation, does not answer the question, because if the power

here sought to be exercised does not exist, if the fact if it can't be found in the Constitution, and there are no statutes except in the Taft-Hartley Act that bear upon it, the fact that it is intended that compensation be given to the owners of the steel mills for their property taken, might be an incident to the exercise of power, but it can't create the power if it doesn't otherwise exist.

That is our contention upon that provision.

Now it seems to me that this Court is asked to go a very long way in the request for a holding that the President of the United States can thus seize the steel mills of this great industry upon his own finding and determination that such action is necessary in the public defense, and predicate that contention upon the very narrow—and we think not sustainable grounds—that he can do that in the exercise either of his executive powers as Chief Executive or as Commander-in-Chief of the Army and the Navy. I respectfully submit, if your Honor please, that such a doctrine, without enlarging upon it at this time in my argument, is opposed to the whole philosophy of the American Nation, [fol. 1311] of our Constitution. It is opposed to the deep down bedrock foundation upon which this Government was created; and that such a doctrine should not be declared to be the law in this case in response to the arguments made here which we believe are without any substantial foundation.

I think that is all I care to say—I am not going to discuss the Taft-Hartley Act. That has been done by the counsel who preceded me—except to say that it appears to me, as it appears to them, that here is a remedy provided by an Act of Congress directly applicable here that meets the situation.

In determining whether or not the President has the powers contended for by the Department, and whether or not this Court will by what we concede to be a strained construction, hold that the power existed under the provisions of the Constitution which they point to, I think your Honor may very well bear in mind—if I may humbly suggest it—that there is an Act of Congress that does apply here, and there is no occasion to so greatly extend the powers of the President in a situation where Congress has acted with relation to it.

So we believe, if your Honor please, that on behalf of Republic, this motion for preliminary injunction should be granted.

[fol. 1312] If your Honor is convinced—and I say it once more in conclusion—if your Honor is convinced that the action of the President in that respect here involved is clearly unlawful, then your Honor undoubtedly, if he sees fit so to do, will grant an injunction, a far sweeping injunction.

If on the other hand there appears to your Honor to be as we submit it must clearly appear, that there is a serious doubt as to the power of the President, your Honor may grant the preliminary injunction preserving the status quo.

I want to once more thank your Honor for listening to me.

The Court: You are quite welcome, Mr. Day.

I would like to ask one question that occurred to me in connection with your discussion of the subject of just compensation.

As I understood you, you took the position that there never could be an exercise of eminent domain unless it was a conventional exercise of eminent domain. Haven't there been occasions when there has been, what I determine an "informal exercise" of eminent domain?

Mr. Day: I think there have. I think there have. I don't think they are under situations as to facts at all akin to that here presented.

The point I was trying to make was——

The Court: You regard this then as not an exercise of [fol. 1313] eminent domain?

Mr. Day: That is right.

And I say, with all due respect to the contentions of the Department, that if the power to seize our steel mills is not vested in the President by the Constitution, and if no Act of Congress except the Taft-Hartley Act which does not have application they cannot enlarge the power of the President or justify the exercise of that power by saying that if it is improperly or illegally exercised we have no right to object because we will be compensated.

I just wanted to say to the Court that Mr. Charles Tuttle of New York will now address the Court in behalf of the Armco Steel Corporation.

We kind of agreed among ourselves that as each one of us gets through he presents the next one to the Court.

The Court: Very well.

Mr. Tuttle: Thank you very much, Mr. Day.

The Court: It is unnecessary. I have encountered Mr. Tuttle before.

Oral Presentation on Behalf of Armco Steel Corporation.

By Charles Tuttle, Esquire:

Mr. Tuttle: I appreciate the importance of endeavoring to avoid repetition in every way possible and, above all, to be brief.

I will, therefore, with your permission, address myself [fol. 1314] to certain statements and claims in the Attornel General's brief here, which it seems to me bring out into clear relief several statements that are vital to this case. When I have done that I will have concluded.

In the first place, the brief for the Department of Justice states what it concedes to be the principle which at this time your Honor should guard yourself by in determining these motions.

It does so at Page 16; and there in the first paragraph it says:

> "An essential part of the right to interlocutory relief must consist of some kind of showing or assurance to the court that the parties seeking the relief have a fair chance of prevailing on final hearing and are, accordingly, entitled to interim protection."

The ensuing sentence states in somewhat similar phraseology the same thing, to-wit: Is there a showing of substantial possibility of obtaining final equity intervention in favor of the plaintiffs.

It was with that in mind that I made the statement in response to your Honor's request as to what was the position here of the corporations that I represent, because I do conceive that the basic claim in our complaint, that the seizure itself is illegal, is part of the consideration which [fol. 1315] your Honor will give to this case in determining

whether in the light of what is said here in the Department's brief, these plaintiffs are entitled to interim protection at the least. Certainly against any further enlargement of the seizure, the invoking of additional and further powers which can still further change the situation.

Now the issue much discussed in the Attorney General's brief turns on the phrase which is repeated time and time again, but I venture to believe not defined or at least not adequately defined, the phrase "residual power".

The question necessarily comes judicially therefore: Residual power in what field? The Constitution itself, even before its amendments, provided in so many words that the Constitution and the laws of the United States enacted in pursuance thereof, shall be the Supreme law of the land.

The question necessarily comes therefore when we are discussing this rather entrancing phrase, a metaphorical phrase, which does not appear in the Constitution itself in any form, shape or manner—we should be asking the Department to tell us in what field is this residual power. Is it a residual power solely in the field of administration? In the administrative matters the President may have from his powers delegated to him by the Constitution to adminis- [fol. 1316] ter the laws, certain incidental or implied powers that go with it, and which are essential to administering the laws.

If they mean by that not so much residium power, because that phrase is decidedly, I believe, elastic—if they mean by that merely "implied power" in the field of the executive, then that would be a different proposition. But I don't find any statement in the brief of the Department of Justice where they are substituting the phrase "implied power" for their chosen phraseology of "residium power".

Now, let us see, if I may, what light their own brief shows on what they mean by "residium power". I think the explanation can be best brought into focus, at least initially, by turning to Page 28 of their brief where they said that a certain statement by President Taft—than whom probably there was no more great constitutional jurist in our history—they take issue with his statement.

He is dealing there with implied power. He says the power that the President exercises must be "either in the

Federal Constitution or in an act of Congress passed in pursuance thereof."

That must be so, because where it is otherwise, then the phrase "due process of law" would not have the settled meaning that it has.

[fol. 1317] It is merely the Constitution and laws passed in pursuance thereof. That is the only thing that we have of "due process of law".

There isn't any such thing in the Federal Courts as "due process of law" outside of the Constitution and the laws passed in pursuance thereof.

Now, consequently, the President has no power to create law. But they say he has some kind of mysterious undefined power when it comes to the field of general welfare.

You will find that on Page 29, where in contrast to what Chief Justice Taft said in his analytical book on the Powers of the Chief Magistrate, they turned to one who was not a lawyer, but a very vigorous and forward going President of the United States whose slogan was "big stick". They say there, they adopt the position there—this is what they mean by "residium power". We now get it.

It is on Page 28. President Theodore Roosevelt said:

> "My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."

Now, we have been accustomed as Americans to regard the Federal Government, whether it is the President or the Congress or the judiciary, as having no power at all except [fol. 1318] what is delegated to them by the Constitution and the laws passed in pursuance thereof, because the Constitution itself states that all other powers whatsoever not thus delegated are reserved to the states or to the people.

In consequence it has become axiomatic that the Federal Government is solely a Government of delegated powers, deriving its just authority to that extent from the consent of the Government. There is no other expression of consent of the Government.

Now here we have it turned around that the President may do anything that he thinks the needs of the Nation demands unless there is a prohibition in the Constitution.

In other words, instead of delegated power, you have absolute power subject to stated restrictions, if you can find them.

I think that upsets the entire theory of American Constitutional liberty, and turns our Government into a Government by edict, by some benevolent man, who feels that he may do whatever is necessary to promote the needs of the people as a whole. If there could be any doubt of that, as to the meaning of "residium power" that they are talking about, not residium implied power in the field of administration, but rather in the field of the general welfare, then their [fol. 1319] next quotation on the top of the next page, Page 29, clinches it.

> "In other words," says Theodore Roosevelt,
> "I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition."

Now, our friends in the Department of Justice are trying to turn that expression into an expression of Constitutional law. They are proposing an amendment to the Constitution of the United States to put that language into it either expressly or by implication. They are asking your Honor to assist them in so doing.

Now, what do they say about the Chief Justice's expression where he defined the implied powers of the President as one which must flow from express delegated power and incidental to its exercise. They say that that was all taken back by Chief Justice Taft in the Myers case which they discuss on Page 29. (Myers vs. United States, 272 U. S. 52). Now, in the Myers case we had a very simple issue of Constitutional law and implied power. The President appointed an official who had been appointed with the advice and consent of the Senate. Subsequently to his appointment he turned out to be unfit in the mind of the President of the [fol. 1320] United States on who rested the chief responsibility of proper administration. The only question was whether the President could discharge that man without getting the advice and consent of the Senate. Chief Justice Taft held that that was a pure case of implied power, not

residual power but implied power, in the first place, because he was the appointing power. When he came to the conclusion that the man he appointed wasn't fit, he could discharge him by necessary implication, and second, because he had the responsibility for the administration. Since he had the responsibility for the administration, he had a right to have assistants who would carry forward according to his ideas of what was honorable and proper administration.

So in that Myers case we have a statement by Chief Justice Taft which not only takes back nothing, but in my judgment takes the whole foundation from under their argument. They have quoted it in their own brief. I read it:

> "Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i.e.,"

namely—a definition by the Supreme Court of the United States, unanimously, I believe, if I recall it correctly.

> [fol. 1321] "—the general administrative control of those executing the laws,"

Administrative control. Not to do anything and everything that he might deem which is for the public good.

Now they say right under that:

> "Elsewhere in his opinion, the Chief Justice stated that the specific enumeration of the legislative power as contrasted with the general grant of executive power revealed an intention to repose a residual power in the President."

There is no such language in the opinion. They were talking about "implied", what was implied in the appointing power that was granted by the Constitution.

But we have more explanatory of that, if your Honor will look at Page 29 of the Government's brief. You will see there in the third sentence from the bottom this statement:

> "The suggestion that the judiciary will use the force of an injunction to restrain the President in

> action which he believes to be necessary to the welfare of the nation is in itself rather startling."

If such a power was stated in the Constitution his judgment might be entitled to great weight. But we show in the cases that we have in our brief that it still remains a judicial question because the judicial power of *of* the United [fol. 1322] States is expressly one to handle all cases arising under the Constitution and laws of the United States. And the only liberty we can have for long in this country lies necessarily in an independent and fearless judiciary which knows when the bounds of the Constitution are overstepped either by a powerful Executive or by a powerful Congress.

The judiciary has had no hesitancy under the phrase which I have just quoted as the supreme law of the land, in determining that the Acts of Congress, no matter whether unanimously passed, are violative of the supreme law of the land and are therefore void.

Is the Executive exempt from the same principle?

Are the Courts more impotent in the preservation of the Constitution when the invasion comes from the Executive than when it comes from the legislature?

So I say it would be startling—it would indeed be startling to use their language—if the judiciary did not feel that it would preserve the Constitution where the President through his subordinates was taking action for which there was no Constitutional authority.

But in addition we have Page 27 of their brief in their footnote.

[fol. 1323] May I call attention to the footnote—the footnote is:

> "It should be noted that we do not contend that the President has a residuum of powers." Not "implied powers," but again "residuum"— "—outside of the Constitution inherent in his position as Chief of State,—"

Now I pause to say that here is another phrase which isn't in the Constitution. We have "residuum powers" in the field of public welfare and general need. Now, we

have a phrase which has had connotations in other countries with most unfortunate and disastrous consequences.

"The Chief of State"—I don't know where that comes from in the United States Constitution. I don't understand that anybody is recognized as a "Chief of State." A man is recognized as under obligation to execute and administer the laws of the land, but not to be over the American people as Chief of State.

And that is in the Attorney General's own brief.

I go on:

> "—as Plaintiffs would have this Court believe our position to be. We contend only that he has such powers under the Constitution and concede that his actions are subject to constitutional limitations. In the instant case, the applicable limitation is that just [fol. 1324] compensation be paid for the taking of the plaintiffs' properties in accordance with the mandate of the Fifth Amendment."

Now they are in effect saying there that the Bill of Rights so far as the residual powers of the President as Chief of State are concerned leaves a citizen with no remedy in the courts except to get compensation for the taking of its property.

In what Your Honor referred to a moment ago as the conventional exercise of the power of eminent domain, that power is exercised lawfully, and you get compensation because subject to compensation the Government can through and under constitutional circumstances take property if it proceeds lawfully and within the Constitution. But it is another question if the Government is not proceeding lawfully. When I say "the Government" I mean some public official is not proceeding lawfully. It is a very grave question whether there is any law at all which permits the citizen, where there is an unlawful taking of the property, to recover damages.

But the issue goes much further than that because that clause about taking property subject to compensation is preceded by another clause equally applicable and equally part of the Bill of Rights that "neither liberty nor property shall be taken without due process of law."

[fol. 1325] Now they say that "due process of law" is merely what the President thinks it is in the public good. That is their interpretation of this.

But we go further. The Bill of Rights has many protections to the individual citizen, both in liberty and property, rights which are essential to the preservation of liberty as a whole.

How far is this residual power to go in relation to all of the other Bill of Rights if it can override the two that I have just quoted and make them subject to the individual judgment of a single man, who by exercising that judgment creates due process of law ipso facto and ousts the court of injunctive power to protect man of his Bill of Rights and throws him over to a doubtful privilege of going to some court, if he can find one, where he can get a judgment for money.

The rights in the Bill of Rights were never put there for the purpose of having a monetary evaluation. Never! The Founding Fathers were not putting money price on the liberties that they were putting in the Bill of Rights. And to have that now suggested in the Department of Justice's brief at the footnote here is indeed startling.

It would be more startling in view of their further contention which Mr. Day has referred to so movingly that you can't even get money because the President's deter-[fol. 1326] mination that there is a public need for his doing what he is doing in the exercise of residual power closes the courts out.

Now, where does the Constitution of the United States put the power of general welfare and common defense? I know that Your Honor is familiar with the fact that those two phrases first appear in the preamble.

> "We the people of the United States in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Now, it would have been surprising if after that preamble there weren't some statement in the Constitution where

those powers to preserve those objectives would be as a result of delegation from the states and the people.

We find those two phrases reproduced precisely in Section 8 of Article I:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;"—

Now, the preamble is adverted into a delegation of power and it is in Congress, the representatives of the people. [fol. 1327] If there could be the slightest doubt about that, the same section which states that in its first sentence, echoes it in its last because it says in the last sentence that the Congress shall make or have power to make all laws which shall be necessary and proper.

There is where the determination is. There is where the body and power to decide what is in the common welfare and for the common defense resides.

It says:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

There is where the residual power—if I could use that term, although the Constitution doesn't—places the matter of common defense and the general welfare.

Now, as has been pointed out already, the Attorney General's brief significantly fails to refer to any enactment of Congress as authorizing what has occurred. Much less as authorizing what is supposed to be added what has occurred, namely the power to take away from these companies the power of collective bargaining, to enforce what originally was a mere voluntary procedure subject to the [fol. 1328] recommendations, to be subject to acceptance, and to turn it all into compulsory arbitration.

I don't think any secret is made at all—I don't think that will be made by Mr. Baldridge—that that is the next step.

Under those circumstances, just briefly in closing, I want to call to Your Honor's attention what the Supreme Court of the United States has said on this subject.

> "The general power which is given to the Executive is to execute the law. He can't create the laws. He can only execute them. The word 'execute' is a simple word. In the process of executing the laws he may have in addition to what is enumerated in Sections 2 and 3 of Article II as to certain specific powers, he may have implied powers which those powers, including the one to execute the laws necessarily imposed on him, because he can't personally tend to the vast administrative business of the United States.

This language must not be lost sight of.

The Court: What are you reading from?

Mr. Tuttle: What I am going to read here is Home Building and Loan Association v. Blaisdell, 290 U. S. 398. If this language is not upheld and received in all its integrity, then our whole system of government is changed [fol. 1329] and we have a government by "Chief of State."

Chief Justice Hughes, I suppose one of the greatest constitutional lawyers along with Chief Justice Taft, the country has ever seen, said:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."

I have cited in our brief a number of cases that have implied that even against the Chief Executives of various States calling out the military under certain circumstances to seize property and to impose burdens, and all in the name of the general welfare of the state.

The Supreme Court has repudiated that concept and has said that there remains power in the judiciary as an independent arm of the Government to determine judicially whether, first, the power existed at all; and second, whether the circumstances under which it is exercised have been lawful.

The judiciary has both powers and must have it unless we are to go the way of other nations that have recently gone, when an independent judiciary was overthrown and the executive broke through into a dictatorship.

In consequence I say that if you find the power is exercised honestly within the limits of that power, it may not [fol. 1330] be subject to the judiciary review. There is nothing magic about that because that is the same with an order of an administrative officer, the humblest of administrative officers. If he has that power and exercises it according to his discretion, then the courts wouldn't interfere with that even though he is the humblest of all.

But does the situation change if the administrative officer is the top of them all?

Now, Your Honor, just this.

A residual power to take care of the general interests of the people of the United States just knows no limits. There are no limits. Everything that happens in this country concerns the welfare of the United States in one way or the other if it has an importance at all and not a private matter. Are those all within the residual consideration of the President of the United States? Are all of the Bill of Rights subject to that unexpressed power?

Why suppose, just for example—and I needn't cite any others—suppose the President of the United States should come to the conclusion that it was in the general interest to seize all the means of communicating thought, the radio stations, the television stations and all that. He thought that what was going over them was not conducive to the [fol. 1331] common defense or to the general welfare. No law on the subject, no statute on the books. He just thinks somebody else should be better, and he thinks this is an emergency, and so he declares that for the time being he should take over those means of communication.

Now, there is only one article of the Bill of Rights that the President can suspend, and that is habeas corpus, and he can suspend that only because he is given that power in time of rebellion and insurrection. But now we are suspending other Bills of Rights under the magic of abracadabra of residual power.

I think this question of the basic right to seize, which is one of the basic propositions in our complaint, is an inevi-

table part of the question of whether there should be interim protection.

I think this has been mentioned, but I want to mention it in closing.

At the present minute if this Executive Order means anything, it means that the persons engaged in these mills are now employees of the United States. We get our orders from the "boss," and that boss is not chosen by our stockholders or by the general directors, nor are the employees any longer subject to the direction of the stockholders or general directors except by grace of the order which directs [fol. 1332] that they continue—grace which can be changed.

The United States Government isn't paying its employees. The pay is being taken out. If it is increased it will be taken out of the moneys of the stockholders and out of their profits.

What is more intangible—the right of collective bargaining, which is certainly one of the basic Bill of Rights—that is where it is derived from—it has been a fundamental policy of this nation for the last quarter of a century if not longer—is taken away from them. It is handed out to a Government official, the defendant in this case, who makes the bargain, and then makes the stockholders and the corporation make good on it and lose forever the right of an equal dealing across the table with their own employees.

If that should be declared illegal, then going on to the next step doesn't mean a strike, because Section 188 of the Taft-Hartley law states in so many words that employees of the United States cannot strike against the Government. That is a privilege withdrawn. It is the same way in pretty nearly every state. The State of New York makes it a criminal offense to do it. People don't have to get into that employment if they don't want to. But after they are in it their relation is such to the public good that [fol. 1333] they can't strike.

I thank you, Your Honor.

It is my privilege to introduce to Your Honor Mr. Bane for Jones & Laughlin Steel Corporation.

Oral Presentation on Behalf of Jones & Laughlin Steel Corporation by John C. Bane, Jr., Esquire

Mr. Bane: If it please the Court, I will be just as brief as I can.

I recognize that it is hard for a lawyer like me to speak on constitutional questions after such a gentleman as Mr. Tuttle and the rest of the others here have spoken on that subject. Yesterday I had a similar misfortune when discussing labor matters before the Senate Committee, because Mr. Murray, representing the Unions is also a forceful speaker.

The case before your Honor has been thoroughly covered in all but a few *few* details. If I contribute anything it will be in the way of an endeavor to simplify one or two points:

Jones & Laughlin Steel Corporation, my client, brought suit against Charles Sawyer, individually. The fact that he is Secretary of Commerce and therefore a high officer of the Government is an accident. In our view of the law, and so far as the averments of the complaint are con- [fol. 1334] cerned, he is a trespasser for, as you know, in spite of the good intentions of such men as Mr. Sawyer, if he has seized our plant or threatened to seize our plant, as he has, without proper authority in law, as we assert he has, he is a trespasser and is personally liable to us for any injury done us and unquestionably is subject to the injunction of the court and the Court would require him to cease and desist entirely from any proceeding under the Executive Order.

The fact that equity has jurisdiction, and a rule of law as to balances of such equities, are matters that have been decided in the case of Land vs. Dollar, in the Supreme Court at 330 U. S., which has been referred to previously and which is referred to and cited at Page 11 of the brief handed to your Honor, and I will take just one moment to read a relevant passage from it. What the Court said there was this:

> "* * * But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's

> realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

[fol. 1335] I think that that answers your Honor's question.

I think that that answers the question that you put this morning, a question that has been not answered until now. That answers the complete question, first, whether the Court has jurisdiction in equity and, second, the need for balancing equities between Government and citizen, and, third, possible remedy, in the Court of Claims or some other court, and by means of the Federal Torts Act.

That case, the case of Land vs. Dollar, decides each of those three questions in favor of my client. It answers those questions in this wise:

First, we have a remedy in equity;

Second, we are not deprived of that remedy, and

Third, a trespasser has no equity on his side.

Therefore, the equities, under the law, are on our side completely, and there is nothing to balance.

The conclusion to come to is, if your are satisfied as a matter of law that the individual we have sued is not lawfully empowered—not the Secretary of Commerce, but the individual—then, there is no question of balancing the equities and there is no occasion for waiting for trial on the merits, so there would be no doubt about the facts.

I do not think there is any doubt at all in this case.

Our bill is verified and the Constitution needs no veri-[fol. 1336] fication and there is nothing in the counter affidavit that changes anything that we are relying on—the affidavits merely state that Mr. Sawyer was faced by an emergency.

Mr. Sawyer is a trespasser under the rule of law we are relying on, unless the Executive Order was warranted by the Constitution or by a statute, and since nowhere is there any statute, reliance must be had on the Constitution. The absence of any color or justification that this can be justi-

fied under the "Commander in Chief" power has been covered and, I understand, is not seriously urged by Mr. Sawyer; he has not urged that the seizure could be justified as the act of the Commander in Chief.

That, then, leaves only the remainder, your Honor:

> ". . . he shall take care that the laws be faithfully executed,"

I will not duplicate the fine argument of Mr. Tuttle or the arguments of the other equally fine men who preceded me, but I would like to call your Honor's attention to one thing that has not been covered:

Under the decisions there are no inherent powers. We cite that here in our brief.

Under the decisions, in any field of Government or in any field of constitutional interpretation, there are only express powers and express powers, powers necessarily [fol. 1337] implicit from the grant of express powers, whether from acts of the Congress or acts otherwise expressly taken, and it is our understanding under the law and the cases that the President cannot, even in emergency, invade a field where Government is vested by anything save the Constitution or the Act of Congress.

Here the Government is attempting to do what it seeks to do in, it says, an effort to support the Army in Korea. There are two things that I would like to say in respect to that:

The power to seize property for such purposes is vested in Congress. The Supreme Court has held that in the case of United States vs. Bethlehem Steel Corporation, 315 U. S. 289.

Secondly, the power to raise and maintain an Army is specifically vested in Congress under Article I, Section 8 of the Constitution.

You have heard from several gentlemen here that Congress already acted to protect the people against the possibility of industrial strife, such as has been spoken of as being threatened here, and you have been told that that can be done through the Taft-Hartley Act which is expressly designed for that purpose.

The President has chosen this means which we are combatting for some reason of policy appealing to him—it may be a good one. So far as I know he may be right. I won't argue that. I doubt it; but, what has the President done in this so-called emergency? He has chosen to reject the path laid down by the Congress and take a road of his own choosing, warranted by nothing in the Constitution or in the statute, and I suggest that the President cannot do that without destroying any semblance of the administration of justice or without ignoring expressly the provisions made by the Congress.

The situation has developed itself to a point where it is to my mind the same as if Congress sent the Army to Korea and, under Section 1 of the Constitution determined to maintain it by levelling a tax on one kind of property. The President, under his duty of seeing that the Army got to Korea, would go that far, but, being not satisfied with the tax that Congress levied against the particular kind of property, made no effort to enforce the tax and then, with the Army in Korea, he has no money to take care of it, and then excuses himself by reference to an emergency and, under that guise, he levies a brand new tax on some other property.

The illustration is so absurd that I do not think that any court would harbor it for a moment. It would amount to a question of the President seizing the property of any citizen in an effort to collect a tax levied by "Presidential [fol. 1339] discretion", and that is what you have here.

The President can say: I could have used the Taft-Hartley Act, but I did not.

But, the duty to determine what plants shall be seized belongs to Congress.

The President can say: I could have used the Taft-Hartley Act but I did not; but he decided to use another way.

Yet, in 1947, Congress made a choice of the means by which the President might handle a situation such as the recent threat of the steel strike. Congress having made its choice, the President is limited in his action to the following of that choice. But, the President said: "I will find a means of my own, and I will seize the steel companies, and the men will go on working."

That is Government by executive decree, without any particular limit on it, and it is nothing less than Government by a "Chief of State", or whatever you want to call it—there is nothing that finds itself in our Constitution, and our Constitution never contemplated any such kind of Government, and certainly no intelligent thought has been had on any such kind of government, and it is not, as I stated, contemplated by the Constitution of the United States.

For that reason I urge on you, as I understand from the [fol. 1340] other attorneys they have urged on you, that you grant the injunction prayed for.

The Court: You have indicated that you only asked for limited relief.

Is that so?

Mr. Bane: No, sir; we are asking for complete relief.

The Court: Who was it said that he wanted only limited relief at this time?

Mr. Bane: I think it was Mr. Kiendl who said that he would be content with that at the moment.

The Court: And do you not agree with him?

Mr. Bane: Well, I do not.

If you do not grant the full injunction, the same consideration that I have presented will apply to the grant of an injunction or the status quo to exist until the final hearing.

The next speaker that I will present will be Mr. John J. Wilson a member of this Bar and well known, I know, to this Court.

The Court: Yes.

[fol. 1341] Oral Presentation on Behalf of the Youngstown Sheet and Tube Company and the Youngstown Metal Products Company by John J. Wilson, Esquire

Mr. Wilson: If your Honor please, I would like to speak for a few moments on a subject that comes within the same sphere upon which Mr. Tuttle touched. I would like to discuss several of the other cases on which the Government seems to rely.

I realize that your Honor, as a lawyer, is going to deal with this problem from a lawyer's point of view.

The citation of a half a dozen or of a dozen instances where Presidents in the past have possibly usurped power to make seizures are no precedents on which this Court can rely to determine the situation presented to you.

The Court: You need not argue that.

Mr. Wilson: I take it that you would not want me to argue that.

Also, I take it, that the observations of members of Congress, in the halls of Congress, saying that the President already had the power not binding upon your Honor and, perhaps, not in the least persuasive.

So, I come directly to the pronouncements of the Supreme Court on this instant subject, and, even at this late hour, I want to discuss in some minute detail some of these [fol. 1342] decisions:

I want to start with an analysis of article II of the Constitution itself, because I definitely adhere to the preceipt that there are no inherent powers in the President definitely assert the proposition that that is what the Government relies upon in this situation.

I think, as Mr. Tuttle does, that Chief Justice Taft, in the Myers case, was proceeding solely and entirely on the basis of implied powers, a doctrine that is well recognized and has been well received by the Courts for years. But, as Mr. Tuttle and others have pointed out, there is not the slig-test doubt that the Government in this case is arguing for some residuum of power, not on the basis of implication but on the basis of inherency.

Having that in mind, I will attempt to analyze Arti-le II of the Constitution.

You will recall that the first section of the Constitution says that:

> "The Executive power shall be vested in a President of the United States."

Then, when we come to Section 2, we find that:

> "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;"

[fol. 1343] and that:

> ". . . he may require the opinion, in writing, of the principal officer in each of the executive departments",

that is, he may require departments to issue opinions on subjects.

We find that the President, under Section 2, shall have the power to make treaties, to appoint ambassadors, and shall have power to make recess appointments. In Section 2 we find only one thing that can possibly be invoked, and it has been invoked, and it has been discussed by Mr. Kiendl and those who followed him, and it is something that cannot be availed of in this situation, and that is the "Commander in Chief" clause.

But, there is nothing else remedial stated in Section 2 from which, even by the slightest implication, the power to seize a plant in this kind of a case arises.

Then we come to Section 3 of article II of the Constitution:

> The President is supposed to make reports to Congress and to recommend 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 adjour-n them to such time as he shall [fol. 1344] think proper; and he shall receive ambassadors and other public ministers; and he shall take care that the laws be faithfully executed, and shall commission all officers from the United States.

Then, of course, Section 4 has to do with impeachment.

The only thing that could possibly apply here is the item that I have indicated, which does not particularly apply in this instance, for the reason that I have given, and then the so-calls "take care" clause which reads that:

> ". . . he shall take care that the laws be faithfully executed, . . ."

Now, that means that, under the express powers of the President, there are only two that can be touched on, namely,

the matter of the "Commander in Chief" aspect, and the matter of "the take care clause".

The Government is not arguing the Commander in Chief clause. I am not sure whether they are arguing the take care clause either. I find them driven to argue that the President only has some kind of a presidential power, so what it is I don't know.

They try to argue the first section as a grant of power. I say that it is not a grant of power and it has never been held to be a grant of power. I say that none of the cases on which the Government relies supports that proposition.

As Mr. Tuttle said in connection with the Myers case, [fol. 1345] I dare say that the Department of Justice will rely principally on certain language of Chief Justice Taft in the Myers case to support their conclusion that there is basis for some kind of an argument to support their theory of inherent power.

In reaching the conclusion that the President has the power to remove Myers, the Postmaster, without the advice and consent of the Senate in a situation where he could only appoint him in the first instance with the advice and consent of the Senate, Chief Justice Taft—and they rely on the quotation the Government's brief themselves—relied on the "take care clause" and he spells out the theory that, if he is to execute the laws he must have agents to do so, reliable agents, and, consequently, he has a right to make a summary removal in that situation, as an implication from the duty to "take care that the laws shall be executed."

Chief Justice Taft did not rely on a residuum of power in the first section. He did not consider, in my judgment, as an ultimate conclusion that there was something in the first section which gave him some broad inherent rights.

I would wish to be frank with the Court and recognize that there are several phrases on the part of Chief Justice Taft in the Myers case which, picked out of text, by the [fol. 1346] Government, are relied upon to demonstrate the argument that in the delineation of special powers in the first section of Article II was not a consummation of all of the powers in Section 1.

It is true that in the course of reaching his decision Chief Justice Taft pointed out in the one hundred and some pages

that he wrote on the subject—and may I respectfully but quite frankly say unnecessarily wrote on the subject—what he said with respect to the general grant of power to the Executive in Article II is significant. The fact that he did state what I have referred to in his convincing opinion is significant, and I assume that some of the matter to which I have made reference, which was raised on the part of Chief Justice Taft will be the perch upon which the Government will rely here to bolster their contention for so-called inherent powers.

I say that what the Chief Justice said in that respect was unnecessary to the decision that Chief Justice Taft reached, because he came to the conclusion that the power to remove without the consent and advice of the Senate was implied from the "take care clause" of that article.

The Court: You seem to make a distinction between "inherent" and "implied" power.

Mr. Wilson: I do. I do not want to quibble.

[fol. 1347] A King, your Honor, may by virtue of birth have some inherent powers——

The Court (interposing): I assume that your distinction is equivalent to what I have read from the brief.

Mr. Wilson: Of course, they can give lip service to this proposition that they mean these powers are in the four corners of the Constitution. They would not argue that the President has some power de hors of the Constitution, although today, in making their definition they are doing that. They would say that and give lip service to it, and say that this residuum of power is within the four corners of the Constitution. But, if they tell you that they use "inherent" as a synonym of "implied" they will tell your Honor that the first section which states that the power is vested in the President is a general grant of power, and they may draw their implications from that.

That is the way that they would have to get around my connotation of inherent.

The Court: That is why I asked this morning as to whether or not my recollection of the law was correct, that Congress had certain implicit powers and the Executive had certain implicit powers and that the Congressional implied powers were limited to those instances necessary to implement the express powers.

My question was if the same criteria was applicable to [fol. 1348] the President and Judge Bromley said that he would have someone look it up.

Mr. Wilson: It is the same.

The Court: Where is the case?

Mr. Wilson: I would say that the series of cases that I will discuss is to that effect.

The Court: Very well.

Mr. Wilson: I do not wish to be too technical in this response and with respect to this, but I doubt seriously if the Government's brief, in any of the sixty-nine pages it embraces uses the word "implied."

The Court: Then my question may be irrelevant.

Mr. Wilson: On more than one occasion they used "inherent" and I suspect strongly their use of "inherent" in opposition to the use of "implied."

The Court: Why not wait until we hear from them and reply to them on that?

Mr. Wilson: Would you think that the better course?

The Court: I think a good deal of the argument would be more helpful in that respect if it were reserved.

Mr. Wilson: If you would rather I talk afterwards——

The Court (interposing): No, no. I want to be informed as I go on.

Perhaps some of the matters you are discussing will not be material before the Court later.

[fol. 1349] Mr. Wilson: I think they will all be material. They cannot be missed, the way the Government's brief is fixed, and a great deal will be heard about the Myers case and the others that will be submitted.

I am wound up and all ready to go.

The Court: I think I will let you answer that argument when it is made. I do not want to cut you short, of course.

Mr. Wilson: I may be better prepared then than I am now.

The Court: All right.

Oral presentation on behalf of E. J. Lavino & Company.

By Randolph W. Childs, Esquire:

Mr. Childs: The Lavino Company, your Honor, is not a member of the steel industry. We have certain grounds in

common with the steel companies in this case, and some that are not.

It is thought, and it might be agreed, that the broader questions would be discussed first, rather than the other additional questions.

The Court: I would prefer that.

Is there anyone else who wishes to be heard for the steel companies?

(There was no response by counsel present.)

The Court: Then, we will take a brief recess.

(Thereupon at 3:08 o'clock p. m. recess was had until 3:12 o'clock p. m., when the following occurred:)

[fol. 1350] Oral Presentation on Behalf of the Defendant by Holmes Baldridge, Esquire

Mr. Baldridge: May it please the Court: I should like to address myself preliminarily to two matters that arose during the presentation by the Plaintiffs:

First: The oral limitation made by counsel for the United States Steel Company of their written motion for a preliminary injunction against the seizure in its entirety; and

Second: The question raised by your Honor as to whether it would be necessary for you to balance the equity in the event that you decided the issue that there was no power in the present proceedings.

I assume, at least for the purpose of the oral limitation, that the United States Steel Company for the moment, at least, concedes the legality of the seizure for the purpose of the present hearing.

What the limitation amounts to is that this Court now enjoin any attempt on behalf of the Secretary of Commerce to change, in any way, the terms and conditions of employment, and that means:

First: That the United States Steel Company wants to be free from the effects of the strike;

Second: They want to be free from the possibility of any wage increase;

[fol. 1351] Third: They want protection in damages for any seizure; and

Fourth: Just compensation under the Fifth Amendment to the Constitution.

I suggest, your Honor, that the United States Steel Company cannot have its cake and eat it too. In fact, that is what the oral limitation of the written motion amounts to.

I may add that Labor has been damaged by this seizure. The only way in which Labor can make its position known and felt is through the power to strike, and that power to strike has been taken away by this seizure.

Obviously the plants cannot be turned back to management unless and until the controversy which was immediately responsible for the seizure action of the President has been resolved.

If your Honor should enter a temporary injunction preventing any action by the Secretary of Commerce in changing the terms and conditions of employment, the whole situation would, in effect, remain on dead center.

Steel management has made it clear from the beginning of the controversy: "No wage increase; no price increase."

Under the instructions sent by the Secretary of Commerce to the Presidents of each of the steel mills those presidents were asked to assume the managership of their [fol. 1352] own plants under the general direction of the Secretary of Commerce.

There has been no interference of any kind with the ordinary general management as well as the day-to-day management of the steel companies' property.

As long as that condition obtains, the steel companies —the United States Steel Company here—are in the comfortable position, if your Honor grants the injunction they sought this morning, to sit tight and the seizure shall continue for an indefinite period.

The second, if your Honor should grant the injunction suit I do not see how you could possibly grant it without going into the merits of the existing wage dispute between the steel workers and management.

The Court: I do not get that—perhaps I misunderstood that.

When you said "the injuunction suit" are you talking about the one sought by plaintiffs other than Steel?

Mr. Baldridge: No; the one sought by the United States Steel Company.

The Court: One defendant agreed with U. S. Steel.

Mr. Baldridge: I thought they did when you asked them to stand up and be counted.

The Court: Do I understand that none of the plaintiffs here agree with the United States Steel Company? [fol. 1353] If that is not so, speak up.

(There was no response by counsel.)

The Court: All right.

Mr. Baldridge: As I was saying, your Honor, I do not think you can grant a motion like that without having a hearing on the merits with respect to the wage controversy.

Just to enter an injunction maintaining the status quo is what they seem to ask for and hence, if you do that, you would be keeping the whole controversy in dead center for a definite period without doing anything. To enter an order to enjoin the Secretary you must be satisfied that there would be no wage increase, that the status quo will be maintained, and there would have to be a hearing on the merits of that question.

The whole system as to wage controversies has been given over to specialized boards and to special agencies in this type of situation. I submit that it is not fair to ask this Court to decide the matter that is involved in the wage controversies.

Secondly, as indicated, other Governmental agencies have been set up to handle the wage situation.

As we have argued in our brief, as plaintiffs' counsel have indicated, we insist that they have an adequate remedy at law under the fifth Amendment. There is some question, as least in our minds, as to how serious the differences are [fol. 1354] between steel and the wage earnings.

I would like to read for a moment from the testimony yesterday of Mr. Stephens given before the Senate Labor Committee:

(The quotation from the testimony of Mr. Stephens, before the Senate Labor Committee on Wednesday, April 23, 1952, will be attached as "Appendix A" of this record, as the last page hereof; the test not being available for inclusion at the time of the preparation of this record.

The "Appendix A" is by this reference made a part hereof.)

Mr. Baldridge: Now, your Honor suggested that you would not need to go into the question of the balancing of equities if you decided at this time that there was no power in the President to seize.

It is our position that——

The Court (interposing): I think I said there was no power in Mr. Sawyer.

Mr. Baldridge: Well, Mr. Sawyer is the alter ego of the President.

The Court: Don't you think that cases abound in this jurisdiction, where executive officers have been enjoined from exercising powers beyond those conferred by law?

Mr. Baldridge: Yes; oh, that is right, under the Constitution or under statute.

[fol. 1355] This is not a situation where this occurred under any statute, but where it occurred under the Executive powers of the President.

The Court: Do you think that makes a stronger case?

Mr. Baldridge: Well, under the Land case and the Larson case——

The Court (interposing): But those cases related to powers granted by statute.

Mr. Baldridge: Correct.

The Court: Now, you contend that exercising powers where there is no statute makes a case stand on a different plane—a preferred plane?

Mr. Baldridge: Correct.

Our position is that there is no power in the Courts to restrain the President and, as I say, Secretary Sawyer is the alter ego of the President and not subject to injunctive order of the Court.

The Court: If the President directs Mr. Sawyer to take you into custody, right now, and have you executed in the morning you say there is no power by which the Court may intervene even by habeas corpus?

Mr. Baldridge: If there are statutes protecting me I would have a remedy.

The Court: What statute would protect you?

Mr. Baldridge: I do not recall any at the moment.

[fol. 1356] The Court: But on the question of the deprivation of your rights you have the Fifth Amendment; that is what protects you.

I would like an answer to that—what about that?

Mr. Baldridge: Well, as I was going to point out in a little while——

The Court (interposing): I will give you a chance to think about that overnight and you may answer me tomorrow.

Mr. Baldridge: Very well. I won't pursue this point at the moment.

If the Court disposes of this matter on the equities in the case then it won't be necessary for you to reach the Constitutional question at all. This is true even on the final hearing on the merits. If there is any other basis—which the Court could decide the case, without reaching the Constitutional issue, it has been held that that should follow. That is, if the case can be disposed of on the merits then, as I say, it is not necessary to go into the constitutional question at all.

I should like to refer to the case of Alma Motor Company vs. Timkin Company, 329 U.S. 129 at Pages 136 and 137, where the Court said:

> "This Court has said repeatedly that it ought not pass on the constitutionality——"

The Court: What is the case? I know the principle, but [fol. 1357] what is the case?

Mr. Baldridge: The case is Alma Motor Company vs. Timkin Company, 329 U.S. 129. There the Court says:

> "This Court has said repeatedly that it ought not pass on the constitutionality of an Act of Congress unless such adjudication is unavoidable. This is true even though the constitutional question is properly presented by the record. If two questions are raised, one of non-constitutional 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."

The Court: Is that exactly applicable?

Mr. Baldridge: It is. That involves statutory powers and this is a constitutional case.

The Court: I thought it grew out of this:

Someone brought suit alleging an Act of Congress was unconstitutional, but the Court found that there was sufficient legal substance to it to rest its decision on that, and the Court did not see why it should go out of its way to decide the unconstitutionality which had been alleged. The Court, as I understood it, decided it on the lack of legal [fol. 1358] merit in it.

Does not that case come close to that?

Here there is only one question raised. The plaintiffs claim that Mr. Sawyer has acted without the law, resulting in damage which is irreparable to them. That is their claim and it seems to me that the question that is here for me to decide is whether he has or has not. It seems to me that is what I have to decide.

Mr. Baldridge: I do not think, your Honor, that your position there is any different on a motion for a preliminary injunction than was the situation before Judge Holtzoff a couple of weeks ago when application was made for a temporary restraining order. That is quite apart from the legality or illegality of the defendant's action. Unless the plaintiff's prove irreparable injury then there is no reason why——

The Court (interposing): I would like cases on that from you where there is a showing of invalidity of power where the Court must find that the equities when weighed in the balance favor no granting of relief.

Mr. Baldridge: We will submit those.

The Court: I have asked the other side to do it. I have heard of cases on the law, learned argument with respect to them but no cases have been cited to me about it.

Mr. Baldridge: Their memorandum of law mostly were served last night or this morning and we would like to have [fol. 1359] a reasonable opportunity in which to make answer.

The Court: I do not know what a "reasonable opportunity" means.

Mr. Baldridge: Well, we would like a week if possible.

The Court: These cases involving applications for temporary injunction require speedy action, almost immediate action by the Court.

Now, unless there is an agreement to maintain the status quo I think the parties are entitled to a very prompt decision, and such a decision will be made by me for I will consider this case to the exclusion of everything else working day and night and I will decide it, and that is not consistent with your request for a week's time——

Mr. Baldridge (interposing): Whatever time.

The Court: I am not fixing the time, but when I take this case and consider it I shall act on it as expeditiously as I can and I shall not wait for briefs to be filed in reply to any argument or other briefs. If you have any idea to the contrary or if you had any such idea as that you should have said something about it before this argument started—that is, unless you are willing to keep the status quo and are willing to make that agreement.

Mr. Baldridge: I cannot make that agreement or promise to maintain the status quo, your Honor.

The Court: Then I cannot give you the time you ask for. [fol. 1360] It would not be fair to the other side.

These motions take precedence over all other motions.

Mr. Baldridge: I can understand the necessity for speedy action on a motion for a temporary restraining order, but that stage has passed in this case.

The Court: I cannot go along with you on that. A temporary restraining order is one that is issued without notice to the other side, as a rule.

Mr. Baldridge: Correct.

The Court: While a temporary injunction is one that is issued, in the course of things, within a week. We make it ten days because of our requirement for five days notice and five days in which to file the opposing brief. It is the method provided to cope with situations that, because of delay, would result in damage if, for instance, we had to wait for an answer.

Mr. Baldridge: My only answer to that is that I do not think that the situation is any different than when a man comes in for a restraining order, insofar as irreparable damage—but we will get you cases on that.

The Court: When I take this case under advisement I will work on it to the exclusion of everything else and when I reach a decision I will file it forthwith unless you agree to maintain the status quo in the meantime.

Mr. Baldridge: I cannot make that commitment, your [fol. 1361] Honor. I am not in a position to.

The Court: All right. That is the usual commitment people make when they want time in which to file briefs.

Mr. Baldridge: I find, of course, that I am acting for the Chief Executive with Mr. Sawyer as his representative.

The Court: You are appearing in this Court as Attorney for Charles Sawyer on the record.

Mr. Baldridge: I would like to pass now, your Honor, to the so-called balancing of equities.

Mr. Bromley admitted in his argument that the defendant might have power to act in some circumstances but that these are not those circumstances.

Now, what are the circumstances which resulted in the President's action?

First, we start with the Executive Order itself in which the President set out the essential nature of the manufacture of steel and of weapons used by the Armed Forces; that steel was indispensable in carrying out the atom energy program; that a continuous supply of steel was necessary for civilian economy on which the military success depends; that a work stoppage in the steel industry would immediately jeopardize and imperil the national defense and the defense of those joined with us in resisting aggression in parts of the world outside the continental [fol. 1362] United States; and, among other things, the stoppage would add danger to our combat troops.

Such findings, your Honor, I submit are adequately supported by the affidavits on file in this case:

I will refer to two or three of the more important affidavits on file in this case, and I refer first to the affidavit of the Secretary of Defense, the Honorable Robert A. Lovett:

Secretary Lovett says that he is the Secretary of Defense of the United States and that he is the principal assistant to the President in all matters relating to the Department of the Defense, and, under the direction of the President, he has direction, authority and control over

the Department of Defense, including the departments of the Army, Navy, and Air Force, and the munitions board.

Secretary Lovett says that pursuant to these statutory duties and in the exercise thereof, he has information relating to the problems of procurement, production, distribution, research and development concerning the logistics requirements of the Armed Forces of the United States in weapons, arms, munitions, equipment, materials and all other necessary supplies for the Armed Forces of the United States.

Secretary Lovett says that there ixists a state of national emergency declared by the President on December [fol. 1363] 16, 1950; that communist aggression is forcing the free world to fight a limited war on the battlefield and an unlimited war of preparation and production.

The Secretary of Defense says that United Nations Armed Forces, largely American, are today fighting a war with Communist armies and Air forces in Korea. The French are fighting Communist forces, he says, in Indo China. That there is a constant threat of further Communist military aggression in other areas and that the men actually fighting Communist forces have been armed for the most part by American industry, and they are relying on American industry to supply the weapons and munitions they need in daily combat.

That to meet this threat of further aggression, we have deployed military forces in Europe and elsewhere and friendly nations have joined us and have assigned their own military units to hold the line along with our forces. These men on the line which may become the firing line at any time, have been armed by western industry, largely American, and they rely on our industry to supply an essential part of the weapons and munitions the must have to defend themselves and all of us.

The Secretary of Defense says that we and other nations are training large numbers of men to increase the forces already combat worthy and to replace those who have [fol. 1364] served their turn and done their duty.

In our case this involves building the core of our nation's defense—a well trained home force fully equipped with modern weapons and equipment. The weapons and equip-

ment for this great training effort have come and must come largely from American industry.

The Secretary says that the steel industry of the United States provides the basic commodity required in the manufacture of substantially all weapons, arms, munitions and equipment produced in the United States. An adequate and continuing supply of steel is essential to every phase of our defense effort.

The Secretary of Defense says in his affidavit that the cessation of production of steel for any prolonged period of time would be catastrophic.

He says that it would add to the hazards of our own soldiers, sailors and airmen and of other fighting men in combat with the enemy. He says it could result in tragedy and disaster.

It is stated also by the Secretary of Defense that it would prevent us from adequately arming the military forces now facing the enemy on uneasy fronts.

It would seriously delay us in adequately training and arming their replacements and reenforcements, and in building the core of our nation's defense, our home force. [fol. 1365] Secretary Lovett says that for economic and financial reasons our armament program has been "stretched out" approximately a year longer than our military men desired from a purely military point of view and that a cessation of steel production at this time would add materially to the risk the stretch-out already entails, thereby increasing the calculated risk we are taking to an unjustifiable point so that to complete the program will take us until 1955 rather than to the date fixed in the original plan, 1954.

Secretary Lovett has made also this very significant statement: That due to newly developed weapons they require more steel, and I quote the Secretary of Defense where he says:

> "We are holding the line with ammunition and not with the lives of our troops",

after, in his affidavit, he had pointed out the situation with respect to arms and the fact that the techniques and

objectives now employed require a greatly increased use of steel.

He has pointed out in his affidavit that a sudden and large-scale resumption of combat in Korea may occur at any time and, in such case, the demands for ammunition as well as many other types of munitions would vastly increase.

Secretary Lovett points out that:

> [fol. 1366] "Another specific example of a critical shortage is in stainless steel. Fifteen per cent 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."

Secretary Lovett concludes, therefore, that any curtailment in the production of steel, even for a short period of time, will have serious effects on the programs of the Department of Defense which are essential, and would be disastrous.

In support, also, of defendant's opposition to plaintiffs' motion for a preliminary injunction is the affidavit of Gordon Dean, Chairman of the United States Atomic Energy Commission.

The affidavit of Gordon Dean states the need for the production of fissionable and other materials for atomic weapons authorized by the President and the Congress, and the expansion program which includes the construction of major facilities at Savannah River, South Carolina, Paducah, Kentucky, Fernald, Ohio, and other places.

Gordon Dean has stated in his affidavit that dates for the completion of the construction program established by the President to fulfil the requirements of the Armed [fol. 1367] Forces in the interest of the National security are integral parts of the program and that national security is dependent on the production and on delivery of materials required in this program.

Attention is called by Gordon Dean to the time already lost through schedule slippages attributable to delivery delays which must be recovered and that these recoveries

cannot be had nor can the program be met in the event of a nationwide stoppage of production of steel.

[fol. 1368] There are further affidavits from Mr. Henry H. Fowler, Administrator of the National Production Authority, and the Secretary of Commerce, from the Secretary of the Interior, stating the crippling effect that even a short stoppage of production in steel would have on the petroleum, gas and electric power fields, products of which are of course essentially necessary in the expansion not only for domestic production but for military use as well.

Now, what are the plaintiffs' interests here as contrasted to those of the defendant?

They have alleged that seizure interferes with customer relations and destroys the good will of the companies, destroys their trade secrets, harms the plants, by virtue of having them operated by inexperienced managers, and they invade the stockholders rights to select managers, and also that it would interfere with their labor relations, to-wit, their ability to bargain collectively with their employees.

The Executive Order as well as Order No. 1 of the Secretary of Commerce provides that there will be no interference by the Secretary of Commerce unless, of course, directed by the Secretary, and that the Secretary's order appoints the President of each steel company as the manager of that company; that the operations are to be conducted by him in the same day to day fashion as they would be conducted had the Government actually placed strangers [fol. 1369] in as managers, and the same applies to the accumulation of profits and relations between the steel companies and their stockholders.

Now, as to their charge that it interferes with their labor relations.

The Executive Order as well as the Secretary of Commerce's Order No. 1 permitted the Secretary to change terms and conditions of employment but it also was designed, and the words so state, to encourage the continuation of collective bargaining as between management and the Union. Since the seizure occurred on April 8th there have been several conferences between management and labor in connection with attempts to arrive at some agreed settlement of the wage controversy.

The Court: Now, Mr. Attorney General, it is getting near the time when we shall have to stop. I wonder if you would give me such assistance as you can before we stop so that I can think about your viewpoint overnight, as to your power, or as to your client's power.

As I understand it, you do not assert any statutory power.

Mr. Baldridge: That is correct.

The Court: And you do not assert any express constitutional power.

Mr. Baldridge: Well, your Honor, we base the President's power on Sections 1, 2 and 3 of Article II of the [fol. 1370] Constitution, and whatever inherent, implied or residual powers may flow therefrom.

We do not propose to get into a discussion of semantics with counsel for plaintiffs. We say that when an emergency situation in this country arises that is of such importance to the entire welfare of the country that something has to be done about it and has to be done now, and there is no statutory provision for handling the matter, that it is the duty of the Executive to step in and protect the national security and the national interests. We say that Article II of the Constitution, whi*hc* provides that the Executive power of the Government shall reside in the President, that he shall faithfully execute the laws of the office and he shall be Commander-in-Chief of the Army and of the Navy and that he shall take care that the laws be faithfully executed, are sufficient to permit him to meet any national emergency that might arise, be it peace time, technical war time, or actual war time.

The Court: So you contend the Executive has unlimited power in time of an emergency?

Mr. Baldridge: He has the power to take such action as is necessary to meet the emergency.

The Court: If the emergency is great, it is unlimited, is it?

Mr. Baldridge: I suppose if you carry it to its logical [fol. 1371] conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment.

The Court: Then, as I understand it, you claim that in time of emergency the Executive has this great power.

Mr. Baldridge: That is correct.

The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.

Mr. Baldridge: That is correct.

The Court: Do you have any case that sustains such a proposition as that?

Mr. Baldridge: Yes, indeed, your Honor.

The only case in which an attempt was made by the Courts to interfere with the exercise of inherent executive power it the case of Mississippi vs. Johnson, reported in 4 Wall 475. I think your Honor may be familiar with the facts of that case.

The Court: Yes.

Mr. Baldridge: There the Court held——

The Court: There is no seizure in that.

Mr. Baldridge: Well, there was an attempt to stay executive power, and the Court decided they did not have that power.

The Court: There is no attempt to stay executive power [fol. 1372] here. It is to stay Mr. Sawyer's act. That is what they claim.

Mr. Baldridge: Well, Mr. Sawyer in this case is the alter ego of the President.

Suppose your Honor could enjoin Mr. Sawyer. The President could immediately appoint somebody else to operate the steel mills, or he could undertake that himself.

The Court: That bridge would be crossed when it is reached. The only case you have, then, is the Mississippi vs. Johnson case?

Mr. Baldridge: The only case in which there has been an attempt——

The Court: Do you have any case of a seizure except a seizure authorized by statute during wartime, which made the statute constitutional?

Mr. Baldridge: Well, we have set out in our brief a number of instances, your Honor, in which seizure occurred in the absence of statutory authorization.

The Court: I mean where the Courts approved it.

Mr. Baldridge: I do not know of any——

The Court: I do not think a seizure without judicial interference is relevant. The fact that a man reaches in

your pocket and steals your wallet is not a precedent for making that a valid act.

Mr. Baldridge: I might call your Honor's attention to [fol. 1373] the Pewee Coal case, reported in 341. That case went like most of the others. The Court has always avoided decision on the question as to whether the Executive had the power.

The Court: That was a Court of Claims case, was it not?

Mr. Baldridge: That is right. But that involved a suit for just compensation by a coal company which had been seized by the President under Executive Order in 1943 without statutory authority.

The Court: And it elected to sue for damages.

Mr. Baldridge: That is right.

The Court: How does that support you?

Mr. Baldridge: As I say, your Honor, the Courts have—at least the Supreme Courts, some of the lower courts, have passed on the power and held that they have it.

The Court: That you have the power?

Mr. Baldridge: That is right.

The Court: Cite one to me.

Mr. Baldridge: I am sorry, your Honor, for the delay.

The Court: That is all right. Take your time.

Mr. Baldridge: Page 26 of my memorandum.

The Court: What is the case?

Mr. Baldridge: The case is Employers Group of Motor Freight Carriers, Inc., et al. vs. National War Labor Board, et al., 143 Fed. 2nd 145, 151.

The Court: Was that not under a statute? It is my [fol. 1374] recollection of it. I think the statute was so broad that it forbade judicial review. Nevertheless the Court of Appeals upheld it because Congress said so. That is my recollection of it.

Mr. Baldridge: Well, your Honor, the broad constitutional power of the President does not depend on any action taken by the War Labor Board.

The Court: If I am wrong about my recollection of that case, I want to be corrected.

It is five minutes of four. You see the points on which I want assistance, Mr. Attorney General, and you can be

going over those points this evening and be prepared in the morning.

Mr. Baldridge: I will.

The Court: We will adjourn now until tomorrow morning.

(Thereupon at 3:55 o'clock p.m. an adjournment was taken until 10 o'clock a.m., Friday, April 25, 1952.)

[fol. 1375] Washington, D. C.,
Friday, April 25, 1952.

Pursuant to recess heretofore on Thursday, April 24, 1952, taken, the above-entitled causes of action at 10 o'clock in the forenoon on Friday, April 25, 1952, came on for further hearing

[fol. 1376] Proceedings

The Court: You may proceed, Mr. Baldridge.

Mr. Baldridge: May it please the Court, I should like to hand to Your Honor a brief two and a half page supplemental memorandum on the question you inquired on yesterday as to whether you must reach the Constitution before balancing the equities. Copies have been furnished counsel.

When I closed the argument yesterday Your Honor put several questions to me which I should like first to address myself to:

One was the question in connection with Presidential powers: You asked whether if the President empowered the Secretary of Commerce to take me into custody and execute me, would I have no recourse to the courts and would you have no power to enjoin the President.

The case I think nearest on the facts to that situation is the case of Ex Parte Merryman, cited in the footnote on page 21 of our brief. The facts in that case were briefly as follows:

The case involved an application by the petitioner to Chief Justice Taney who was sitting on circuit, for a writ of habeas corpus.

The petitioner, a resident of Baltimore County, Maryland, was taken into custody by the Armed Forces. They [fol. 1377] compelled him to leave his house and to accompany them to Fort McHenry.

In the application for a writ of habeas corpus, the Judge concluded that the petitioner appeared to have been arrested upon general charges of treason and rebellion without proof and without giving the names of witnesses or specifying the acts which in the judgment of the military officers, constituted the crime.

In his opinion, Chief Justice Taney held that the suspension of the writ of habeas corpus by President Lincoln was invalid, the writ of habeas corpus having been at that time suspended.

But Chief Justice Taney stated that unless the President chose voluntarily to follow the decision of the court, the court was powerless to make its order effective. Hence he issued no injunction, but merely filed his opinion and the records in the case in the Clerk's office, and sent a copy of the papers to President Lincoln.

In the opinion of Chief Justice Taney he said—and I quote:

> "I shall therefore order all the proceedings in this case with my opinion to be filed and recorded in the Circuit Court of the United States for the District of Maryland and direct the Clerk to transmit a copy under seal, to the President of the United States.
> [fol. 1378] "It will then remain for that high officer in fullfillment of his constitutional obligations to take care that the laws be faithfully executed to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

The Court: Did not Chief Justice Taney also say that he did not have the superior physical power necessary to carry out his decision?

Mr. Baldridge: There was some discussion of that, Your Honor, but he based his decision——

The Court (interposing): On the premise, as he stated, that the Court did not have at its disposal means to overcome the military force that was holding the petitioner in Maryland.

Was there not something of that kind in that case?

Mr. Baldridge: There was some discussion of that, Your Honor, along those lines, but as I read the case the dis-

cussion was based upon the Court's belief that, as a court, Chief Justice Taney had no power to enjoin the Chief Executive.

The Court: I have not read that case in recent years, but I have read it in years gone by. My recollection is Chief Justice Taney said that he did not have the physical [fol. 1379] force with which to combat the Army of the United States and that he therefore bowed to superior physical power. But, he did not deny the existence of power in the court.

But, is that applicable to the case I posed to you?

Mr. Baldridge: Your illustration seemed to me to involve the ultimate extension of the absence of the power of the court, if there be such an absence.

The Court: That may have been a hard case that I used as an example.

Let me put a case to you that is not quite so difficult:

Supposing the President should declare that the public interest required the seizure of your home and directed an agent to seize it and to dispossess you: Do you think or do you contend that the court could not restrain that act because the President had declared an emergency and because he had directed an agent to carry out his will?

Mr. Baldridge: I would rather, Your Honor, not answer a case in that extremity. We are dealing here with a situation involving a grave national emergency.

I think that in determining the question whether the courts can enjoin executive power, it is essential that you look at the circumstances which give rise to the exercise of that power.

I think that here, particularly in view of the affidavits [fol. 1380] that have been filed in support of the position—that certainly there has been no attempt made to deny that there was and that there is a grave national emergency that requires the exercise of rather unusual powers in these particular circumstances.

I do not believe any President would exercise such unusual power unless, in his opinion, there was a grave and an extreme national emergency existing.

The Court: Is that your conception of our Government?

Mr. Baldridge: Our conception of the powers of the Executive, Your Honor, is that under the doctrine of separa-

tion of powers—which I shall discuss a little more at length after a while—that, except for an occasional overlapping, there have not been and are not any instances of importance where one branch of the Government attempts to encroach upon the power and authority of the other.

The Court: Well, is it not your conception of our Government that it is a Government whose powers are derived solely from the Constitution of the United States?

Mr. Baldridge: That is correct.

The Court: And is it not also your view that the powers of the Government are limited by and enumerated in the Constitution of the United States?

Mr. Baldridge: That is true, Your Honor, with respect [fol. 1381] to legislative powers.

The Court: But it is not true, you say, as to the Executive?

Mr. Baldridge: No. Section 1, of Article II of the Constitution——

The Court (interposing): Have you read the case of McCullough v. Maryland lately?

Mr. Baldridge: I have, Your Honor.

Section 1, Article II, of the Constitution reposes all of the executive power in the Chief Executive.

I think that the distinction that the Constitution itself makes between the powers of the Executive and the powers of the legislative branch of the Government are significant and important.

In so far as the Executive is concerned, all executive power is vested in the President.

In so far as legislative powers are concerned, the Congress has only those powers that are specifically delegated to it, plus the implied power to carry out the powers specifically enumerated.

The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive.

[fol. 1382] Is that what you say?

Mr. Baldridge: That is the way we read Article II of the Constitution.

The Court: I see.

I have never heard that view expressed in any authoritative opinion of any court. If you have any cases expressing that view, I would certainly like to hear them.

Mr. Baldridge: Well, in a moment I was going to get to the attempts that have been made on the part of the courts to enjoin the Executive.

The Court: Very well.

Mr. Baldridge: Another question that was raised by Your Honor yesterday was this:

Why may a court enjoin an executive officer from acting under an unconstitutional statute but may not enjoin him on acts taken without statutory authority?

Now I want to say preliminarily that our petition on the pending motion for a temporary injunction does not rest primarily upon the question of the immunity of the President from suit.

Our main argument—and that is advanced also in our memorandum—is that if the conventional test of the balancing of the equities is aplied, then the plaintiffs' motions here should be denied.

We also raise the question of the immunity of the Pres- [fol. 1383] ident to suit, but only as an additional reason why this Court should deny the injunction prayed for.

Now, as to the line of cases cited yesterday by counsel for the plaintiffs involving suits against the United States, such as the Dollar case and the Lee case: We say they are irrelevant in this proceeding because the issue raised here is one of "indispensable party" rather than one of an "unconsented suit against the United States."

While it is true that the United States cannot be sued without its consent, nevertheless, in order that there may be judicial review of executive acts, the Courts have developed the fiction that an officer who acts in excess of statutory authority or who acts under an unconstitutional statute is not acting as an officer, but is acting in his individual capacity." Hence, as an individual, he may be reached by judicial process.

Assuming under such a fiction a suit to test the validity of executive action would lie. The question may arise as to whether the Executive Officer is before the Court. If he has not been made a party defendant, then the action may fail because of the plaintiff's inability to join this party

as a defendant, even though the suit is not an unconsented suit against the United States.

I mean this: We do not say that it is an unconsented [fol. 1384] suit against the United States, but we do say that the President is an indispensable party and, because the President cannot be enjoined as a defendant, he is immune from judicial process.

The question here is not whether this is a suit against the United States. The question is whether the President is, in fact, an indispensable party.

Based on the discussion made here yesterday I submit that the President is an indispensable party because clearly in the Executive Order it was the President that seized this property. True, the mechanical details of carrying out the seizure were delegated to his alter ego, the Secretary of Commerce, but we cannot lose sight of the fact that the act of seizure was the act of the President and was not the act of any other officer of the Federal Government.

Now, the next question that the Court posed was a request for cases holding that the Court cannot enjoin the President:

I think I indicated yesterday that the case of Mississippi v. Johnson reported in 4 Wallace is the only case reporting an instance in which an attempt was made to invoke the power of the Court directly against the Executive.

If Your Honor will recall, in that case the State of Missis- [fol. 1385] sippi sought to restrain the President and General Orr from carrying into effect the Post War Reconstruction Act on the ground that they were illegally attempting to impose unconstitutional legislation on the people of the State of Mississippi. The Supreme Court refused to enjoin either the President or his military commander, General Orr, and based that refusal on the ground that the Commander-in-Chief, the President, was performing purely executive or military duties in enforcing the law, whether constitutionally valid or not.

In that connection the Court said—and I quote:

> "The Congress is the legislative department of the Government. The President is the executive department. Neither can be restrained in its action by the

judicial department though the acts of both when performed are, in proper cases, subject to its cognizance."

I submit that there again is a restatement of the separation of powers doctrine, which is a part of our constitutional system; that one branch of the Government will not encroach, except in an incidental overlapping, on the powers and duties of any one of the other two co-equal branches.

It is our position that the President is accountable only to the country, and that the decisions of the President are [fol. 1386] conclusive.

Also, we say that where an executive officer acts at the direction of the President, in the sense that Mr. Sawyer here is the alter ego of the President, the courts will not interfere.

We say here for the courts to encroach upon the executive authority is prohibited in a situation such as we have here, where the plaintiffs have an available remedy but have refused to pursue it. They have an adequate remedy at law in a suit for just compensation under the Fifth Amendment.

The Court: Does not that presuppose the legality of the taking?

Mr. Baldridge: That is correct, Your Honor.

The Court: How would there be a remedy if the taking was illegal?

Mr. Baldridge: We suggested in the hearings before Judge Holtzoff that a tortuous taking would be remedied by an action for damages under the Federal Tort Claims Act.

The Court: How do you answer the argument made by your opponents to the contrary in citation of cases on that point?

Mr. Baldridge: Your Honor, that is the reason I asked yesterday for a week—not to postpone the hearing—in which to answer the briefs that were served on us just [fol. 1387] about ten minutes before court convened yesterday.

I have not read the memoranda nor have I had an opportunity to.

The Court: Well, as I indicated yesterday, if objection was to be made to the filing of the briefs, you should have

made the objection known at the time when the attempt was made to file the brief.

Mr. Baldridge: Well, I think Your Honor is entitled to all the help in this important situation that counsel on either side can give you. It is not only an important problem, it is an exceedingly difficult one.

The Court: I agree with you.

Mr. Baldridge: There are no clear-cut lines of authority either way.

We have presented in our memorandum, and we have covered it somewhat at least in our oral argument thus far, by citing cases that we think are applicable, and we have reviewed the executive and legislative history which plaintiffs cavalierly tossed off as being meaningless.

We think, with respect to the matter of constitutional interpretation that custom and usage are important elements in determining what the law is.

The Court: But you said yesterday that you were unable to or unwilling to or that you were not authorized to maintain the status quo for that length of time—that is, while [fol. 1388] the case was being heard.

Mr. Baldridge: I said I was not able to make a commitment on the status quo in so far as the situation with respect to terms and conditions of employment is concerned. I want to advert to that later. This proposed change in terms and conditions of employment by the Secretary of Commerce, with the approval of the President, is not a "one-way street." It is contemplated that when a change terms an dconditions of employment is made that an adjustment in the way of the Capehart benefit will be made in the way of a price increase for steel, or at approximately the same time that a wage increase may be put into effect.

As to when a wage increase and a Capehart increase would be put into effect, if it is put into effect, I do not know. This situation is one that fluctuates from day to day. There are a tremendous number of people and a tremendous number of agencies that are interested in it, that are working on it, that are attempting to solve a most difficult situation; and a situation that exists today may in some feature or another be changed tomorrow.

I just cannot give, as I suggested yesterday, any assurance to the Court that the status quo will be maintained

until such time as this Court has had an opportunity to act on the pending motions—I am sorry I cannot.

The Court: Well, I shall then have to act on the motions [fol. 1389] as expeditiously as possible, consistent with a complete, calm, and deliberate understanding of the case, and make my decision on the case. But I cannot assure you that that will be within a week. My impression is that it will be in much less time than a week, because I think the exigencies of the case require—that indeed justice requires—prompt action.

[fol. 1390] Mr. Baldridge: We agree with Your Honor, although I do want to restate one thing I said yesterday.

The plaintiffs argued here that the damage as a result of the seizure has been incalculable. We want to reiterate that the seizure has also taken away from the unions the only weapon they have to enforce what they think are their rights, namely, the right to strike. They are now Government employees, and as such, cannot strike. Again, this seizure is not a one-way street. I want to give some figures a little later on to show that the condition is not as serious as all statements of counsel for plaintiffs might indicate. Even though it isn't a matter that is really before this Court directly, I think that it is necessary and essential background to an understanding of the issues here.

Now, yesterday I reviewed briefly the executive powers conferred on the President by Article II of the Constitution, particularly Section 1, which provides that: "The executive power shall be vested in the President of the United States of America."

And in Section 2 of Article II, the President is made the Commander-in-Chief of the Army and the Navy of the United States.

And in Section 3 of Article II it provides that the President shall take care that the laws be faithfully ex- [fol.1391] ecuted.

Now I should like to compare, as I have briefly a moment ago, the grant of the power to the Chief Executive in Article II as compared to the legislative grant in Article I.

Article I, Section 1, reads, and I quote: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Now, contrast that with Section 1, Article II, which reads: "The executive power shall be vested in a President of the United States."

It is obvious that the legislative powers are limited to those specifically enumerated, whereas all executive power, whether or not enumerated, is vested in the Chief Executive. Hence, the executive power is broader. One might say it is similar to the legal principle of self-defense, that having a broad grant of power the executive, particularly in times of national emergency, can meet whatever situation endangers the national safety of the country.

We submit, if Your Honor please, that the burden of proof here lies with the plaintiffs to show that there is no power in the Executive to seize. Yesterday the Government was placed on the defensive, and asked to show wherein [fol. 1392] lies power to seize. We are not the moving parties here. The plaintiffs, the steel companies, have asked Your Honor to enjoin this seizure. It is their duty to make a showing, if they can, that no such power resides. And all they have shown so far is to make oral assertions that no such power exists.

In the Government's memorandum we have analyzed the applicable provisions of the Constitution. We have dealt with customs and usage in so far as the executive and legislative branches of the Government are concerned. And we have given Your Honor the benefit of what case law is available.

I want to point out that whether that be too convincing or not, there is not one single instance in which the courts have enjoined executive power where it was based upon the Constitution and not upon statute.

Now, if the plaintiffs here have such cases, we say let them come up with them. We have not seen them. We have been unable to discover any.

Now, I should like to advert briefly to an interpretation of the powers of the Executive as set out in Article II of the Constitution. The plaintiffs yesterday relied upon the treatise written by ex-President Taft in 1916 in which he says that there is no residuum of power that the President can exercise merely because he thinks it is in the public [fol. 1393] interest. We contrast that with the attitude of other Chief Executives as to their idea of what constitutes executive power.

Theodore Roosevelt believed in the stewardship theory of the Presidency. He believed that the President can do what is imperatively necessary for the good of the nation without specific authorization. He believed that it is the duty of the President to do what the needs of the nation demand unless forbidden by the Constitution and laws.

Of course, as a result of that view, there was a greatly expanded view of the executive power.

As far back as the days of Alexander Hamilton, a broad construction of executive powers have been strongly advocated. Hamilton said that the specific enumeration of powers merely specifies the principal powers implied in the Chief Executive, that the remainder flows from the general grant.

Even Chief Justice Taft ten years later after his statement in the treatise that there were no remedial powers in the President, when faced with a specific case, the Myers case, averted to yesterday by plaintiffs, held expressly that Section 1, Article II, constitutes a general grant of the executive powers of the President.

We submit further, Your Honor, that Section 3 of Article II requiring that the President shall take care that the [fol. 1394] laws be faithfully executed is also important. The scope of this section is explained and elucidated in the Neagle case, reported at 135 U. S., which involved a habeas corpus proceeding brought by the United States Marshal against Neagle who had killed one Terry in the defense of Judge Field.

In that case the Court held that the executive power conferred by Section 3 is not limited to the enforcement of the laws of the United States, but includes, and I quote:

> "The rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."

In this case a strike would prevent this Government from keeping its treaty obligations with other Governments because this country has become the arsenal for arms and weapons. We have treaties, particularly with the NATO countries, that this country will supply certain arms, a

larger part, as a matter of fact, of the arms necessary for defense of Western Europe against the constant threat of Soviet aggression. Those are solemn treaty obligations. Those commitments cannot be fulfilled unless there is an adequate and continuous supply of steel for the manufacture of arms.

We submit, further, Your Honor, that the scope of execu-[fol. 1395] tive power is demonstrated further by the so-called Prize cases. In these cases the validity of President Lincoln's blockade of the Southern ports was upheld even though the Congress had not at that time declared war.

In connection with the holding, the Court said, and I quote: "The Constitution confers on the President the whole security power."

Again in the Debs case which involved the labor dispute between the American Railway Union and the Pullman Company, and involved violence in such degree as to obstruct the mails, an injunction restraining the strike was issued. Over the objection of the Governor of Illinois President Cleveland sent troops in to "enforce the faithful execution of laws, and to protect and remove obstruction of the mails."

With respect to the use of Federal troops, the Court said that the executive would take whatever steps were necessary to meet the situation.

I submit, Your Honor, that the national interest involved in that strike was far less than the situation today, and yet the courts held that executive power was sufficient in reach to meet that particular emergency.

Now I should like to pass briefly to the construction given Article II by both the executive and legislative branches of the Government.

[fol. 1396] This is the so-called custom and usage approach which we think are important in determining what constitutional powers are.

Apparently the extent of the exercise of executive power depends upon the views held by the particular president with respect to the magnitude of the problem. It might even be said that what the Presidency is depends, in important measure, on who is President.

In Lincoln's day the Secretary of War, at the President's direction, seized the railroads and telegraph lines between Annapolis and Washington. This was without specific legislative or statutory authority.

Again, confronted with secession, he issued the famous Emancipation Proclamation which he rested exclusively on his powers as Commander in Chief, without specific legislative or statutory authority.

He also increased the Army and the Navy and suspended the writ of habeas corpus.

He proclaimed the blocking of the southern ports, also without legislative or statutory authority.

In Wilson's time he exercised inherent power, not authorized by any statute, and seized the arms plant of the Smith and Wesson Company which had refused to accept the mediation decisions of the National War Labor Board, and the President seized the company under inherent powers [fol. 1397] in order to secure continuity of production.

Wilson, like Theodore Roosevelt, held the "stewardship" view of the Presidency, also in the absence of legislative authority, and created the War Industry Board, the War Labor Board, and the Committee on Public Information.

Also in the absence of statute he ordered the telephone and telegraph lines to be operated under the regulations of the War Department and the Navy Department.

President Franklin D. Roosevelt made extensive use of the inherent powers in the Presidency on at least twelve occasions prior to the passage of the War Labor Disputes Act in 1943 and, in 1943, issued executive orders taking possession of plants when it appeared that work stoppage would impair the war efforts, and the first seizure was six months before Pearl Harbor—the seizure of the North American Aviation plant.

President Franklin D. Roosevelt did not hesitate to use the inherent powers reposed in the Executive, even in peace time, if the national emergency was sufficiently grave —to illustrate I need only refer to his declaration of the National Bank Holiday.

Now, what has the Congress said about the use, the meaning and scope of executive power and the power of the executive to act?

In two instances in the memorandum, the one dealing [fol. 1398] with the Lincoln seizure of the railroads and telegraph lines, and the other with the hearings in connection with the passage of the War Labor Disputes Act in Franklin D. Roosevelt's Administration, the Congress was considering whether it should pass laws which would give statutory authority to the acts that the President had taken under his inherent power. Almost without exception, Congressional debates will indicate that the members of the legislative branch of the Government thought that the President had the powers that he exercised. It is interesting to note that most of those who voted "no" did so on the specifically stated reason that it might be construed as a limitation on the powers that they admitted the Executive already had.

Now, a word as to how the Courts considered the matter: They have held that the Executive, in appropriate circumstances, has inherent power in the nature of eminent domain and police power to seize, without statutory authority, and the Courts have been concerned not so much with whether the power existed but whether just compensation is required in view of the circumstances, and, as to that, they have held if the taking was under the power of eminent domain just compensation was required, and, if the taking was under the police power, no compensation was required.

As I indicated a while ago the Congress has assumed the existence of this inherent executive power without deciding [fol. 1399] it, and it is significant that they have never struck it down.

The Court: Where have the Courts assumed the power existed?

Mr. Baldridge: I beg your pardon?

The Court: I say: Where have the Courts assumed the inherent power existed?

Mr. Baldridge: The Pewee Coal is an apt illustration. The President, without statutory authority, seized the coal mines of the country to avert the paralyzing effect of the strike, and he did so under executive order, and, after the seizure, Pewee sued the Government for just compensation under the Fifth Amendment. Without deciding specifically whether the Executive had the power to seize without statutory authorization, the Court held that the seizure

was lawful and, being lawful, the company was entitled to just compensation under the Fifth Amendment for the property taken.

The Court: Are you sure?

Mr. Baldridge: Yes, indeed.

The Court: My recollection is that the ground of the seizure, so far as its constitutional authorization was concerned, was never raised.

Mr. Baldridge: The Court did not pass on the question whether the President had the power to seize in the absence [fol. 1400] of a statute, but it held that the seizure was valid.

The Court: The Court viewed it as a fait accompli and recompensed for the damage suffered, and never considered the other view of it.

That is my impression of that case.

If I am wrong about it, I wish to be corrected.

Mr. Baldridge: I had a different view of it, your Honor, but, whether your view is correct or mine is, the case stands for the proposition that the Court did grant just compersation over the vigorous objection of the Government, and, after all, it was a small, a token, seizure but it did require the payment of just compensation.

The Court: But you did not raise the question in that case that the seizure was illegal, which would have been a complete defense.

Mr. Baldridge: No, apparently not; I do not believe it was raised by either side.

Mr. Kiendl: With Mr. Baldridge's consent, may I interrupt to clarify that?

Mr. Baldridge: Certainly Mr. Kiendl.

The Court: I would like you to if that can be done.

Mr. Kiendl: The Pewee Coal Company case is referred to in Section IV at Page 35 of our brief and we say there:

> "Defendant refers . . . as confirming the existence [fol. 1401] of a Constitutional power in the President to seize property during a national emergency."

I should have said that the defendant refers to the case of United States vs. Pewee Coal Company, 341 U. S. 114 (1951), as is pointed out at Page 57 of his memorandum.

We say in our memorandum:

> "This assertion is made in the face of the incontrovertable face that the legality of the taking—i.e., the question of the power of the executive to seize the property—was not an issue in the case, as specifically stated by the court below. (See Pewee Coal Co. v. United States, 88 F. Supp. 426, at Page 430 (Ct. Cl. 1950)."

The Court: Thank you for confirming my recollection.

Mr. Baldridge: As I say, whichever view was taken, compensation was granted and the seizure did occur without statutory authorization.

I do not think I need to further discuss the emergency situation which we submit existed and which is sufficient to justify, in these circumstances, the exercise of the President's inherent powers to prevent a national catastrophe by issuing the seizure order.

At the session yesterday, counsel for plaintiffs, Mr. Bromley for Bethlehem Steel Company particularly, having insisted that a statutory remedy was available to the Chief [fol. 1402] Executive; that the statute was passed with that specific purpose in mind and hence that route should have been taken rather than the inherent power of seizure right.

I say at the outset that where several remedies are available to an Executive and he chooses one rather than another, I do not think it is the concern of the Courts to decide that he should have taken a different route.

The function of the Court is to determine whether as to the route the President did take that that route so taken was actually legal—that is, when properly raised, as it is here or will be on a motion for a final injunction.

The Court: I thought they raised that point as an argument against your position that an injunction could be catastrophic.

They said that an injunction would not result in a catastrophe because there is a remedy available to prevent a strike, to-wit, the Taft-Hartley law.

That is what I got out of what they said.

I do not think they said that if the Executive had two

courses to pursue or that he could pursue that the Court could direct which one he should pursue.

Mr. Baldridge: They did not, your Honor.

The Court: I had no such view.

Mr. Baldridge: They did say that there was a statutory remedy which should have been followed rather than a route [fol. 1403] that the President took.

The Court: Yes, that is right; that is right.

Mr. Baldridge: Now we submit, your Honor, that the Taft-Hartley Act was not and is not intended to preclude the President from resorting to residual or implied powers.

The Taft-Hartley Act is persuasive rather than mandatory.

The President may appoint a fact-finding board and, upon receiving the report of the fact-finding board he may direct the Attorney General to seek an injunction.

The legislative history of the Taft-Hartley Act will show that the use of the word "may" was direct—and, incidentally, the House version was, first, "shall", but the Senate version always used the word "may", and the conference report adopted the use of the word "may" making the Taft-Hartley Act persuasive.

Another instance indicating that Congress recognized the power of the Executive to resort to alternative remedies in labor disputes affecting the national defense is illustrated by Section 18 of the Selective Service Act passed in 1914 and certain provisions of it are directly pertinent to this argument and sustain my view.

Also, the labor disputes provisions of the Defense Production Act of 1950 as amended are particularly pertinent. [fol. 1404] As we say in our brief, our position is not that the present order is based on either of these statutes, but that their enactment indicates that the Taft-Hartley Act was clearly considered not to be an exclusive remedy.

Those two measures to which I have referred were not followed for other reasons, because, administratively, they were thought not to be adequate to meet the situation that faced the country as of midnight on April 8, 1952.

The same is true of the Taft-Hartley Act.

It could be said that the situation would be remedied and that the President should have gone to the Taft-Hartley

Act because the Act provides that there may be an injunction against a threat to strike as well as an injunction against an actual strike.

But, with this matter under consideration for several months, and placed in the hands of the Wage Stabilization Board it must be remembered that in any negotiation there is a "give and take" period on either side; there is always the hope that before the last minute dead line, an agreement will be reached; it is always possible that at five o'clock in the afternoon the negotiators would be one cent apart; at seven o'clock in the evening they could be worlds apart while at eight o'clock they would have almost reached an agreement.

That is the normal history of labor management negotia-
[fol. 1405] tions around the collective bargaining table.

Hence, it was not until very late in the evening of April 8th that it became apparent that the wage controversy in this industry would not be settled on a negotiation basis as between the management and the Union.

If the President at that time had gone the Taft-Hartley route, he realized that it takes time to prepare an executive order.

Then the fact-finding board must be convened and, unless their hearings and finding are a pure sham, particularly in a case that has these various elements of wage benefits, fringe benefits, and what not, careful consideration must be given by the board to the full disclosure of the facts before such panel on each side. It may be a week, two weeks, or a month before such a board could have reported its findings.

In the meantime, the strike would have occurred and would have gone on, as called at 12:01 a.m., April 9th. Steel production would stop and the defense effort and the national security would have been jeopardized in a very real sense, as is suggested by the affidavits supporting the Government's position, particularly those affidavits of Mr. Lovett and Mr. Dean.

We submit, your Honor, that all the results that could have been achieved under the Taft-Hartley Act were achieved by voluntary action prior to Government seizure
[fol. 1406] at midnight on April 8th.