THE YOUNGSTOWN SHEET AND TUBE COMPANY, et al.,

Petitioners,

—vs.— No. 744

CHARLES SAWYER,

Respondent.

CHARLES SAWYER, SECRETARY OF COMMERCE,

Petitioner,

—vs.— No. 745

THE YOUNGSTOWN SHEET AND TUBE COMPANY, et al.,

Respondents.

Washington, D.C.
Monday, May 12, 1952.

The Supreme Court of the United States having on May 3, 1952, filed orders allowing certiorari in the above-entitled cases, and having assigned the said cases for argument on Monday, May 12, 1952, the said cases did on May 12, 1952, come on for oral argument.

BEFORE:

FRED M. VINSON, *Chief Justice of the United States*
HUGO LAFAYETTE BLACK, *Associate Justice*
STANLEY FORMAN REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM ORVILLE DOUGLAS, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
HAROLD HITZ BURTON, *Associate Justice*
TOM C. CLARK, *Associate Justice*
SHERMAN MINTON, *Associate Justice*

APPEARANCES:

JOHN W. DAVIS, ESQ., *Counsel for United States Steel Company, 15 Broad Street, New York 5, New York.*

PHILIP B. PERLMAN, ESQ., *Solicitor General of the United States, Department of Justice, Washington, D. C.*

PROCEEDINGS

MR. CHIEF JUSTICE VINSON: *The Youngstown Sheet and Tube Company, et al.*, Petitioners, versus *Charles Sawyer*, Respondent, Case No. 744, October Term, 1951; and *Charles Sawyer*, Secretary of Commerce, Petitioner, versus *The Youngstown Sheet and Tube Company, et al.*, Respondents, October Term, 1951, No. 745.

Are the parties ready?

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE VINSON: Mr. Davis?

ORAL ARGUMENT OF JOHN W. DAVIS, ESQ., ON BEHALF OF YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.

MR. DAVIS: If the Court please:

These cases are here on *certiorari* to the Court of Appeals of the District of Columbia Circuit. There are seven such cases brought by individual litigants against Charles Sawyer, Secretary of Commerce. The cases are also here on *certiorari* to the Court of Appeals of the District of Columbia Circuit by Charles Sawyer, Secretary of Commerce, countering the *certiorari* prayer of the Petitioner-Plaintiffs.

The cases were not consolidated for trial or for hearing at any stage, but they have been heard together. They have marched side by side, such as would be the case if they were consolidated, and, in each case, there have been appropriate pleadings, petitions, and orders, but, as I say, the cases were not at any stage consolidated. But since they have marched side by side we, in this Court, have filed for the seven Petitioners here the consolidated brief.

In addition to the consolidated brief that I have mentioned, my brother Tuttle has filed a very excellent brief on behalf of Armco Steel Corporation and of Sheffield Steel Corporation, which I highly commend to the Court. The fact, however, that there is such a separate brief does not indicate any differences of opinion among these Plaintiffs, for, whatever avenue of reasoning be employed, the result comes out the same.

Now, I may summarize the chain of events out of which this controversy has emerged, and, perhaps in an adherence to chronology, we will throw it into relief better than if I undertook to break the chain:

It was in November, 1951, that the United States Steelworkers, whose contract was to expire with the companies in thirty days, or at the end of that year, gave notice that it was their desire to negotiate a new contract. The United Steelworkers submitted to the corporations a list of twenty-two demands which they had wished to be considered in the formulation of a new agreement. But the 10th of December, after further consideration, these demands had swollen into one hundred in number which would be considered and considered before an agreement was made, and the Steelworkers indicated that if the demands were not granted, or if a conclusion was not reached, by the latter part of December, by the 31st of December, 1951, they would call a strike.

The President of the United States was disturbed by that threat and, on the 22nd day of December, he remitted the controversy to the Wage Stabilization Board to investigate and to make a report. The Wage Stabilization Board took the matter under advisement and, on the 3rd of January, they erected a tripartite panel to consider and advise, a panel composed of representatives of labor, of management, and of the public. That Board proceeded to hear the controversy and, on the 20th of March last, they reported to the Wage Stabilization Board, and the Wage Stabilization Board entered an order recommending what they believed to be a fair and a just arrangement between the companies and the union.

The public members of the Board and the labor members of the Board, that is, of the tripartite Board, agreed in their recommendations. The industry members of the Board disagreed. Some heat has been generated here and there in the course of the controversy by reason of that disagreement. According to one point of view, the report of this Wage Stabilization Board, adding together the specific wage increases and the so-called fringe benefits meant an increase of 26 cents an hour in the payment of wages to the members of the union, and, in addition, the compulsory provision for a union shop. These recommendations were not acceptable to the management. They were accepted by the Union, and there emerges an intimation here and there that they were not only acceptable to the Union, but amounted to more than the Union had hoped to obtain.

It has been estimated in the affidavits filed on behalf of the Plaintiffs below that the cost of these increased wages to the United States Steel Corporation alone would, in the year of 1952, amount to something over $100 million; and that in the year 1953, if the report of the Board were made effective, the increase in cost would amount to $141 million. Now, whether these calculations are correct or not is not a matter with which Your Honors may disturb yourselves. It is enough to say that the increases were very substantial and that the amount of those increases, if put into force, would be a burden on each and all of the companies engaged in this industry.

When it was apparent that management was not disposed to accept this recommendation of the Board voluntarily, the Union, on the 4th of April, gave notice that at 12:01 o'clock a.m., on April 9th, 1952, they would call a strike. That 96 hour interval was an agreed period to which the members of the Union had committed themselves. They had agreed in the earlier stages of these negotiations that at least 96 hours notice would have to be given of a proposed strike and, on the 4th of April, they gave the due 96 hours notice. The strike was set to begin at one minute after twelve o'clock a.m., on April 9th.

Thereupon the President took action and, on the 8th day of April, he promulgated Executive Order No. 10340, which is the crux of this present dispute. After reciting that the cessation of the manufacture of steel would result as a consequence of the threatened strike; that steel was important and indispensable to the national economy, he, by virtue of authority vested in him by the Constitution and laws of the United States, and as President of the United States and Commander-in-Chief of the Armed Forces of the United States, directed the Secretary of Commerce—and that I may not misquite him, I will read that portion of the order found on page seven of the printed record, as follows:

> The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the named in the list attached hereto, or any part thereof, as he ...

That is, the Secretary of Commerce:

> ... may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

The Executive Order goes on:

> "In carrying out this order the Secretary of Commerce may act through or with the aid of such public or private instrumentalities or persons as he may designate; and all Federal agencies shall cooperate with the Secretary of Commerce to the fullest extent possible in carrying out the purposes of this order.

The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other property, possession of which is taken pursuant to this order, shall be operated. The Secretary of Commerce shall recognize the rights of workers to bargain collectively ..."

Not the rights of workers and employers, Your Honor, but the "rights of workers":

"... to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining, adjustment of grievances, or other mutual aid or protection, provided that such activities do not interfere with the operation of such plants, facilities, and other properties."

Then there is provision that the Secretary of Commerce shall provide from time to time management of the plants and facilities and finally—that is, in the subsequent order, except so far as he may otherwise direct—the existing rights and obligations of such companies shall remain in full force and effect.

To that Executive Order is appended a list of 85 steel manufacturers.

Now, the Secretary of Commerce was not laggard in using the authority that was so attempted to be conveyed to him and, on the same day, and simultaneously, I take it, on April 8th, he issued his "Order No. 1", which is found on page 22 of the printed record. The Secretary of Commerce redefines or defines the terms "plant", "facilties", and "other properties" of which he takes effective possession at twelve o'clock midnight, April 8th. He restates or defines the terms "plants, facilities, and other properties" which he seizes to include but not be limited to any and all real and personal property, franchises, rights, funds and other assets used or useful in connection with the operation of such plants, facilities, and other properties that he has seized, and, making no doubt a very careful selection, instead of the 85 companies covered by the Presidential Order, he shortens the number to 71, which is sufficiently broad to fairly represent the industry, and he provides that:

The president of each company named in the list specified ... is hereby designated Operating Manager for the United States for such company until further notice, and is authorized and directed, subject to such supervision as I ..."

The Secretary of Commerce,

"... may prescribe, in accordance with such regulations and orders as are promulgated by me or pursuant to authority delegated by me, to operate the plants, facilities, and other property of such company and to do all things necessary and appropriate for the operation thereof and for the distribution and sale of the products thereof."

And then, what is perhaps the most innocuous provision of the Order, he directs that:

"The Operating Manager for the United States shall forthwith fly the flag of the United States upon all premises."

And that, I take it, would not seriously impair the rights of anybody.

From the receipt of the order directing the presidents of the companies to assume the posture as operating manager for the United States, the companies responded, under protest, and typical of that is the communication of Mr. Fairless of the United States Steel Company found on page 100 of the printed record, where he addresses himself to the Secretary of Commerce and states:

"I acknowledge receipt of your telegram of April 9, 1952, advising that you have appointed me as Operating Manager on behalf of the United States of the properties of the United States Steel Company 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 properties. And 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 whatsoever, and we intend promptly to vindicate our rights in court."

The other presidents responded in not perhaps the exact terms, but in similar fashion.

Thereupon, on the 9th day of April, several companies instituted their suits in the District Court of the District of Columbia. They averred that the seizure was unlawful; that the Executive Order No. 10340 was without validity as exceeding the power of the President; and they averred that the Secretary of Commerce, being without authority to act as he was undertaking to act, was a mere trespasser.

These companies pled that the trespass be enjoined and that a declaratory judgment might be entered vacating and declaring to be void the Presidential Order.

The case came on to be heard. An application made to Judge Holtzoff in the District Court for a temporary restraining order was denied and the case was remitted for hearing on notice and the matter came on for hearing on a motion for a preliminary injunction.

The case was heard and was argued at length. Elaborate affidavits were filed, those filed on behalf of the Plaintiffs dealing largely with the question of irreparable damage, and those filed on behalf of the Defendant dealing largely with the question of national emergency and of the importance of steel to our national economy and to the needs of the Government. I do not think that Your Honors will find it necessary for me to review the affidavits which are quite lengthy, pro and con on these issues.

The case came down to a naked question of law: That there was an entry on the property of these companies; that there was a taking of possession; that there was an assertion of the right to use the funds of these companies for such purposes—not only their plants, but their funds—for such purposes as the Secretary of Commerce deemed proper. There was, too, an assertion on the part of the Secretary of Commerce of the right to prescribe terms and conditions of employment. There can be no doubt about that.

After argument before His Honor Judge Pine, he rendered his opinion in which he found that there was neither statutory nor constitutional authority for the President's Order of seizure; that that Order could not be defended because of the existence of inherent power in the Executive; that the mere instances of acts which were alleged to be similar furnished no precedent if those acts themselves were unchallenged; and that this seizure was not an exercise of the right of eminent domain, which was a Congressional power.

It was held in Judge Pine's order that the stewardship theory of the late great President Theodore Roosevelt was expressly discounted. Judge Pine held the damages were irreparable. He held that the suit was not one brought against the President in his Executive capacity. He held that there was no adequate remedy at law to which the Plaintiffs could resort, and that a preliminary injunction to redress the trespass may be forthwith issued, and that was done. An application for a stay of the order was denied.

Appeal was taken to the Court of Appeals of the District of Columbia and, in that court, in application for a stay of the order, and on the part of the Plaintiffs, an insistence that the order should stay the trespass and affirmatively debar the Secretary of Commerce of interfering with the terms and conditions of employment, was made. That addendum to the order was denied by the Court of Appeals, by a vote of five to four. Thereupon both parties filed a petition for *certiorari*, which petitions are here before the Court.

Now, whatever may be said about the law's delays, and whatever may be said as to that being a subject of immemorial complaint, no such complaint is addressed to any of the courts participating in any of these acts in the instant case, for it must be stated without denial that we are all here as a result of extraordinary speed and expedition.

I should have stated that pending this litigation the Secretary of Commerce, not once but three or four times, announced his plan and his purpose to revise the terms of employment and the wage conditions and to do so under the power of seizure and by virtue of the position of seizure which he occupied, and, as late as the 3rd day of May, the President of the United States announced that, lacking an agreement on that day between the contending parties, he would impose the wage and employment conditions that the Secretary of Commerce proposed to impose, and it was on the 3rd day of May that Your Honors suspended that power or stayed it.

Now, it is stated by the Defendant Sawyer that he acted and the President acted under no statutory authority whatever. That concession was made in argument before Judge Pine. I take it that it is repeated in my friend's brief here, and therefore it might seem useless to review the statutes on this subject of seizure, that it would be merely to negate their application which has occurred here. But I should like to make a brief review of those statutes, because I think from them we can distill a very clear argument on what at least one of the tripartite branches of the Government thinks of the question of arbitrary seizure. Let me run that over:

First, the National Defense Act of 1916 is where, so far as I know, this legislative authority for the seizure of property first originated. Section 120 of that Act gives authority, in time of war or when war is imminent—and we have to recall the surrounding circumstances when the Act was passed—gives authority to the Executive to place obligatory orders for produce or materials. Upon the failure or refusal to supply those orders, the President may authorize immediate seizure of any manufacturing plant or plants, may proceed to manufacture, must pay compensation which shall be fair and just, until he has produced the desired article.

That was a contract compulsion section. It is of no further importance here because it was suspended by Joint Resolution of Congress on July 25, 1947.

There was at that same time passed a statute authorizing the Executive to seize means of transportation, and I understand that certain aspects of that statute will come before Your Honors in the course of this discussion, but I shall have nothing more to say about it.

Then the Selective Training and Service Act of 1940 came into being, which by its terms was to expire on May 15, 1945. The expiration date was extended to May 15, 1946, and to July 1, 1946, and finally, by March 31, 1947, particularly, Section 9 of that Act finally expired. Section 9 was a repetition of the seizure clause of the National Defense Act. It was solely directed to compulsory orders of the Executive, and gave power to the Executive to do what he felt was requisite for wartime use. That Act has expired and there is no need for further concern in regard to it or comment on it, except as it marks the compass of Congressional power.

We come then to the War Labor Disputes Act of 1943. Here we have the power of seizure given upon proclamation and provides facilities to cope with any impeding or delay of the war effort. But that Act provided that any plant, mine or facility shall be returned sixty days after the emergency has ended, and the Act provided that possession should not be taken after the termination of hostilities "in the present war".

There is an express granting of the right of seizure in the case of a labor dispute, first, that it shall not continue more than sixty days after return to the owner or termination of hostilities. This Act expired on the 30th of June, 1947. It is somewhat interesting to note that this Act was probably the first Congressional grant of authority to seize in case of labor disputes, and also, it was passed over Presidential veto, for whatever that circumstance may amount to. But it was further provided in this seizure Act that any plant seized should be operated by the Government under the terms and conditions of employment which were in effect at the time such plant, mine or facility was so taken, with the power to resort to the National War Labor Board if any adjustment was to be had.

So that we have in these Congressional Acts, broad as the powers may be, direct limits as to time, direct limits as to operation, direct limits as to alteration of terms and conditions of employment. But that Act also is behind us.

Then the Universal Military Training and Service Act of 1948—I trust I am not unduly wearying the patience of the Court by this resume, but the Universal Military Training and Service Act of 1948 is highly important because it provided, as did the earlier Act, for the placing of compulsory orders and the seizure or possession that followed on refusal or failure to perform those orders; but fair and good compensation was to be paid. And there was a special paragraph to steel manufacturers: They had to ration production and there was a provision for seizure should they refuse to comply. There is nothing in that Act that relates to labor disputes; it does not even incorporate the labor dispute clause of the Act of 1943.

In the meantime, the Taft-Hartley Act was put on the books and the President's authority, after seizure was established, was defined as being confined to the production of articles ordered by the Armed Forces.

The Defense Production Act of 1950—there authority is given to the President to requisition personalty and to condemn realty, upon a condition to be determined at the time, for the supply of materials or facilities necessary for the manufacture of articles required for national defense. The original Act gave no power over realty and personalty. By an amendment of 1951 there was power over realty taken away, and it was determined that that could be only by eminent domain. The Taft-Hartley Act of 1947 was on the books before this Act was passed, and there was an express mandate that its provisions should be observed.

I think that from this review of Congressional action three things clearly emerge:

The first is that Congress fully understands the nature and scope of the power to seize private property for Government purposes;

Second: It recognizes the right of the Executive to exercise this power is drawn entirely from Legislative sources, and;

Third: That the power should be granted, if at all, sparingly, for specific reasons and for limited purposes and with appropriate safeguards.

Now, having abandoned the express provision for seizure in the earlier Act, Congress passed the Taft-Hartley law. We need spend but little time in its discussion. Your Honors are familiar with its terms, as are counsel. Congress did not ignore the possibility of an intractable labor dispute. Congress did not intend to leave the President entirely barren with no weapon with which to meet a crisis. So they adopted in 1947 the Taft-Hartley Act. Under the Taft-Hartley Act they had first the investigation, then the report, then further consideration and a report to Congress if no agreement had been achieved.

Now, we do not contend that the President is under mandatory authority to utilize the Taft-Hartley law. He may or he may not resort to that machinery for settlement, but the fact of its existence points up a claim we make here that, having that weapon at hand, any effort on his part to forge a new and a different weapon only aggravates the claim of usurpation which we are compelled to make.

I was interested in what appears on page 151 of my friend's brief and the reasons given why the Taft-Hartley law offered no assistance in the present crisis. The first reason given on page 151 of Mr. Sawyer's brief is:

"... the substance, if not precise forms, of the Labor Management Relations Act was more than achieved by the President and the parties to the labor dispute during the 99-day strike postponement."

In other words, that an abstention on the part of the labor union and an exercise of a right to strike implies an aptitude for righteousness—the fact that they had refrained from striking during the statutory period under the Act.

First, how long may labor abstain from the provisions of the Taft-Hartley Act, and whether the 90 day period is more desirable than the 50 or the 40 day, we are not able to say, and certainly we insist that the theory that labor can escape the Congressional Act is not factually in keeping with that with which we are faced.

Then he says that:

"... the situation, when the President found it necessary to take the action here in question, was such that the procedures of the Labor Management Relations Act would have been inadequate to prevent the cessation of steel production which it was necessary to prevent without the slightest delay; and the patent unfairness of seeking to enjoin the Union for another 80 days after it had voluntarily refrained from striking for 99 days would have written finis to the effectiveness of the Government's measures for enlisting the willing cooperation of labor and management in the settlement of labor disputes affecting defense production."

In other words, the processes of the Taft-Hartley Act are so dilatory, in fact, that they are not an effective weapon in cases of this sort.

Well, it is said it will take a long time to investigate, but we have a precedent. In the Longshoremen's strike a committee was appointed, a committee of investigation, on one day, and on the next day it heard the case, and on the third day its report was in, and on the fourth day there was an injunction against a strike and that injunction was in full force and effect. That was not so highly dilatory, nor is it conceivable to me that in four days time there would be the jeopardizing effect of a strike over the economy and the military structure that has been stated to be possible.

Then, in the case of the non-ferrous metal strike, the period between the appointment of the committee and the final action was five days.

The record is full of the experiences that have arisen in this regard. I do not find anything that indicates a fatal or an indefensible length of time that has been actually taken to effect the result.

The third reason given here in Mr. Sawyer's brief is:

"The patent unfairness of seeking to enjoin the Union for another 80 days after it had voluntarily refrained from striking for 99 days would have written finis to the effectiveness of the Government's measures for enlisting the willing cooperation of labor and management in the settlement of labor disputes affecting defense production."

That goes back to the proposition again whether there is any great merit won by refusal to act earlier. So we say, granted the power of the President to use or not to use the machinery that Congress provided, its very existence points up the lack of necessity for the conduct that was finally adopted—and Congress has not had the last word on this question.

The Emergency Powers Interim Continuation Act of April 9th last continues the war powers of the President under a long roster of Acts, how many I do not recall, but it said that the Congress, in perpetuating the Acts for purposes of Presidential employment, stated clearly that nothing contained herein:

"... shall be construed to authorize seizure by the Government, under the authority of any Act herein extended, of any privately owned plants or facilities which are not public utilities."

Could there be a clearer declaration of the concept that Congress has of this legislative power with respect to the seizure power? Could there be any more clear evidence of the caution with which they wish the seizure power applied and the clear denial of it in some of these acts of the President, of the Executive, or any of its agencies? Very good.

There is no—according to our contention and the Defendant's admission, there is no statutory framework into which this seizure can possibly be fit. What then? What then?

There is one other source of Executive power and that, of course, is in the Constitution itself. My friends, my learned friends, are not very specific when they undertake to deduce their power or the power of the Executive from Constitutional sources. They speak of the Executive enjoying all the Executive power of which the Government is capable. I would agree, but they intimate that, perhaps lurking in some of the clauses of Section 2 of the Constitution, there are powers from which this action may be deduced.

Perhaps this is threshing old straw. But let us look at Article II of the Constitution for a moment. Section 1 of Article II of the Constitution, following the framework of Article I and Article III of the Constitution, granted that the Executive power vested in

the President, just as the Constitution declared that the Legislative power vested in the Congress, and as the Constitution declared that the power to interpret our laws, of course, vested in the Judiciary. So we have power in the Congress and the Judicial power which later shall be vested in one Supreme Court. We have a tripartite type of government and we have that division, and it is made complete and absolute.

Now, having vested the Executive power in this officer, the framers of the Constitution went on with a carefully catalogued tabulation of the scope which that Executive power embraced and said just what it might occupy. There are ten categories so enumerated and I think there is but one, at most two, which the President of his own volition may occupy or exercise subject to no check from either one of the other branches of the Government—only two and perhaps only one; I am not sure.

What are they? It will take but a moment to enumerate them. First, the President is made 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. But Congress has the duty to raise and support armies and provide and maintain a Navy, and adopt rules and regulations and articles of war for their government. If Congress did not provide an Army and did not provide and maintain a Navy, the President could not step into the breach and perform that function. The President may call for volunteers, but no one, not even in the dark days of the Civil War, pretended that the President could adopt a draft call and raise an army compulsorily by his own unaided fiat. The President's power as Commander-in-Chief of the Army and Navy of the United States is cabined and confined by the higher power of Congress.

Perhaps Your Honors will remember the famous interview that was recited in history in connection with Cleveland where he and a Committee of the Senate had debated that question. It is a very instructive incident, not only because of its defining of the measure of power, but the measure of the particular character of power that may be reposed in the Executive.

Now, this power of the President, as the Commander-in-Chief of the Army and the Navy, is a military power and it is not a civilian power, and it is exercised by him when military action requires it. My friends cite in their brief some language of Justice Clifford in the case of *United States* versus *Russell*, 13 Wall., and they are welcome to it. I am glad they cited it. Justice Clifford exhausted the font of adjective language when he described what this power of the Commander-in-Chief is. He said:

> "... in cases of extreme necessity in time of war or of immediate and impending public danger, ..."

And he says:

> "Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, ..."

And:

> "... where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use."

He says:

> "Where such an extraordinary and unforeseen emergency occurs in the public service in time of war, no doubt is entertained that the power of the Government is ample to supply for the moment the public wants in that way to the extent of the ..."

And mark this language:

> "... but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed."

I do not know where in our language can be found a broader or a larger catalogue of adjectives to describe a situation than that. And, of course, the Commander-in-Chief, or the generals of the Army acting under him, can destroy bridges to stop the advance of a pursuing army, a pursuing enemy, and may level and raise buildings to get them out of the line of fire, and may even plunder a warehouse to provide food to starving armies.

But is that a general grant, is that a broad character of power that may be given to the President in times of civilian emergency, and can such power be properly bottled within such limits?

The President may require the opinion in writing of the principal officers in each of the Executive departments upon any subject relating to the duties of their respective offices—a purely

administrative matter, opinions from administrative offices. These opinions may be required from the heads of the Executive departments and they are the heads that control departments created by the Congress, officers appointed pursuant thereto, and it is from these officers, by the Constitution, that the President may require written opinions.

The President, according to Section 2 of Article II of the Constitution, "... shall have power to grant reprieves and pardons..." And there I can see that the power of the President admits of no restriction. There is no limitation on his power to extend mercy, and if he chooses to do so, I apprehend that he could open the door of every Federal prison in the United States and say to the inmates, "Go free", and did he do so, no power on earth could return those convicts to the imprisonment he lifted.

Of course, it is suggested that any power exercised on his part corruptly, or any power by him abused, for that he may be called to account by the process of impeachment. But the power, the power—and that is what we are talking about here—is a power that knows no restriction.

The President may make treaties. That makes him the effective agent of the Government in foreign affairs. But as to treaties, they are not subject to ratification until the Senate gives its consent to them.

And may I interject here to point out that our friends say that one illustration of the sweeping Executive power is to be found in President Jefferson's Louisiana Purchase. I never understood from what source the myth originated that Jefferson was squeamish about his power. It is clear as a pipe stem that he had the power to negotiate for the port of New Orleans, and when Talleyrand astounded them by saying, "Take the whole package," they drew a treaty to that effect. It was indubitably an option, and it was brought back and approved with the advice and consent of the Senate, and then the Senate and the House appropriated the $15 million to complete the greatest real estate bargain known in history. Why, from that, there should be drawn any illustration of Executive usurpation, if you call it that, beggars my imagination.

Of course the President has the right to make treaties, but he is constrained by necessity to seek and obtain Senatorial advice. He may nominate and appoint ambassadors and other public ministers and consuls, and he is given that right that no other right exceeds, one of the most important rights and potent sources of right and power that any man can possess; he may appoint the judges of the Supreme Court. But even that great power is circumscribed and is reserved, by necessity, for Senatorial approval.

He may make recess appointments which, however, have no lasting quality. It is a right that merely exists as a matter of convenience to prevent vacancies in office, but these recess appointments expire at the expiration of the next Senatorial session.

He may approach Congress; he is given the right to. He can give them a report of the state of the Union, and he may recommend to the consideration of Congress such measures as he shall judge necessary and expedient. He may even convene them in extra session or, if they fall out about the date of adjournment, he may fix the date to resolve that controversy.

That is all he may do. But he cannot impair and cannot restrain in any way the power of Congress, which, in spite of his recommendation and reports, is perfectly free to ignore any quasi-majestic views he may have to the extent that it sees fit.

MR. JUSTICE FRANKFURTER: What about the holding operation whereby the President took action in the Midwest Company cases, and the relationship of his action to the will of Congress?

MR. DAVIS: It fell to my lot to argue that case. May I finish my brief presentation before I answer Your Honor?

MR. JUSTICE FRANKFURTER: Yes.

MR. DAVIS: One particular circumstance burned that case into my memory.

The President may receive ambassadors and other foreign ministers—I may as well follow through with this catalogue of the Executive and other duties of the President as they are defined in the Constitution. He had but one unrestricted power, and that is the power to pardon. This may be another, although I am not sure; it may be. However, I will cite it. From this is deduced the power of the President to recognize or refuse to recognize foreign ambassadors and ministers, and whether he can, against his will, be constrained by the Legislative branch to recognize the foreign representatives of other governments whom he refuses to recognize—it may be that that power to receive ambassadors, like the power to extend pardon, is unrestricted and cannot be restrained.

Then there is this: "... he shall take care that the laws be faithfully executed." That is his great administrative duty. It is an executive duty imposed on him and it is to take care of laws, and the only laws that he can take care that they be faithfully executed are the laws enacted by the Legislative branch of the Government, in whom all lawmaking power is vested. I do not concede that under the power to "take care that the laws be faithfully executed" he may, by his own *ipse dictum*, proclaim a law, and then proceed to execute it in accordance with his own proclamation.

And then he shall commission all the officers of the United

States—purely a ministerial duty. And he has the veto power. When as Executive he believes he should exercise that power, he may do so and veto the will of the Legislative branch. But even there his veto is subject to being overridden by those who are the masters of the law, the members of the Senate and the House of Representatives.

Now, it is out of that category of power that the learned Solicitor General proposes to draw a power that is attempted to be exercised by the President in this instance. It is supposed that out of that category of power there is a sum which makes the whole, in fact, makes the aggregate of all its parts.

It is true that the Constitution shall be the law to rule and regulate all alike, and it provides for crises such as occur in time of war, and it is the only source of any branch of the Government available for the drawing of power under our theory. And I am not helped by the statement made by my friend in his brief that the only power here springs from that one clause. I think I must notice a paragraph in this brief which I am not willing to leave without comment. It appears on page 101 of the brief of the Solicitor General, where I read this:

> "Rigid concepts, comparable to notions of common law pleadings, which would require either the President or the Congress to specify particular powers as the basis for necessary and valid action, at their peril, should be taken as of no more value in resolving the living problems present in these cases than is the discredited technique of constitutional interpretation, based on 'immutable' principles, which was employed by the court below."

I repeat:

> "... the discredited technique of constitutional interpretation, based on 'immutable' principles, which was employed by the court below."

Well, if the Court please, is it or is it not an immutable principle that our Government—and that under our system of government—it is one of limited and granted powers? Is it or is it not an immutable principle that powers of government are distributed in a tripartite type of division of legislation, execution and judgment? Is it or is it not an immutable principle that ours is a Government of laws and not of men? Is it or is it not an immutable principle that, under the Fifth Amendment, private property, life, and liberty—and while there is a descending importance there, life first, liberty next and property—are all alike protected from seizure without due process of law?

Now, you cannot, my friends, you cannot dispose of these immutable principles by saying anything like that. You cannot dispose of these principles merely by a seizure of this kind.

In the argument in the court below, counsel then speaking for the Government said, with what I think was commendable candor, what their conception of the Executive power is, and it was stated in this language in the Court below, as it appears at page 27 of the brief, and I read:

> "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 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: 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. Is that what you say?
> "Mr. Baldridge: That is the way we read Article II of the Constitution. It is our position that the President is accountable only to the country, and that the decisions of the President are conclusive."

I am aware of the fact that that statement has been disclaimed and, in certain quarters, it has been discounted. I am aware of the fact, and I read it in my friend's brief, of the existence of a rather studied effort to retreat from so bold an assertion of unrestricted Executive power. But is the phraseology important?

It is contended further that the President is the sole judge of the emergency, and that claim, Your Honors, has not been abandoned. It is contended that the President also is the sole judge of the remedy and as to his selection of the remedy and the determination of the emergency; and it is contended that that is uncontrolled and uncontrollable, and that if the remedy the Congress provides failed, then the protection clause of the Fifth Amendment would control; but that does not place any barrier in his path.

Now, what is the difference between conditions like that and conditions phrased in the language employed by counsel for the Defendant in the Court of Appeals? It is a mere gloss upon words and comes out the same, and is the same thing. It is a reassertion of the kingly prerogatives which have been the foundation of every struggle against sovereignty that has existed in Anglo-Saxon history.

Think of the struggle during the reign of King George; Runnymeade; Bishop; the Prize cases; the Bill of Rights; the indictment of George III; and the Declaration of Independence. What are they? What are they all but the demonstrable, uncontrollable resistance of the so-called kingly prerogative?

Now, Your Honor mentioned the Midwest Oil cases. Let me dispose of that.

MR. JUSTICE FRANKFURTER: This is appropriate to the question of the specific power and to the right to recommend legislation. This was applicable in order to give Congress an opportunity to enact legislation.

MR. DAVIS: In the case of the *United States* versus *Midwest Oil Company* there was the question of government land owned in Wyoming and in California, and the President made orders with respect to them. These lands, by the then-current statute, were open to allocation and settlement under the Placer-Mining Laws of the United States. They were being very rapidly lapped up, and the Department of the Interior recommended to the President that he exercise the right of eminent domain and reserve certain of these lands for the purposes of the American Navy, and that those lands be substituted for the outlawed Placer-Mining Law. It was about as definite as that.

President Taft then withdrew, for temporary purposes and from Congressional consideration, further Congressional consideration, and stopped settlement on three million acres. Midwest Oil Company believed that order to be void and made an allocation in Wyoming and protested later. The Government sued and ousted the Midwest Oil Company as a trespasser.

I participated in that suit, and Mr. Knaebel, a former reporter of this Court, and we took some rather broad grounds in our brief to the Court, but the Court did not go as far as we asked. The majority opinion was written by Justice Lamar, and the Court held that there was no question of private rights involved, because what was withdrawn was the property of the United States Government, and that the President of the United States was acting as agent for the Government, and we cited 352 occasions on which the Government had withdrawn public lands, but there was a fair implication that Congress had authorized this agent, the President, to proceed in this fashion.

There was a vigourous dissenting opinion by Justice Day, with whom Justice McKenna and Justice Vandevanter concurred, holding that the Presidential order, in effect, was an assertion of power and was an attempt to dispense with the law, the Placer-Mining Law of the United States that was on the books.

MR. CHIEF JUSTICE VINSON: How far would you have gone or did you go then?

MR. DAVIS: I beg your pardon?

MR. CHIEF JUSTICE VINSON: I say, how far would you have gone or did you go then?

MR. DAVIS: We invoked the Fifth Amendment and said that it did not stand in the way, because there were no private rights involved, and the President disclaimed any interference with anything like that, and what he had done had theretofore been done.

But after the opinions were handed down, it is perhaps interesting to note that Mr. Justice Day reached to a page and sent me a note, commenting: "And you," he said, "a Jeffersonian Democrat, have done this thing."

MR. CHIEF JUSTICE VINSON: And of course, you were representing the Government?

MR. DAVIS: Yes, I was representing the Government. And there was a very clear distinction between that case and this. There was no invasion in that case and no taking of private property without due process of law. There was no property taken. Government property only was involved. In this case the property and the plants and facilities, the rights, the franchises, the funds are all gathered up under the all-omnipotent hand of the Government.

Now I pass to what might be designated as a minor point, minor only by reason of its situation in the case, but a highly important one—and minor because it is overshadowed by the question of the Constitutional power that stands out in such bold relief here; some of these things seem to be minor.

First, the question whether there is an adequate remedy at law which barred equity action here. It is asserted on behalf of the Defendant that these complaining companies and their associates have a right to damages against the United States by a suit that might be brought in the Court of Claims, and, therefore, assuming, as we must, that the damages awarded would be adequate, accordingly there is no occasion for intervention of the court of equity.

We deny that. We have no remedy in the Court of Claims, we

say, if we are correct in saying that Charles Sawyer is a mere trespasser. If it is established, as we say it must be, that he is a trespasser, there could be no implied contract entitling us to redress in the Court of Claims. There is no question about the matter of remedy under the Tort Claims Act. Under that Act we might only recover if the action of the Government official is a lawful one or if done in the exercise of his employment, and if we are right that Mr. Sawyer is a trespasser, the Court of Claims would shut its door in our faces.

But in abundant generosity, I read here and heard in the argument before the lower court, and read in the brief, that the Government, the Solicitor General, the Department of Justice, proposes to relieve us from that embarrassment, and they propose to agree that they will not raise in the Court of Claims this question, when we say that there is no question about the power of the Court of Claims to refuse to entertain us at all. That is a gesture so generous, so appealing. But there are two defects in it.

I have learned that no counsel can go to the Court of Claims or anywhere else and divest it of jurisdiction which, under the terms of the Act of Congress creating the Court, are abundantly clear, and the Court would not for one moment entertain such a proposition.

Then, in also observing this generous proposal, we have the diminishing of that benediction that comes from one officer of the Government, because the benediction of one officer, as I say, is not always the act of his successor, because it can be easily contemplated that in any circuit court, one official of the Government can say "OK" to the steel companies, and the others be opposed. That issue has been so sufficiently demonstrated that I must, with due humility, say that we do decline to accept the tender by the Solicitor General.

And, in the matter of irreparable injury: After all, they say, this is only a question of dollars and cents. If the Secretary of Commerce had exercised the power the Order permits him to exercise and gives him the power that he seeks, we know that he has declared over and over again that he intended to exercise the power to change the wages and the terms of employment, and that is an important matter of dollars, and that that can be adequately determined by customary processes of appraisement.

Look at that for a moment. One of the rights of the employer, equal with the rights of the employee, is the right to bargain about the terms and conditions of employment. It is now proposed, without qualification or apology even, to take away from these employers the right to bargain with their employees. It is now proposed to substitute for such contract as would be arrived at through bargaining processes between the employers and the employees, a result and an agreement made by the Union only and the fiat of the government, through the Secretary of Commerce. And it must not be forgotten that it is important to note the proposal to use the impounded funds of these companies to pay these arbitrarily-reached fixed terms of employment and wages.

Irreparable injury? Is it conceivable that irreparable injury could be defined in any more unequivocal terms than that? What do they say about the balancing of equities? The Court below found, and found in the face of admitted documents, and after full argument, that there was a balancing of the equity in favor of the companies.

Here Charles Sawyer, the Defendant, had been guilty of deliberate trespass on the property and assets of the corporations. Would they say that in finding any such thing that the court below did not balance the equity? Of course, the balancing of equities was demonstrated and was made one of the important bases for the decision of the Court.

Now, they say—the Government says—the mistake that the judge made below is that he should have first decided the case on an entirely different basis, and if he had decided it on the basis they suggest he would not have gone to the balancing of equities, and if he had even decided all of those questions we would never have had to approach the Constitutional question at all.

That is asking a lot. He need not consider a trespass? He can go on to these minor points, and if and when he decided all these in favor of the Government's position it would not be necessary to approach the highly delicate question of the Constitutional power vested in him or sought to be his? We find ourselves unable to follow that line of reasoning, Your Honors.

We say that the fact that the court based his opinion on the Constitutional basis, and approached these questions in that light, and not in the light of these minor points, was not a fault, but was the exercise of the judicial treatment of this case that it was entitled to and was a determination by the lower court of the matter in the way in which this Court is entitled to have it for consideration.

If the Court please, I am trespassing on the Court's time.

There is one more thing that I wish to say in my opening. The controversy here between the management of these companies and the employees of these companies is highly regrettable. The interruption, if any there has been or will be, in the production of steel, a vital article of commerce, is necessarily most unfortunate. But it is as certain as the rising of tomorrow's sun that all of that, which has thus far happened, is a mere transient incident. The day will come beyond peradventure when these furnaces will glow as

now, when the mills will turn as they turn now, and sooner or later, when a line of contented workmen will pass the window and receive the wages they are justly entitled to.

I say "sooner or later". One may think it will be sooner without Government intervention. One may think it may be later if the Government does not intervene. But these views are the mere casual ideas of a wholly uninstructed bystander and are not under consideration here. But all of that will some day be history. All of those incidentals will be gone, but our country will not perish and there will be the determination of the extent of the power of the Chief Executive of this country, the limitation of that power by the legislature, and the duty of the courts to hold that balance even. All that will be as lasting as the life of the Republic itself, and, knowing by history how power grows by what it feeds upon, you can but insist that those who occupy offices under the Government, no matter how lofty or personal, are still servants of the public and are servants exercising their duties under the power given them by the Congress and only under that power.

It is not necessary for me to go back, as Brother Tuttle did in his brief, to remind ourselves of Washington's Farewell Address and his admonition. I think of another sentence which I believe to be as pregnant as any ever written or penned in our history, the words that Jefferson wrote in the Kentucky Resolution, which in a sentence sums up the entire theory of American Constitutional Government:

> "In questions of power let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

MR. CHIEF JUSTICE VINSON: Mr. Solicitor General?

ORAL ARGUMENT OF
PHILIP B. PERLMAN, ESQ.,
ON BEHALF OF CHARLES B. SAWYER, ET AL.

MR. PERLMAN: If the Court please, I will make an effort to review some of the facts which are pertinent to this argument, omitting those that have already been covered. There are some which have not yet been mentioned and some which we believe deserve special emphasis.

Your Honors have just listened to an eloquent argument, an argument that is designed to turn the minds of this Court away from the facts in this case, away from the reasons which prompted the President of the United States to take the action that he did. Very little, if anything, was said to this Court about the conditions in the world today, about the struggle in which this Nation is engaged. And, Your Honors, practically nothing at all was said about the necessity, the vital necessity, to keep the plants owned by the Plaintiffs here in operation without interruption of any kind. And it is argued here that Your Honors should practically ignore that situation and pass on some constitutional interpretation of the powers that the President exercised, powers which have been exercised by presidents, maybe in times of peace and maybe in times of war, but without any regard to the situation in which the whole Nation finds itself today.

Now, what are the important facts that Your Honor should consider? The contract between the employers and the employees in the steel industry was to expire on December 31, 1951. As has been said, notice was given in November, on the 1st of November, that the Union, representing the employees, intended to ask for changes in working conditions, and the usual negotiations under this kind of notice were had. It became evident in December that no agreement was being reached between the employers and their employees. And then it became necessary and the Chief Executive of this Nation had to determine what he was to do about it.

The President referred the dispute to the Wage Stabilization Board. That Board was created under the provisions of the Defense Production Act of 1950, and under the Defense Production Act of 1950, Title IV of that Act, the President assigned to that Board this labor dispute. Now, the President was given ample authority under the provisions of Title V of that Act to create another kind of board, any kind of board he deemed necessary. He was given special authority under Title V to do everything in his power to resolve labor disputes. I emphasize that and I will come back to that later.

That Act of 1950 contained special provisions and authority for the settlement of disputes, and was passed three years after the Taft-Hartley Act was passed, and provided a different method for the settlement of these disputes. I shall show this to the Court and I shall show to the Court that Congress well understood that this Act was provided as an alternative method of settling disputes.

The fact is that the President referred that dispute to the Wage Stabilization Board, and it was an act on the part of the President that every one of these companies acquiesced in. They all acquiesced in the President's action. They took part in the assemblage; they were part of the special panel created by the Board itself, a panel of public members, of labor members and also representatives of management. They participated, the companies participated. They became part of the panel, and they took part in the creation of the report.

It took three months to make the study and that report was

filed in March 1952, and the report was a report to the full Board, without recommendation by the panel, and the whole Board made a report to the President of the United States on March 22, 1952.

Now, the interesting thing about it is that management participated without protest of any kind to having this labor dispute adjusted under the provisions of the Act of 1950, and through the instrumentality of the Wage Stabilization Board, and everyone believed that that was a fair and preferable method to pursue, more preferable than any other act could be to effect a settlement of this dispute; and it attempted the settlement not only of the controversy between the employers and the employees, and considered all the facts that were relied on in the labor dispute itself, but the facts concerning the efforts of the Stabilization Board to stabilize wages throughout the country and to care for adequately the whole economic program of the United States, because it was done by the Wage Stabilization Board which had authority not only over wages, but had authority over prices.

Now, it was not until the report was made to the President of the United States that objection was made by management. Labor accepted the recommendation of the Wage Stabilization Board. Management rejected the recommendations of the Wage Stabilization Board.

Faced with that situation, further attempts were made in March to negotiate the settlement of the strike, or, I should not say the strike, but the settlement of the dispute. These efforts to settle the dispute in March were not fruitful of results. The strike was called, as Your Honors have been told, for one minute after midnight on the night of April 8th, 1952.

Negotiations continued at the request of the President, at the request of the officials of the Government, until the same night, and no agreement having been reached, the President issued the Executive Order which brought about the litigation now before the Court. The Executive Order which authorized the Secretary of Commerce to take over and operate the steel mills of the country, and the order, Order No. 1, which was issued by the Secretary of Commerce in pursuance of that Executive Order, are in the record in this case.

Now, if Your Honors please, it is important to look at the affidavits which are in this case and which are a part of this record, the affidavits which have been filed by the Government in answer to the bill of complaint. The affidavit made by the Secretary of Defense, the affidavit of the Secretary of Commerce—

[Whereupon, at 2:00 o'clock p.m., the Court was recessed, to reconvene at 2:30 o'clock the same day.]

AFTERNOON SESSION

[2:30 p.m.]

MR. CHIEF JUSTICE VINSON: You may continue, Mr. Solicitor General.

MR. PERLMAN: May it please the Court:

The situation that I would like to emphasize, going back again to what occurred in the month of December 1959, was, as we look back at what happened and as we knew it at the time, is that the President had to make his choice in December, whether he would go by the road, the recent road, that had been established for him by the Congress in the Defense Act and use the powers that were given to him to create a Board—and that was the Wage Stabilization Board—and that decision had to be made in December. The President had, as our brief shows, alternative methods to pursue in an effort to compose wage disputes, and that decision was made, and it was made to use the Wage Stabilization Board.

Again, I emphasize the fact that the companies affected acquiesced in that decision and became a part of the effort to compose or have their differences with labor composed under the provisions that the President used for that particular dispute.

MR. JUSTICE BURTON: Did the President not, by that action, cut off the availability of the Taft-Hartley law?

MR. PERLMAN: I do not say that he cut off the availability of the Taft-Hartley law, but I do say that he had alternatives and he selected one of them, and I do say that what was done was acquiesced in by all concerned, and that it was by the agreement of all concerned that that alternative should be used, and that is why it was done. That is why we point out in the brief that Congress enacted a provision of Title V of the Defense Act, and it was acquiesced in by the members of the Congress and it was thoroughly understood by the members of the Committees of the Congress that reported the bill out of Committee, that the Act would provide for an alternative method, a method in addition to the one previously set out a few years before.

MR. JUSTICE FRANKFURTER: Do I understood it to be that, that having been done in December, the President could not pursue both sides or both roads, as you call it, but must choose one or the other, and that the one did not displace the other? What is your point as to that?

MR. PERLMAN: That is correct. He had to take one or the other at that time. I intend later on to go into the more critical analysis of the situation, and I say now that there could be no doubt but that Congress was providing an alternative to the President; nor could there be any doubt that, had the President chosen to do so, he might have used the instrumentality in existence through the Taft-Hartley Act. But he pursued the most recent course provided for him by Congress, Congress understanding at the time that it passed the Act that it was enacting an alternative method; and we have a quotation in our brief from the Chairman of the Committee saying that the President could pursue either one of those alternative methods, and he might pursue both if he chose to do so.

MR. CHIEF JUSTICE VINSON: Are you speaking of the Taft-Hartley Act and the Defense Act of 1950?

MR. PERLMAN: The Defense Act of 1950, Your Honor.

Now, the affidavits that I have mentioned, attached to the answer that I filed in the district court, those affidavits, we submit, are tremendously important, because you cannot read those affidavits, which are uncontradicted in this case, without knowing that the country faced not only an emergency, not merely an emergency, but a threat to its actual existence.

I call Your Honors' attention to the affidavit made by the Secretary of Defense in which he says it was necessary for the country to have an adequate and continuing supply of steel, and in which he pointed out that there exists a state of national emergency, and that it was essential to have a continuous flow of steel to meet not only the conditions at home here, but the conditions facing our Armed Forces throughout the world. He points out the necessity of providing steel to meet the needs of our troops, and he states that the very existence of the Armed Forces fighting in Korea and in Indochina, that is, our allied nations fighting with us, there and elsewhere, are dependent upon this continuous flow of steel, and that our effort and the effort of other nations who are working with us to repel aggression throughout the world are dependent on this situation being an uninterrupted one, when we are engaged in carrying on world defense and are repelling aggression wherever it is found.

The affidavit of the Secretary of Defense, Mr. Lovett, as I say, is in the record, and in that affidavit he states that any curtailment in the production of steel, even for a short period, would imperil the nation. Further than that, he points out that the techniques and objectives of our nation and our Armed Forces require a greatly increased use of steel, and says, quite significantly, in his affidavit: "We are holding the line with ammunition and not with the lives of our troops."

Then there is the affidavit in the record of Gordon Dean, the Chairman of the Atomic Energy Commission, in which he tells of how necessary steel is to the varied and unusual types of defense in which we are now engaged, and in which he pointed out the necessity of keeping our facilities construction program on schedule to meet the established goals of the nation. He points out that time already has been lost through schedule slippages attributable to delivery delays, and that that time must be recovered. The Chairman of the Atomic Energy Commission in his affidavit points to the requirements of construction projects that include virtually all types of kinds of steel, including special forms of structural steel for building and substantial quantities of stainless steel for process equipment.

It is pointed out that the duties of the Atomic Energy Commission, and the performance of their efforts to comply with the Acts of Congress that have been passed, to carry on their work of research and their production of atomic energy weapons, are literally dependent upon the ensurance of the delivery of steel on accelerated and normal schedules, and that the ultimate effect of delayed completion of production facilities will inevitably be reflected in the Commission's inability to step up the production of weapons to the rate required to meet the goals of our Government.

And, Your Honors, there is also in the record the affidavit of the Administrator of the Defense Production Administration, the Administrator of the National Production Authority, and an affidavit by Secretary of Commerce Sawyer, the Defendant in this case, and others, different other secretaries and higher governmental officials, all of which are to the same effect and all of which are undisputed.

It is a *concessum* in this case that the nation faced a threat to its existence, a threat which required and which does require the uninterrupted production of steel, and I take it, if Your Honors please, the situation that exists today makes this case a little bit different from the abstract cases, some of which were cited in the argument you have already listened to.

Now, it is interesting to point out that the President took over the steel industry on April 9th, or on the night of April 8, 1952. It is interesting to note that, on the morning of April 9th, the President sent a message to the Congress telling them of what he had done. He invited the immediate passage of legislation by the Congress of the United States, so that his action not only would be ratified by any legislation that the Congress passed, but if the Congress did not agree with his action, they could reject it and propose some other method by which to solve the problem that faces the American people.

It is more than interesting to note that on April 21st, twelve days later, the President of the United States sent to Congress another message, in which he again invited the Congress of the United States to pass legislation if they did not agree with the action that he had taken. And Your Honors know that here it is, May 12th. May 12th. This is May the 12th, more than one month since the President of the United States issued his Executive Order, and the Congress to this day has done nothing.

MR. JUSTICE REED: How could they reject this?

MR. PERLMAN: They could reject this, if Your Honor please, by passing an Act rejecting it and enacting other legislation.

MR. JUSTICE REED: Passing a resolution to do what?

MR. PERLMAN: Passing a resolution or terminating the action the President had taken.

MR. JUSTICE JACKSON: If the President has independent authority to do it under the Constitution, how could Congress do that? Don't you refute your own argument?

MR. PERLMAN: The answer to that is that the President told Congress that he would abide by any action it had taken. That is not at issue, though. He said to them that he had done a certain thing officially. He gave to Congress an opportunity to do otherwise and said that he would abide by the action of Congress. But first of all, he told Congress how he had measured up to the emergency of the country, and he would put into action any course that Congress chose to take.

Whether he has the Constitutional authority to ignore that action is not an issue here, because he took the position that he was justified, and rightfully, in doing what he did do, but nevertheless, he would abide by what Congress finally did—and Congress has done nothing.

MR. JUSTICE BURTON: But at that time there were pending lawsuits attacking the very action to which you refer, and those lawsuits were before the court. Does not that explain why Congress would necessarily decide to await the action of the courts?

MR. PERLMAN: I do not think so, if Your Honor please, because they could resolve or avoid that question at the President's invitation, for he told them that he would abide by any act that Congress chose to take, by anything Congress did on the subject, and there is no reason why Congress should not act.

It is interesting in that connection to note, I think, that one of the branches of Congress has passed either a resolution or has passed and approved an amendment to an appropriations bill, providing that no part of the appropriation should be used by the President in carrying out the seizure.

MR. CHIEF JUSTICE VINSON: For what period is that provision effective?

MR. PERLMAN: It is not effective.

MR. CHIEF JUSTICE VINSON: I say again: For what period was it effective? As I understood it—and I may be wrong—I understood that the action the House proposed was for Fiscal Year 1953, and that for the Fiscal Year 1952 no language was added to the appropriation.

MR. PERLMAN: That is right; no language has been added to any appropriation bill for 1952.

MR. CHIEF JUSTICE VINSON: What do I understand your position to be or the position of the Government to be, in regard to action by the legislative body or by Congress, vetoing or expressing disapproval of the action of the President in this matter? Do I understand that you concede any power exists in the Congress to effect any course that would affect the Presidential action?

MR. PERLMAN: No, sir, I do not concede the power. But I say that that is not in issue here because the President in a message to Congress said to Congress that he would abide by what Congress did.

MR. CHIEF JUSTICE VINSON: Voluntarily withdraw his action, or turn the properties back? Is that what you mean? Anything that the Congress desired he would follow voluntarily?

MR. PERLMAN: That is right. He made that crystal-clear in his message of April 2nd.

MR. JUSTICE FRANKFURTER: That assumes that even though he had inherent power and Congress acquiesces, it does not limit the inherent power. Suppose it to be admitted that he had the inherent power: Do you suggest that this non-action of Congress is the equivalent to what was done in the *Midwest Oil* case?

MR. PERLMAN: I want to go into that *Midwest Oil* case later on.

MR. JUSTICE FRANKFURTER: Are you suggesting that because Congress did not act there is any legal significance to be

drawn? Congress does not act; is that to be taken to mean that what has been affirmatively done by him indicates that he has been given that power, you say, because Congress did not do anything?

MR. PERLMAN: Yes.

MR. JUSTICE FRANKFURTER: From that, then, what meaning do you draw? Assume that the President is unlimited in his powers: What is the significance of the fact that Congress did not do anything?

MR. PERLMAN: Did not you bring it in in connection with the *Midwest Oil* cases?

MR. JUSTICE FRANKFURTER: You say that Congress did not do anything, although the Preisdent invited them to. I want to know what the legal significance of that non-action is in this case.

MR. PERLMAN: I think it can be inferred from their failure to act that they were content to let the Presidential action stand.

MR. JUSTICE FRANKFURTER: We have a very wide range of opinions of the Court to the effect that non-action is not to be so regarded.

MR. PERLMAN: Under these circumstances, in the teeth of the two messages asking Congress to accept responsibility, telling Congress that he would abide by anything that Congress passed, then I think if Congress did not suggest anything different from what the President had done, it can be inferred that Congress was quite satisfied with the situation.

MR. JUSTICE FRANKFURTER: What does that mean legally? All you can say is that they were satisfied to let this stand. That is all, isn't it?

MR. PERLMAN: Yes, that is all. But I will come to an argument here that usage and custom has a bearing on the solution of this problem.

MR. JUSTICE FRANKFURTER: That is a different question. I was listening to you with a great deal of interest, to what you were saying, and I shall listen to you with a great deal of interest when you argue the question of usage. But that is a very different theme.

MR. PERLMAN: That would be an illustration.

MR.JUSTICE FRANKFURTER: Well, all right.

MR. PERLMAN: Well, you suggested it in connection with the *Midwest Oil Company* cases, and in connection with that case—and I discuss it with a great deal of trepidation in the presence of the former Solicitor General, and—

MR. CHIEF JUSTICE VINSON: He confesses today that he had certain ambitions that possibly he could attribute to the present Solicitor General.

MR. PERLMAN: I am very much flattered by that suggestion, Your Honor.

But as I understand that case, what was done there was that the action of the President was in the teeth of the action of Congress. There there was an Act of Congress and the President chose to disobey it, and his action in disobeying the Act of Congress was sustained by this Court on the ground alone—

MR. JUSTICE FRANKFURTER: If our reporter wrote what he said about the case before, he would be accurately stating what the Court decided.

MR. PERLMAN: I said on the ground alone of possible usage of withdrawing public land from time to time, and they passed the matter and based their approval of what the President had done in the teeth of the statute, on the basis that what had been done was in accordance with both custom and action over a great many years.

One of the things in connection with the discussion of the facts is, that after the Presidential Order was issued on the night of April 8th, that the plans that had been in preparation for closing down the mills and starting the strike were immediately abandoned, and on the same morning the members of the Union returned to work. So, Your Honors, the object the President had in taking over the plants so that there might be an uninterrupted production of steel, that object was gratified, and his act was successful, in that steel and the production of steel which had been threatened was resumed.

There was some delay there because of the nature of the operation of steel mills, and maybe I ought to say here that when a strike occurs, or when a mill is shut down, it is necessary to bank the fires in the furnaces and allow the furnaces to cool off gradually, a process that takes a day, and a process that must be performed carefully in order that no permanent damage may be done to the furnaces. It is important to remember that those furnaces are cooled off gradually, and it is important to remember that when production is again started it takes days to get the furnaces back in production. So that a short interruption, a short

interruption means the loss of days, and a few days would mean the loss of weeks, and that would be the minimum duration of interruption of the production of steel.

I am further told that with respect to some of these furnaces, some of the old ones, that if they were allowed to cool off it would take months and months to get them back in operation. They would have to be rebuilt entirely. The handling of the furnaces is a very delicate operation, and is one that requires not only great care but a great deal of time.

I say that to Your Honors so that it may be understood how important it was and is to the operation of the steel mills, and how great an effect the closing down of the furnaces would have on the production of steel and necessarily the safety of the nation, as disclosed by the affidavits filed in this case, which are, I say again, definitely to the effect that any interruption whatever that occurs in the operation of these steel mills places this country in peril and danger.

Now, it has been suggested in the argument here that an interruption of four or five days in the operation of a steel mill is a matter of very little consequence, but that is not an accurate picture and it is not a statement of the fact. An interruption of four or five days in the matter of the operation of a steel mill means the loss of millions of tons of steel production for the United States; that is the fact.

Now, when the President acted, he was exercising, we say, the powers that are vested in him not only by the Constitution of the United States, but he was exercising the powers and carrying out the duties that have been conferred upon him by many Acts of Congress, by treaties which he has entered into with other nations, and which have been consented to and ratified by the Senate of the United States. Our brief cites the recent treaties that have been entered into, such as treaties with other countries, for example, the North Atlantic Treaty which was ratified in 1949. The original North Atlantic Treaty has been implemented with the Mutual Defense Assistance Act of 1949, and in 1959 this was succeeded by the Mutual Security Act of 1951—all with the backing of the Congress. In this connection we are calling the Court's attention to the fact that we have defense and security pacts with the Philippines, with Australia, with New Zealand, and with Japan, and that we have an army, a fighting army, stationed in Korea, and that we have part of the Navy and six divisions of the troops of our country in Europe ready to do their part to ward off an attack that may come at any time.

It was in accordance with the preparation that we are making with our allies in different parts of the world to defend ourselves in case of any attack that the Defense Production Act of 1950 was enacted. That Act, as has been stated, provides for price and wage controls and allocations of materials, and it provides for requisition powers and for powers to create controls, all of which is related in our brief and are practically without precedent in this nation in time of peace. The amount of expenditures have run into the figure, already, of $130 billion—

MR. JUSTICE DOUGLAS: Some of us know something about the situation.

MR. PERLMAN: I am attempting to describe the situation that confronted the Chief Executive of the nation when Congress vested him with various duties and powers and authorized him to set up all these agencies that have been previously referred to, all of them done in the Acts passed, and all in pursuance of the efforts to mobilize the whole economy throughout all of this nation and to enable us to carry out our obligations to the other nations for the common defense of the world. That is the situation that you know exists, and that is the situation that was practically ignored in the opening presentation, and that was the reason why the President acted.

I come to the Constitution as the source of the President's power.

MR. JUSTICE REED: Have you finished with what you want to say about the statutes?

MR. PERLMAN: Yes, Your Honor. I was using them as an illustration of the powers and duties recently vested in the Executive.

MR. JUSTICE REED: Do you depend on any statute that gives the President any power to do this specifically?

MR. PERLMAN: Specifically? There is no specific authority.

MR. JUSTICE REED: You have the Defense Production Act of 1950 and—

MR. PERLMAN: Yes, that authorizes him to operate—We have been discussing other acts, vesting him with authority to endeavor to settle labor disputes and to appoint boards.

MR. JUSTICE REED: How about taking over of property?

MR. PERLMAN: Well, there are provisions in the Defense Act.

MR. JUSTICE REED: That is what I assumed.

MR. JUSTICE BLACK: Do you rely on the Defense Act or any statute, or on the Constitution?

MR. PERLMAN: Your Honor, we rely first on the Constitution; then on the existence of Acts of Congress that give him authority to take over property. Some we freely concede we did not follow, that is, with respect to the procedures outlined by those Acts. There are several particularly relevant in this sense.

MR. JUSTICE BLACK: My question is whether you depend on statute as supplying the power to do what the President did, or if you simply depend on the Constitution.

MR. PERLMAN: We depend on the existence of at least two statutes that we have discussed; they give power to requisition or seize. There is power that can be derived from the Acts, and as we say, the power that is directly conferred upon the President by the Constitution.

MR. JUSTICE BLACK: And do you depend on those Acts as defining the powers to do what was done here?

MR. PERLMAN: No, sir. We think the President has the power under the Constitution. We think that power is supplemental and simplified by authority given by Congress to seize property necessary for the emergency that now exists.

MR. JUSTICE BLACK: My question is designed to determine whether I am required to focus my attention on a single question or whether there are two issues here. Is the issue confined to the Constitution, or do you say the Acts of Congress—

MR. PERLMAN: Yes.

MR. JUSTICE BLACK: Aside from the powers of the President under the Constitution, is it contended that there is any Act of Congress that sustains what the President has done here, that supplies the power?

MR. PERLMAN: There is no statute that specifically gives it.

MR. JUSTICE BLACK: I did not say "specifically". Is there any statute on which the Government relies to grant the authority to the President to do what he has done, or must we look to the Constitution for that authority?

MR. PERLMAN: Your Honor, we think the power is in the Constitution. We think also that Congress, if Your Honors please, by the passage of two statutes that I will discuss later, has provided authority for this action which did not follow the Acts of Congress.

MR. JUSTICE BLACK: Then the Government is not merely depending on the authority for power given under the Constitution—

MR. PERLMAN: Yes, sir.

MR. JUSTICE BLACK: But it depends on the source of the power, the Act as Congress has enacted it?

MR. PERLMAN: We are depending on the power contained in the Constitution. We will call the Court's attention to the existence of circumstances of statutes passed by Congress, which authorize the taking of property and upon which there is authority for the proposition that where authority of that kind exists, that even though we do not follow those statutes, there is an adequate remedy at law which makes it impossible for the Plaintiffs to proceed as they have.

MR. JUSTICE MINTON: You dispute the contention that the Taft-Hartley Act is a statute that specifically applies to this kind of a situation?

MR. PERLMAN: If Your Honor please, the Taft-Hartley Act—I will come to the Taft-Hartley Act if you will let me argue the case I set out to do. I will come to the Taft-Hartley Act. But I think that we have a compelling argument why the Taft-Hartley Act was not used, and are not—

MR. JUSTICE MINTON: But you do not say that it is inapplicable?

MR. PERLMAN: No. It could have been used in December. It could have been used then, but I will show Your Honor that by taking the other alternative that Congress has provided, the alternative that was available also to the President, that by using that alternative the President has obtained for the public much more than could have been obtained for the public had the President used the other alternative.

MR. CHIEF JUSTICE VINSON: I thought I understood Mr. Davis to say that, as to the Taft-Hartley Act, the President was not compelled to use the Taft-Hartley Act in that situation that was presented to him.

MR. PERLMAN: I do not want to discuss the Taft-Hartley Act yet.

MR. CHIEF JUSTICE VINSON: Did I hear you correctly?

MR. DAVIS: Certainly. He is not compelled to use the Taft-Hartley Act.

MR. CHIEF JUSTICE VINSON: I thought so.

MR. DAVIS: But I said that the presence of the Taft-Hartley Act pointed up the absence of authority on his part to manufacture an entirely different procedure.

MR. JUSTICE MINTON: I think the Acts you refer to point up the power of the President, as Mr. Davis says, to use the Taft-Hartley Act. He could use the Taft-Hartley Act also; is that right? He could use, according to you, either the Taft-Hartley Act or the procedure he followed?

MR. PERLMAN: I think that is a proper statement. I would like to come to the Taft-Hartley Act a little later. I have a lot to say about the Taft-Hartley Act, but I have a considerable argument and would not like to have it broken up in pieces.

Let me get back to the Constitution, because it is claimed here that the President has no such power as he exerted here or attempted to exert, under the provisions of the Constitution. Now, all of the President's power, the Constitutional power here, practically all of it is in Article II of the Constitution, and Your Honors have been eloquently told that in the first section of Article II, the President is given the Executive power. Nothing could be more clear than the language of Section 1 of Article II of the Constitution:

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

MR. DAVIS: The Constitution reads:

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

not in "the President".

MR. PERLMAN: That is correct:

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

not "the", as Mr. Davis says.

Then, Section 2 of Article II is clear in that it says, that section, that the President shall be the Commander-in-Chief of the Army and Navy. And Section 3 says:

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

Now, here the President issued an Executive Order that contemplated a temporary taking of property. The action of the President in issuing that Executive Order we say was in response to a pressing emergency, and we state in our brief the authority and the proposition that under the circumstances where the Executive has acted, the courts will inquire into the facts, the facts that we have set forth in the affidavits attached to the answer, and will inquire into those facts only to ascertain whether there was any substantial basis for the action taken by the President.

Now, we submit that the source of the President's power must be considered in the light of the circumstances of this case. The circumstances that confronted the President—

MR. JUSTICE FRANKFURTER: "The source of the President's power must be considered in the light of the circumstances"? It is one thing to say circumstances, but you do not derive the existence of a power from circumstances.

MR. PERLMAN: That is right. We say that the source must be there, and that from the source comes the power. I did not say that you create power by the circumstances.

MR. JUSTICE FRANKFURTER: I thought you did.

MR. PERLMAN: But whether or not the power may be exercised is controlled by the circumstances, and that is all I intended to say.

Now, the discussion of the effect of Article II of the Constitution that was written by Chief Justice Taft in the *Myers* case, the case that had to do with the right of the President to remove an official, in that opinion the majority of this Court undertook to interpret the powers that are conferred upon the President of the United States in Article II of the Constitution, and as Your Honors have been told, there have been various interpretations of these articles and various viewpoints as to where the powers apply. You have been told that the powers of the President are limited by the enumeration set forth in Article II, and there has been mentioned the stewardship theory held by President Theodore Roosevelt, where those powers were not controlled by the enumeration contained in Article II of the Constitution but were in powers contained in different sections of Article II and other points in the Constitution, and are given a different interpretation.

It is interesting to note that Mr. Taft had different views of the same subject. Before Mr. Taft became the Chief Justice of the United States, and after he was President of the United States, he criticized President Theodore Roosevelt's stewardship theory. But when he was on this Court, he wrote an opinion in the *Myers* case and took a rather broad view of the powers vested in the

President by the Constitution and particularly by Article II of the Constitution, and—

MR. JUSTICE FRANKFURTER: And the Court took it back.

MR. PERLMAN: They did, if Your Honor please, in the *Humphreys* case ten years later, when they passed on the theory and they held that the President did have authority to do it.

MR. JUSTICE FRANKFURTER: And that essentially prevailed.

MR. PERLMAN: There are views that the Court repealed or overruled much of what they had said in the *Myers* case, and also views to the effect that the *Humphreys* case was on a different basis, that Humphreys was a member of the Federal Trade Commission, a quasi-judicial officer, performing quasi-judicial duties, and the contention was that he occupied quite a different position than was occupied in the postmaster case.

MR. JUSTICE FRANKFURTER: I did not disagree on that. In the *Meyers* case there was a good deal of "tall talk", and in the *Humphreys* case the unanimous Court said that these principles were disproven.

MR. PERLMAN: The Court there—Mr. Justice Jackson pointed out in his book, "Struggle for Judicial Supremacy"—

MR. JUSTICE FRANKFURTER: I point out what the Court said.

MR. JUSTICE JACKSON: Justice Frankfurter did not read the book.

MR. PERLMAN: I suppose I should take advantage of this opportunity to recommend it to him.

MR. JUSTICE FRANKFURTER: Doctor Johnson said, you know, you can give a person knowledge, but not understanding.

MR. PERLMAN: If that is meant for me, it is a dirty dig.

MR. JUSTICE FRANKFURTER: It is meant for me.

MR. PERLMAN: I suppose Your Honors know the different interpretations put on the Constitution, and on Article II of the Constitution, by this Court. What we try to do in our brief is to set out first the executive interpretation, then the legislative interpretation, and then the judicial interpretation of the powers of the President. Now, it is important, we think, to look at the executive interpretation first.

Your Honors will find that ever since the Revolutionary days there have been wartime executive acts in seizing private property. There has been a lot of indignation expressed over the action of the President of the United States as if, constitutionally, the Chief Executive of this nation had undertaken an act that no one could have foreseen or heard of before. That is not the fact.

As we go back in history and watch and see what the Chief Executives have done, Your Honors cannot help but know that from the very beginning Article II of the Constitution has been construed at least by the Executives themselves as vesting in them that authority to meet emergencies that is necessary to be exercised where there is no other provision for meeting the emergencies, no other way in which the emergencies may be met, except by prompt action and except by prompt action by the Executive.

MR. JUSTICE DOUGLAS: Was there not statutory provision that could have been followed, or were there not any?

MR. PERLMAN: In many cases there were not any.

MR. JUSTICE DOUGLAS: But definitely, then, these were war power cases.

MR. PERLMAN: Some were war power cases. I will detail these in their order, because the earlier ones were of military form, the very early actions having to do with military officers; and I may say that the first action of a President in seizing property was the occasion associated with the happenings by President Lincoln in seizing railroads between Washington and Annapolis. As we state in our brief, the first discovered instance of a taking by order of the President himself, as distinguished from a taking by a subordinate military official, occurred in the first year of the Civil War. There, confronted with secession, President Lincoln exercised greater Executive power than had been exercised by any previous President. For instance, there was his Emancipation Proclamation, an action resting exclusively on his Constitutional powers as Commander-in-Chief.

As we point out, in connection with the seizing by President Lincoln of the railroad between Washington and Annapolis: There President Lincoln took over the railroad and telegraph lines in the absence of any statutory authority, and President Lincoln, in that seizure and in connection with other occasions, exercised greater authority than had been exercised by any individual President up to that time. He increased the size of the Army and the Navy without statutory authority; he provided for the payment of money out of the Treasury; he undertook the suspension of the writ of *habeas corpus*—all actions that the Chief Executive

thought to be necessary to meet emergencies, actions which he, the Chief Executive, thought to be necessary.

There are other occasions and instances that we detail in the brief. For instance, the instance where Cleveland sent troops to Illinois to enforce an injunction obtained, and an instance where President Roosevelt threatened and was on the point of seizing coal mines in the State of Pennsylvania. President Wilson seized property without statutory authority during the First World War. For instance, following the precedent set by President Lincoln, Wilson exercised his Constitutional power to seize the property of the Smith and Wesson Company, ammunition makers, and there was no idea expressed or record of a thought that he was not acting under any statutory provisions.

MR. JUSTICE FRANKFURTER: But he had a statute, however?

MR. PERLMAN: Yes, he had a statute, but he did not follow the procedure set out by the statute, and Attorney General Biddle testified in the Senate hearings in 1944 to the effect, and he so stated, that President Wilson acted without statutory authority.

MR. JUSTICE FRANKFURTER: But Mr. Biddle was not President Wilson's Attorney General.

MR. PERLMAN: No, he was not. I am not sure whether he was President Wilson's Attorney General, and we have not been able to confirm it one way or another, but there is evidence that throughout the hearing there was a lieutenant colonel in the room who testified he thought that he had acted under Section 120.

MR. JUSTICE FRANKFURTER: If I may avail myself of the advantage of being what might be termed "old aged", I assure you that while Mr. Biddle testified he was not Mr. Wilson's Attorney General, the thought that you have expressed was not the testimony of the Attorney General.

MR. PERLMAN: We tried to find out how President Wilson took that action, and it is rather vague.

MR. JUSTICE FRANKFURTER: I would say "cloudy".

MR. PERLMAN: Cloudy, yes. And we had, nevertheless, the statement made by Attorney General Biddle that it was not done under any statute, and we have set that out in the brief.

Of course, my attention is called to the fact that the same statute that was in existence then is still in existence, or a similar one is in existence, the Selective Service Act, and there is cited in our brief Section 18 of the Selective Service Act of 1948, which we cite as authority for the requisition or seizures authorized by Congress. It is still in effect, or a similar statute is, and if Your Honors please, if it can be argued that President Wilson had authority, statutory authority, under that Act, maybe it can be argued that President Truman had authority under the similar statute.

MR. JUSTICE FRANKFURTER: But you candidly stated in your brief, probably under legal advice, that the President did not choose to follow that procedure.

MR. PERLMAN: He did not follow that procedure, no. Now, I want to amend that because of the existence of authority, to the effect that if the statutory power exists, it does not make any difference, so far as the remedy is concerned, whether he followed the specific procedure set out by the statute or not.

Now, if President Wilson acted, it may have been without statutory authority. There are others that have acted without statutory authority, and they have so acted in more important seizures.

Then we come to the occasions occurring during the Administration of President Franklin Delano Roosevelt. The first seizure made by President Franklin D. Roosevelt, during his Administration, was that of the plants of the North American Aviation Company. That was seized on June 9, 1941, and that was before, six months before, Pearl Harbor. There was no war at the time and there was no statutory authority for that seizure. But the President, in the light of the existence of threats to the nation, in the light of the existence of circumstances that made it apparent that sooner or later this nation would be brought into the conflict that was then in progress in Europe, he, with the power to seize, did seize those plants and exercised the authority that was vested in him without any specific statutory authorization, and on the powers vested in him by the Constitution, under all of the sections that I have read, and under his duty, the duty that had been vested in him time and again by Congress to carry out the previous Acts of Congress and the various Acts that Congress had passed.

MR. JUSTICE JACKSON: Are you not taking a good deal for granted when you take that as a precedent here? Looking back at the matter, if I remember rightly, North American was under direct contract with the United States, and they were subject to control, to that extent, by the United States.

MR. PERLMAN: I think they were.

MR. JUSTICE JACKSON: The Government owned the materials, the goods, and had control of the plants, and the whole

thing, in a measure, was in the hands of the Government. There is no Government property here.

MR. PERLMAN: No, there is no property here.

MR. JUSTICE JACKSON: The strike in that case was on an entirely different basis. Here we have a collective bargaining contract that was in force, and this is what I take to be a legitimate labor dispute over wages and other terms and conditions of employment. If you will examine the report of what transpired at that time, that was in essence a strike against the Government, and the President did not sign that proclamation until there were men outside the plant who were not admitted, and there were Communists even, and they were not admitted to the plant, and there was a statement that authorized the seizure of the plant on the basis that they did not comply with the obligatory orders. All they looked at there may have been the question whether it was a breach of voluntary contract.

The other distinction in that case, when compared with this, is that the owners all did acquiesce in the seizure, and there was never a contest of it, as far as I recall. They welcomed it, and went through with it to the end.

I do not believe that unless you amend those points you can make that stand as a precedent for this. I looked it up because I wondered how much of this was laid at my door.

MR. PERLMAN: Your Honor, we lay a lot of it at your door.

MR. JUSTICE JACKSON: Perhaps rightly.

MR. PERLMAN: I think the statement—

MR. JUSTICE JACKSON: I claimed everything, of course, like every other Attorney General does. It was a custom that did not leave the Department of Justice when I did.

MR. PERLMAN: Let's see what you did do, though. A part of your statement that we set out in our brief where we mention the case does not, in our brief, mention the Communists. I do not think it mentioned the ownership by the Government of any part of the material there or any part of the plant. But the principle you laid down we think is good. All the principles that you laid down in that regard we think are good and are applicable here, and this is what you said. Let me read it:

"The Constitution lays upon the President..."

MR. JUSTICE REED: At what page are you reading?

MR. PERLMAN: I am reading from page number 149 of our brief, the brief for the Petitioner:

> "The Constitution lays upon the President the duty 'to take care that the laws be faithfully executed'. Among the laws which he is required to find means to execute are those which direct him to equip an enlarged army, to provide for a strengthened navy, to protect Government property, to protect those who are engaged in carrying out the business of the Government, and to carry out the provisions of the Lend-Lease Act. For the faithful execution of such laws the President has back of him not only each general law enforcement power conferred by the various Acts of Congress, but the aggregate of all such powers, plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.
>
> The Constitution also places on the President the responsibility and vests in him the powers of Commander-in-Chief of the Army and of the Navy. These weapons for the protection of the continued existence of the Nation are placed in his sole command and the implication is clear that he should not allow them to become paralyzed by failure to obtain supplies for which Congress has appropriated the money and which it has directed the President to obtain."

We think that is correct.

MR. JUSTICE JACKSON: I agree, so far, but you stop a little early. The statement continues: "The situation of North American plants more nearly resembles insurrection ..." and goes on further.

MR. PERLMAN: That is right, Your Honor, but the part we have reproduced in our brief we think correctly explains the Constitutional powers of the President in the absence of any statutory provisions, and what Your Honor said with respect to the seizure of North American Aviation by the President more clearly states the Constitutional power vested in him. I think you will find that to be so, Your Honor.

MR. JUSTICE FRANKFURTER: He was not "Your Honor" when he said that.

MR. PERLMAN: I beg your pardon?

MR. JUSTICE FRANKFURTER: I say that Justice Jackson was not "His Honor" when he said that.

MR. PERLMAN: Yes, that is so. Well, he is "His Honor" now, and I refer to him as such.

MR. JUSTICE DOUGLAS: North American Aviation had commitments, war commitments, and the President had to see that the machinery and everything connected with it was in operation to meet the Army needs that we required. I do not see where your argument leads us.

MR. PERLMAN: Your Honor, we are dealing with an emergency, and all we say is that in order to meet that emergency the President has power, and the power that the President has is given to him under the provisions of Article II of the Constitution, to meet the emergency. It may be he could only act in an emergency temporarily, until Congress acts. But here Congress has not acted specifically and he has the only authority under the Constitution with the power and the means available to protect the United States under the circumstances that existed here.

There is a reason for Congress acting, and the President has made it absolutely clear, for he has said that the minute Congress acted, and if Congress rejected what he did, he would abide by the action of Congress. There is no question about it. There is no question about the power of Congress. He is not making any question about it and we are not making any question about it. If Congress rejects what he did, and if Congress did provide some other means to solve the problem that faces him, very well. But he had to act, he had to act under circumstances that require the uninterrupted production of steel, and the affidavits on file as part of the case have made that clear.

It is clear that it would be a blow to the nation, it would be a blow to the Armed Forces, and it would endanger and imperil the safety of the nation if he did not act.

MR. JUSTICE MINTON: Could not the same thing have happened under the exercise of the Taft-Hartley Act?

MR. PERLMAN: Your Honor goes back to the Taft-Hartley Act and I will go back to the Taft-Hartley Act. I will promise that; I will do that.

MR. JUSTICE DOUGLAS: Is steel in the same category as wheat, clothing, flour, other commodities?

MR. PERLMAN: I do not say that. I do not think that the same thing can be said of other commodities.

MR. JUSTICE DOUGLAS: I know that we are only deciding one case.

MR. PERLMAN: I know that you cannot say the same thing about a great many things. You have here, Your Honors, a need, a dire need, for the uninterrupted production of steel—that is what we are addressing ourselves to—the uninterrupted production of steel so essential to the needs of our nation that any interference with that uninterrupted production becomes a situation in emergency.

MR. JUSTICE MINTON: You have a grain backlog; not like steel.

MR. PERLMAN: That is true, as to some kinds of steel. Steel goes into 84 percent of everything produced for the war effort. We do not have that in connection with other products.

MR. JUSTICE JACKSON: The difficulty is that once you get in that field, it is difficult for a court or for even an Attorney General, or anyone, to define where there are limitations. I do not see why, in connection with any other commodity, if the President makes a decision that it is required, as in the case of steel, I do not see why any other commodity is not just as vulnerable as steel. Of course, a seizure would produce power and Government control and ability to raise wages, and if that were so with steel it would be just as valid with something else, and yet get in a field where I just do not know where the end of it is. I suppose that troubles you too?

MR. PERLMAN: Your Honor, the end of it is always in this Court.

MR. JUSTICE JACKSON: It is not our busness to decide what is an emergency.

MR. JUSTICE DOUGLAS: You state it in your brief.

MR. PERLMAN: Our brief does not say that, Your Honor. We say that this Court may inquire whether or not an emergency exists; that is, an emergency that determines this action.

MR. CHIEF JUSTICE VINSON: That an emergency existed at the time?

MR. PERLMAN: That is right.

MR. JUSTICE FRANKFURTER: Do you mean by that that this Court should exercise an independent judgment as to the situation as to steel production and what action should be taken to correct the situation? Is not that what you are asking?

MR. PERLMAN: No.

MR. JUSTICE FRANKFURTER: If you do not mean that, then, the President's action would impose the task upon we nine Judges

to decide. To me it is not a helpful suggestion that I should make a study of matters the details of which the President alone knows.

MR. CHIEF JUSTICE VINSON: Why do you ask us to decide that, if you take the position that it depends on what the power of the President is?

MR. PERLMAN: The Congress has a right to determine whether there is a reasonable basis for the action of the President. If it decides that he is right, then the Congress can concur in the judgment of the President, and the President has already said that he will abide by the decision of Congress.

MR. JUSTICE FRANKFURTER: In the *Waterman* case there was no doubt that the President had the power. The only question was if it was subject to judicial review. That is very different from us ascertaining if there is power.

MR. PERLMAN: We cite that case and other cases where you said you would inquire into the exercise of the Executive of his authority and power, but only to the extent of his future concern and operation with—

MR. JUSTICE CLARK: That was a joint operation.

MR. PERLMAN: Yes.

MR. JUSTICE CLARK: You cannot cite that as an authority here.

MR. PERLMAN: You said there that you would inquire into what both branches did, both the Executive and the Legislative.

MR. JUSTICE CLARK: Why do you say that when you say in your brief that you cannot reveal many things that are going on in the world which the conditions of the world would not permit you to reveal? It is obviously impossible for the Court, under those circumstances, to get information that the Executive only has.

MR. PERLMAN: That is right.

MR. JUSTICE CLARK: The question is whether the remedy is equal to the emergency, or vice versa.

MR. PERLMAN: We do not think we come to that question, sir, because we think the record here shows more than a reasonable basis and extent of what could be revealed. We say, respecting the Lovett affidavit, he tells us of the facts and the difficulties, and of the dangers with which the nation is faced.

MR. JUSTICE CLARK: When you get to a discussion of the Taft-Hartley Act you can tell us whether or not—it may be so—that on April 8th we must say that the President had an alternative. I thought I heard you say that the President selected the avenue of the Wage Stabilization Board. When you reach a discussion of the Taft-Hartley Act you can say whether he could, on April 8th, have gone the way of the Taft-Hartley Act or not, and what would have been the effect then.

MR. PERLMAN: I will.

MR. CHIEF JUSTICE VINSON: You repeat your promise.

MR. PERLMAN: I want to—I will discuss the Taft-Hartley Act.

MR. JUSTICE FRANKFURTER: You answered that before. You said the President chose the Wage Stabilization Board, but you said that that did not mean that he had exhausted his recourses, or that that supplanted the Taft-Hartley Act.

MR. PERLMAN: That is right. But there is so much interest in Taft-Hartley that I think I had better talk about Taft-Hartley.

MR. JUSTICE BLACK: You mean the Taft-Hartley Act?

MR. PERLMAN: Yes.

MR. JUSTICE DOUGLAS: You are not relying on the War Powers Act?

MR. PERLMAN: No, sir; no, sir. When you say "the War Powers", we rely on all the authority given the President.

MR. JUSTICE DOUGLAS: The only thing you have mentioned so far is the situation with respect to Article II, Section 3, that: "... he shall take care that the laws be faithfully executed." You have mentioned the North Atlantic Pact and so forth.

MR. JUSTICE REED: And he mentioned the President's powers as Commander-in-Chief.

MR. JUSTICE DOUGLAS: Are you going to the Constitutional argument?

MR. PERLMAN: They want the Taft-Hartley Act discussed.

MR. CHIEF JUSTICE VINSON: Let us have the Congressional action first. We have a number of Acts of Congress, not only one. We have the Rationing Acts, the Credit Control, and others; and Congress has appropriated over $130 billion to carry out its Acts, and the President had something to do about seeing that those Acts were faithfully executed.

MR. PERLMAN: That is right.

MR. JUSTICE DOUGLAS: I am confused as to what you are relying on.

MR. PERLMAN: I am relying on every single law that has been enacted and is on the books in the last recent years in connection with the emergency, all of them, and we specify a number of them in the brief.

MR. JUSTICE DOUGLAS: That there should be collective bargaining; do you rely on that?

MR. PERLMAN: I said—you are asking about the power we have here. I am talking about the laws that have to do with the emergency with which we are faced.

MR. JUSTICE DOUGLAS: Will you give me one law by which the seizure has been justified?

MR. PERLMAN: I think the Defense Act of 1950. I think that is one, and this seizure will be enforced—

MR. JUSTICE DOUGLAS: In what way?

MR. PERLMAN: As to the Army, the Navy and the Air Force. You cannot spend the money, you cannot obtain the equipment, unless the mills are in continuous operation. Take all the money that has been appropriated for the maintenance of the Army in Korea.

MR. JUSTICE DOUGLAS: Korea? Does not that argument as to power extend to anything that is produced, things that the budget has authorized the President to buy?

MR. PERLMAN: The what?

MR. JUSTICE DOUGLAS: Everything; the produce of the farms, for instance?

MR. PERLMAN: No, sir. What he did here was to act in an emergency. You asked me about other goods, and I said that it was not necessary to have continuous production such as was necessary in the case of steel. I tried to make that clear, that it was to meet the emergency that confronted the United States that this Executive Order was issued, and in the absence of any other means to meet the emergency, and only under some such circumstances as are disclosed by the record in this case, the President would have the authority or could exercise the authority vested in him to act under the Constitution in circumstances such as those that existed on April 8th.

You want me to complete the constitutional question, rather than go to the Taft-Hartley Act?

MR. CHIEF JUSTICE VINSON: I want you to do what you want.

MR. PERLMAN: I have not finished with that yet.

MR. CHIEF JUSTICE VINSON: I do not want you to minimize your efforts in regard to the Constitutional aspect of the case, but I want you to get through with that before you discuss the Taft-Hartley Act, and would like you to have it in one continous thought.

MR. PERLMAN: I see; I will do that.

MR. CHIEF JUSTICE VINSON: If you have concluded on that point, I am content on that.

MR. PERLMAN: I am not. I am not anywhere concluded on it.

I had arrived at the point where I discussed the seizures made in the Administration of President Franklin D. Roosevelt, and I had pointed out the situation with regard to the North American Aviation Company, and then we got into this discussion.

MR. CHIEF JUSTICE VINSON: Well, you are back on the main line.

MR. PERLMAN: I am back on the main line now, yes.

And we were discussing with Justice Jackson, who was interested in the question, and we were discussing what Justice Jackson had said when he was not "His Honor", as I think it was that Justice Frankfurter pointed out. We were discussing Justice Jackson's position in respect to that seizure and I was reading what Attorney General Jackson, or part of what Attorney General Jackson, had said in that connection.

What I wanted to point out was that there were twelve seizures made by President Roosevelt, including the six that were made before the enactment of what was called the War Disputes Act, and there were twelve different seizures made prior to the enactment of that particular statute. As I understand it, there were three of those twelve seizures under the authority of other statutes, so that there were a total of nine seizures, a total of nine seizures, Your Honors, made during the Administration of President Roosevelt and while Mr. Justice Jackson, who was not then Mr. Justice Jackson, but was the Attorney General in the Roosevelt Administration—nine seizures without express statutory authority of any kind; nine seizures under powers vested in the President of the United States under Article II of the Constitution.

MR. JUSTICE JACKSON: If I may interplead as Defendant, let me remind you of one or two other instances. There were a lot of immobilized ships in the United States, and under authority contained in the Bill of Rights, President Roosevelt, who was Commander-in-Chief, said that he should not touch them until he had an Act of Congress authorizing him to do so, and Congress promptly gave him authority.

Then there was the matter of the exchange of some destroyers. As to the exchange of some destroyers, you will find that the President was advised, and he acted on that advice, that he could exchange destroyers because the Congress had authorized it, but he could not exchange the mosquito boats contrary to Congressional power, and that was purely dealing with property in his hands as Commander-in-Chief of the Navy. He was told, and he acted on it, that he could not part with that property without a Congressional Act. The mosquito boats were still under construction. I would have been glad to see them get the mosquito boats.

MR. PERLMAN: Was it not a fact, as to the mosquito boats, that there was an express prohibition?

MR. JUSTICE JACKSON: The Act of Congress limited his power as Commander-in-Chief.

MR. PERLMAN: That was an express prohibition. But we are not faced with any express prohibition in this case. In any event, he proceeded—

MR. JUSTICE JACKSON: No, he had no deals with respect to them.

MR. JUSTICE MINTON: The exchange came later. There was an exchange.

MR. JUSTICE JACKSON: The whole point that held it up, it seemed to me, was that there was some agreement attempted to be reached by this Government and Mr. Churchill, and the question was whether we would agree that it would be a simple gift or an exchange.

MR. PERLMAN: I understood it was an exchange.

MR. JUSTICE JACKSON: But there was the Commander-in-Chief of the Navy, told by Congress that he could not dispose of this property except by authority of Congress.

MR. PERLMAN: That is right. I take it, as I said before, and the President has advised Congress, that he will abide by any Act that the Congress adopts.

MR. CHIEF JUSTICE VINSON: Before the Taft-Hartley Act was passed in July 1943—have you passed that yet?

MR. PERLMAN: No, not yet, Your Honor. I was dealing with the matter of seizure, and saying that prior to that there was the instance of twelve seizures made by the Executive, at least nine of which were without any express statutory authority of any kind.

It may be interesting at that point to recall the fact that one of the seizures made prior to the passage of the War Labor Disputes Act was the seizure by President Roosevelt of all the coal mines of the United States. He seized a whole industry, as here, and he seized that industry in the absence of statutory authority. That Act of President Roosevelt was before this Court in another connection fairly recently. Your Honors held that because of that Act, as we think is the law now, when the Government stepped in and took over the coal mines, wherever any damage occurred as a result of that temporary taking by the Government, that the Government was responsible for, and that was cared for.

I listened, of course, with a great deal of interest, to what the former Solicitor General said with respect to my generous offer to his clients in this case. But there was one such case in this Court, and this Court understood that it was not merely my "generous offer," but it was an application of the law that this Court had declared the law to be in the case of the *Pewee Coal Company* case, which resulted from the seizure of the coal mines in this country, and the Court then held that the country was liable for the damage and saw to it that the damage was redressed.

MR. JUSTICE FRANKFURTER: That appears on the question of damages, their right to sue, too.

MR. PERLMAN: Their right to sue, yes; and it does not depend on the promise or view of the Solicitor General, but on the law of this land as laid down in the *Pewee Coal* case.

MR. JUSTICE FRANKFURTER: But the question of the seizure of the coal mines is different than just the fact that the Government takes it or that an officer of the Government takes it. It must be determined whether the Government has acted legally. We look at the *Pewee Coal* case, not only as an exercise of the President's authority by virtue of his being Commander-in-Chief of the Army and Navy, but from the viewpoint of the War Labor Disputes Act. Is not that so?

MR. PERLMEN: Yes, *Pewee* was not—they seized the mines four different times.

MR. JUSTICE DOUGLAS: The authority to seize was not ques-

tioned; the authority to seize was there and it was not contested.

MR. PERLMAN: It was not contested, but there was a three to four dissenting opinion, and had the Court or the dissenters been aware of anything that would lead to the conclusion that we would not be responsible for the fact, it would have been quite clear.

MR. JUSTICE FRANKFURTER: The Court does not have to go to the illegality of the seizure if the question is being considered on the basis of eminent domain. That is what the decision was on. I am not entitled to speak for them, perhaps, but I read the opinion.

MR. PERLMAN: If I can get back on the track again:

There were nine seizures under the Roosevelt Administration without statutory authority, and we have set up in our brief every instance where Presidents, when they acted without special authority, derived their authority to act. I want to get away from the Executive construction, which is shown to be conclusive in the absence of the existence of power to seize property in the presence of an emergency, and there is no other adequate way in which an emergency can be handled.

We have set out the Legislative interpretation of the powers of the President under Article II, the same powers that we have been discussing here. And we refer to a number of instances in which—or where Congress undertook to pass legislation that conferred power on the President. It so happens that there were a number of instances where the debate that took place involved the question as to whether any such legislation was necessary, and some of the most eminent members of Congress voted against proposals to authorize seizure of property by the Chief Executive since he already possessed those powers under the Constitution, and their view was that to pass legislation of that character may have the result of being interpreted as a restriction on those powers that always have existed in the Chief Executive. And some members of the Congress voted against that character of legislation because they did not want even to give the appearance of questioning the authority of the President in that regard, and in that connection we set up a number of statements made during the Administration of President Woodrow Wilson by members of the Congress in the Senate and the House, and as well by members of the Congress in the Senate and the House during the Administration of President Wilson, for instance.

MR. JUSTICE BLACK: President Lincoln, you mean?

MR. PERLMAN: We have it during the Administration of President Wilson. We have statements made by Senator Wade, for example, where the Senator stated:

> "Mr. President, this Bill confers no additional power upon the Government, as I understand it, beyond what they possess now. It attempts to regulate the power which they undoubtedly have; for they may seize upon private property anywhere, and subject it to the public use by virtue of the Constitution."

Then there are statements by members of the Congress during the Wilson Administration and even during the Administration of Roosevelt. So also, you will find the statement by Senator Connally, still the Chairman of the Foreign Relations Committee of the Senate, and he made the statement that appears on page 118 of our brief with reference to proposals in regard to these things.

MR. JUSTICE FRANKFURTER: I suppose there could be cited many contrary statements by men in the Senate. One cannot say that this man's opinion is more weighty than the other man's, although I suppose in a way it may be.

MR. JUSTICE CLARK: Senator Thomas, at another point in the record, said that someone in the Department of Justice said that all of these seizures were made upon the authority of Section 9 of the Selective Service Act of 1940. Was there not some comment made here in regard to that?

MR. PERLMAN: I do not know about that.

MR. JUSTICE CLARK: As my brother Frankfurter indicated, it is a little cloudy—that is, the legislative history—whether they ratified the action of the President, or whether they directed him to carry out certain action, or whether he was pursuing his duties as President under the Constitution, and more particularly, whether he was exercising statutory powers. After all, was not he acting, in all of these instances, pursuant to some statute?

MR. PERLMAN: I do not know. I do not think it is so, Your Honor.

If you will read the statements that we put in our brief from the time of Lincoln down, Your Honor will find the statements that we have cited show that the power was in the President; not only was it undisputed, but it was acknowledged frankly by members of Congress, and some members of Congress objected to the passage of legislation for fear that they might thereby be doing something that would be interpreted as a denial of the power which they recognized the President had. That is the reason for

my statement.

MR. JUSTICE FRANKFURTER: But when you come to the discussion of the Taft-Hartley Act, you will say what Mr. Taft said on that question and why the power was not put in the Act, will you?

MR. PERLMAN: I will.

MR. JUSTICE MINTON: We are familiar, of course, with what Congressman Dirksen said, that he has done it once as Commander-in-Chief and surely there is no question that it can be done.

MR. JUSTICE FRANKFURTER: That was during the war, and that was during a time when Congressmen and Senators absorb the war atmosphere.

MR. JUSTICE JACKSON: And when courts do, too.

MR. JUSTICE FRANKFURTER: You cannot decide it merely because Representative Dirksen said it.

MR. PERLMAN: I do not ask you to decide it by what Congressman Dirksen said or what his view may have been. It may have been a little different than the expressions that are here. All I am doing here, and I am sure you all know it, I am telling the Court, or stating to the Court, first the Executive interpretation and then the Legislative interpretation of what the powers of the President were.

MR. JUSTICE FRANKFURTER: I suggest that it is a wise rule that we give recognition to authoritative statements made in Congress by the Chairman of a Committee considering a legislative measure, or the introducer of a bill, and that the statement of those gentlemen must be said to have weight. But independent remarks, even of admirable gentlemen, do not carry any weight.

MR. PERLMAN: I would like to call to the attention of the Court the fact that Senator Connally was the Chairman of the Committee.

MR. JUSTICE FRANKFURTER: If he spoke as Chairman of the Committee or as the introducer of the bill, I will listen to what he said; but I cannot give the same weight to what is said by any member of the Congress, as such.

MR. PERLMAN: We have set it up at page 118 in the brief.

MR. JUSTICE FRANKFURTER: There is a great difference. If a person who introduces a bill says, "I don't have to put such and such in the bill because the President already has that power," that is one thing.

MR. PERLMAN: But Senator Connally was the Chairman of the Committee. I hope you will remember that.

MR. JUSTICE FRANKFURTER: Senators are very versatile.

MR. PERLMAN: Yes.

Now, if I may get back on the track once more, Your Honor: We have set out in our brief that, under Executive direction, there have been a number of instances of seizure, and we have shown to the Court in our brief the Legislative construction, and we have just dealt with some of them. But they are not all—

MR. CHIEF JUSTICE VINSON: "Legislative construction" of what? Of the Constitution under an Act?

MR. PERLMAN: Of the constitutional power vested in the President in Article II.

MR. CHIEF JUSTICE VINSON: You have thirty minutes. I advise you of that so that you may want to have it in mind when you are thinking of the Taft-Hartley Act.

MR. PERLMAN: Your Honor, we have set out in our brief, as a third section, the Judicial interpretation of the powers of the President. We have cited the case of the *United States* versus *Russell*, which we think to be very important in this connection, and the statements made in the *Russell* case indicating the extent of the Executive authority for the seizure of property. We have set out in our brief the case of the *United States* versus *Pacific Railroad*. Those two cases, the *Russell* case, 13 Wall. 623, and the *Pacific Railroad* case, 120 U.S. 227, deal with the authority of the President to take property.

And we call the Court's specific attention to the decision in the United States District Court, a decision in the case of *Dakota Coal Company* versus *Frazer*, and we invite the Court's attention particularly to District Judge Amidon's disposition of a situation substantially identical to that presented in these cases before Your Honors, language apposite to the situation here, but language which carefully explains the principles and reasons that should apply here and that would and do sustain the action of the Chief Executive. In that case, the *Dakota Coal Company* case, 283 Federal 415, the Court dealt with an action of the Governor of the State of North Dakota in the presence of a strike in the coal mines, and he took over as Governor the control of lignite coal, which was the fuel for the western half of the State. The Governor took over the Dakota Coal Company to protect the safety, health

and welfare of the State, and the power of the Governor to do so was questioned, as is the President's power here. Judge Amidon pointed out that:

> "The owners of the coal mines had already charged their right of private property therein with a public use. The continuance of the public service which such use involves cannot be separated from the right of private ownership. As to compensation, that can best be fixed by negotiation between the parties. But if this fails, the State has expressly waived its exemption from suit, and the Plaintiff may recover the reasonable value of the use of its property."

And continuing, the Judge observed:

> "... the difference between verbal anarchy and real anarchy. I do not think the quiet and orderly operation of the coal mines, which has taken place under the management of the Defendants in this case, can properly be characterized as anarchy. On the contrary, if the situation which was presented to the Governor at the time he called out the militia had been permitted to actually arise, and the people had been freezing to death and dying of disease because of the failure of fuel supplies, and men under the excitement of such a situation as that had been driven to acts of violence to relieve themselves against it, that perhaps might have been spoken of as anarchy."

And finally, Judge Amidon said:

> "I am asked to issue a writ of injunction which will necessarily say that the acts of the Governor have been illegal and unconstitutional. If I do that, I am not simply dealing with his acts; I am defining the powers of the chief executive of an American commonwealth to meet a crisis which threatens loss of life. I am not willing to strip the Governor of his power to protect society. I do not believe it comports with good order, with wise government, with a sane and ordered life, to thus limit the agencies of the State to protect the rights of the public as against the exaggerated assertions of private rights."

That is cited to dispose of some of the arguments that are made here against the exercise of the power of the Chief Executive.

MR. JUSTICE JACKSON: But there is a State and a Governor with delegated powers to do things. Is it your contention that that has gone by the board?

MR. PERLMAN: No, Your Honor. But Judge Amidon has made clear—

MR. JUSTICE JACKSON: I am talking about a State with all the powers over all its functions.

MR. PERLMAN: He acted for the same reasons, and used his powers for the same purposes, as President Roosevelt did when he seized all the coal mines of the country, and President Roosevelt did not do that without any authority. He is talking about the President of the United States as well as the Governor of North Dakota in that case.

Let me get to Taft-Hartley. Everyone wants me to discuss the Taft-Hartley, and I am most anxious to do it. Let us understand the Taft-Hartley Act and its application here, first.

The Taft-Hartley Act was passed in 1947. Look at that Act and look at the purpose of the Act as explained by its chief sponsor, Senator Taft, and Your Honors will find at the outset that it is not designed to solve anything. It does not contain in it any definite manner in which to settle a labor dispute. All it was intended to do, all that Senator Taft said it was intended to do, was to provide a cooling off period of eighty days in which time it was hoped the parties would get together and negotiate and settle their differences.

MR. JUSTICE MINTON: During the eighty day period the plants would not be closed?

MR. PERLMAN: That is true; during the eighty day period the plants would not be closed. It is a cooling off process, and that is all it is, and all that it is designed to be. And at the end of eighty days, if collective bargaining has not resulted in agreement between the parties, then—

MR. JUSTICE MINTON: Then it is a deliberate choice by Congress of collective bargaining instead of seizing the property.

MR. PERLMAN: That is a method provided by Congress for a period of eighty days, and the—

MR. JUSTICE MINTON: It is a recognition by Congress that there is to be a report of the ballot and a settlement without seizure.

MR. PERLMAN: Let us go back to what has been done here. Back in December—let us go back to December: Toward the end

of December, when a strike notice had been given for January 1st, and where the collective bargaining procedures up to that point had failed, and the President then could have proceeded under the provisions of the Taft-Hartley Act. There is no question about that. He could have appointed a board. And, under the provisions of the Taft-Hartley Act, he could have waited until that board had made their report. And after that report had been made, then there was authority for injunction. And that has been done, I think, in nine instances altogether, since the passage of the Taft-Hartley Act in 1947, in all of them in which injunctions were applied for. I think it is one out of nine.

MR. JUSTICE MINTON: None of them resulting in seizure?

MR. PERLMAN: Pardon?

MR. JUSTICE MINTON: None of them resulting in seizure?

MR. PERLMAN: That is not the point, Your Honor. But many of them, even after the Taft-Hartley Act, after the cooling off period, there was a strike before and after, and the production of the plants involved in those strikes was interrupted and stopped. That is what the President was interested in here and that is what the President wanted to avoid, the stoppage of the production of steel, and the Taft-Hartley Act was found not to be effective in preventing the interruption of the production of these eight plants.

MR. JUSTICE MINTON: Congress had precisely the same interest in the interruption of steel as the President, did it not?

MR. PERLMAN: I would hope that that was true. But in spite of two invitations made by the President of the United States to have Congress act and assert authority in this matter, here it is, more than a month after the President transmitted his desire to the Congress, and made known the fact to the Congress that steel production must not be interfered with. Congress has done nothing. It has taken no action whatsoever. The President had the thing on his hands and he did act. The Congress was advised and the Congress did not act.

MR. JUSTICE JACKSON: I would not say much about that. The Government was in court, and suit had been entered in the court in connection with all of this. We are all cognizant of the processes that go on in Washington, and I suppose we can say that Congress was not inclined to inject itself into this until and if it is necessary. I wonder if we should draw the conclusion that you suggest.

MR. PERLMAN: I do. I do not think the court proceeding had anything to do with it. The President of the United States delivered a message to Congress the very moment the incident arose, and he waited twelve days and sent another message.

MR. JUSTICE FRANKFURTER: But on April 14th, Congress did give some expression—that is, an expression of a fashion, in the matter.

MR. JUSTICE JACKSON: Do you want us to draw the conclusion that the Congress did not want to do anything about that?

MR. PERLMAN: No.

MR. JUSTICE JACKSON: I do not think we should be put in that position, the position of considering any inaction of the Congress. It is nothing that we should consider.

MR. PERLMAN: I am not asking you to. I am answering questions as to the importance or unimportance of the existence of the Taft-Hartley Act. I want to pursue Taft-Hartley. There are so many questions in connection with it. You have this statute and you have these many statements regarding it, many that are particularly interesting here.

But you also have the Defense Act of 1950 which, when Congress passed it and incorporated the provisions I am referring to, it gave the Chief Executive special authority in labor disputes, and it definitely stated and pointed out and made known the fact that it was an alternative measure. So in December 1952, when the President had to decide whether he would use the Taft-Hartley Act or the Wage Stabilization Board as an avenue by which to reach a conclusion in this important matter, he utilized the Wage Stabilization Board because it had so many more, a great many more, possibilities than did the Taft-Hartley Act.

Instead of appointing a board under the Taft-Hartley Act, there was a special panel set up, a panel consisting of management, labor and the public, all having a part in it, and all during that period, until the board had an opportunity to report, the Union has, as the Court knows, undertaken to remain at work during the time when that Board was making a study of the question, although the contract between the Union and management had expired on January 1, 1952. In spite of that, they remained at work under the same contract until the board reported back, and after the board reported back, on March 22nd, there was a period further when they remained at work without strike, so that they were at work, not striking, for 99 days, Your Honors, 19 days more than the maximum under the Taft-Hartley Act, so that the public got the benefit of the extra

time, assuming that the unions would have struck either before or after the Taft-Hartley Act was exercised.

Now we have the suggestion, at this late date, that that period having expired and the nation being faced with a strike, the period during which they did remain at work, and in view of the inability to come to an agreement, despite the President's repeated and insistent effort to get to some kind of an agreement, the argument now is made, "No, there should be no seizure to prevent a strike." But, having accepted an avenue agreeable to management, as it was to the other parties, having accepted an avenue, I say, agreeable to management, now they argue, "You have gone through that; now let's try Taft-Hartley."

MR. CHIEF JUSTICE VINSON: How many days, after the companies and employees had been bargaining in the nine cases in which the Taft-Hartley Act was applied, was it that other action was taken? Was it eighty days?

MR. PERLMAN: I cannot answer.

MR. CHIEF JUSTICE VINSON: Here you say 99 days. You started bargaining in this case in December.

MR. PERLMAN: Oh, yes—I understand.

MR. CHIEF JUSTICE VINSON: Well, you just had up to March 12th.

MR. PERLMAN: It was March 22nd. What I say is that they remained at work—

MR. CHIEF JUSTICE VINSON: How many days in the nine cases where the Taft-Hartley law was used did they remain at work before the mechanics of the Taft-Hartley Act applied?

MR. PERLMAN: I do not know how many days it was before a strike notice was given.

MR. CHIEF JUSTICE VINSON: Was any strike notice given in cases where Taft-Hartley was used?

MR. PERLMAN: I do not know. The fact is that whenever strike notice was given, except in the Mine Workers case, when the injunction was issued they went back to work. They remained at work.

MR. CHIEF JUSTICE VINSON: I thought you said that you had a strike during the eighty day period in some cases.

MR. PERLMAN: That is true of the Mine Workers; that is right. The cases are all cited in our brief. There were strikes after that period.

MR. CHIEF JUSTICE VINSON: After what period?

MR. PERLMAN: After the eighty day period.

MR. CHIEF JUSTICE VINSON: Prior to injunction?

MR. PERLMAN: Yes, and subsequent to injunction.

MR. JUSTICE CLARK: How many were there subsequent to the eighty day period?

MR. PERLMAN: I do not know. There were six cases altogether. Out of the nine cases there were six cases in which an injunction was obtained. Out of the nine, there were three in which injunction was obtained; and they were settled before the answer.

MR. JUSTICE BURTON: They were not during the Taft-Hartley waiting period.

MR. JUSTICE CLARK: How many were there?

MR. PERLMAN: I know of two.

MR. JUSTICE CLARK: Do you think he legally, the President could have legally used the Taft-Hartley Act, rather than the Wage Stabilization Board?

MR. PERLMAN: I have grave doubt about that, that is, that he could use it with the same effectiveness. After the expiration of the Taft-Hartley period, his only choice would be to get an injunction, and, if he used the Wage Stabilization Board, then the report of the Board would be a sham report, and it would be merely an attempt to do what already had been done.

MR. CHIEF JUSTICE VINSON: Under the Taft-Hartley Act, would they be bound to take or accept the Stabilization program?

MR. PERLMAN: No, they would have no protection.

MR. JUSTICE FRANKFURTER: We are not talking of protection, but—

[Whereupon, at 4:30 o'clock p.m., the Court recessed, to reconvene the following day.]

THE YOUNGSTOWN SHEET AND TUBE COMPANY, et al.,

Petitioners,

—vs.— No. 744

CHARLES SAWYER,

Respondent.

CHARLES SAWYER, SECRETARY OF COMMERCE,

Petitioner,

—vs.— No. 745

THE YOUNGSTOWN SHEET AND TUBE COMPANY, et al.,

Respondents.

Washington, D. C.
Tuesday, May 13, 1952.

The Supreme Court of the United States having on May 3, 1952, filed orders allowing certiorari in the above-entitled cases, and having assigned the said cases for argument on Monday, May 12, 1952, the said cases did on May 13, 1952, come on for further oral argument.

BEFORE:

FRED M. VINSON, *Chief Justice of the United States*
HUGO LAFAYETTE BLACK, *Associate Justice*
STANLEY FORMAN REED, *Associate Justice.*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM ORVILLE DOUGLAS, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
HAROLD HITZ BURTON, *Associate Justice*
TOM C. CLARK, *Associate Justice*
SHERMAN MINTON, *Associate Justice*

APPEARANCES:

PHILIP B. PERLMAN, ESQ., *Solicitor General of the United States, Department of Justice, Washington, D. C.*

JOHN W. DAVIS, ESQ., *Counsel for United States Steel Company, 15 Broad Street, New York 5, New York.*

ARTHUR J. GOLDBERG, ESQ., *General Counsel, United Steelworkers of America, CIO, as Amicus Curiae, 718 Jackson Place, Northwest, Washington, D. C.*

CLIFFORD D. O'BRIEN, ESQ., *Counsel for Amici Curiae Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Order of Railway Conductors, Washington, D. C.*

HAROLD C. HEISS, ESQ., *Counsel for Amici Curiae Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Order of Railway Conductors, Washington, D. C.*

PROCEEDINGS

ORAL ARGUMENT OF PHILIP B. PERLMAN, ESQ., ON BEHALF OF CHARLES SAWYER—RESUMED

MR. JUSTICE FRANKFURTER: I do not wish to interrupt you, Mr. Solicitor General, but before you sit down, will you tell us if Section No. 201 of the Defense Production Act of 1950 is legally available or was legally available to the President, and will you make whatever comments you desire to make as to the undesirability of the use of that, in connection with your other arguments? If you do so, I shall subside during the rest of your argument.

MR. PERLMAN: Thank you.

In the short time remaining, I would like first, if I may, to cover several important points which were considered in the brief, but which I have not yet had an opportunity to discuss:

We contend that injunction will not lie in this proceeding, first, because the Plaintiffs here have an adequate remedy at law. We cite in support of that proposition the *Pewee Coal* case which was before this Court in the last term, which involved the non-statutory seizure of all the coal mines of the United States by Executive Order of President Roosevelt in 1943, before the passage of the War Labor Act that authorized seizures. In that case, this Court held that the Government was liable for any damage that was proved, and it sustained a judgment against the Government for the amount of damages which the lower court had found the operators in that case had suffered by reason of the seizure and the operation of the properties during the period of Government control. We cite that case and another case in our brief in support of the proposition that there is adequate remedy at law available to the Plaintiffs in this case.

MR. JUSTICE DOUGLAS: Was not the question that the seizure was valid tied up in the consideration of the measure?

MR. PERLMAN: The Government in that case made no point of that, in the *Pewee* case.

MR. JUSTICE DOUGLAS: It was not decided.

MR. PERLMAN: It was not decided. But, as Your Honor knows, there were dissenting opinions as to the liability of the Government under the circumstances disclosed by the record, and none of those opinions have any reference whatever to the question of the legality of the seizure. That was not in the case, and we respectfully suggest that if it had been thought that the Government was not liable on account of an alleged illegality of the seizure—

MR. CHIEF JUSTICE VINSON: But the Government did not urge it, did it?

MR. PERLMAN: No, sir, the Government did not urge it, and since that is the case the Government is foreclosed. We did not urge it in that case, and it was our own act, and we would not be heard to argue that our acts are illegal, and since that decision we think that the liability of the Government for any damages that may result from the same kind of seizure that was involved in that case has been established. We did not contest it.

Now, the case that I want to emphasize that I think establishes the liability of the Government in any event is clearly shown—that is, liability for damages as a result of an injunction—is clearly shown in this case of *Hurley* versus *Kincaid*, 285 U.S. 95. That case involved the flooding of some lands, and there was a suit filed for injunction, and the claim was made that the Government was liabile for the damage occasioned by reason of the floods, and—

MR. JUSTICE REED: But there was statutory authority to build the dam.

MR. PERLMAN: Yes, there was statutory authority to build the dam and to acquire the property. There was, as I say, the right to acquire the property. The proceedings had not been engaged in. That is, the proceedings under which the lands were to be condemned and the right to the use of the land had not been exercised. The Government had not taken any action to acquire the right under the usual condemnation procedure.

That case is an illustration of what the Court found was a taking by the Government, and in the opinion in that case—and it is a very short opinion—it was made clear that, even under those circumstances, the Government, though authorized to acquire land in a particular way—it had not done it, but nevertheless, the plants were built without acquiring the right to the property, and the Government had not taken the property; but the Court found that there was taking under Article V of the Constitution and the Government was responsible, and the Court said to the Plaintiffs that in that case, "You have a remedy at law and are not entitled to an injunction."

In the case of *United States* versus *Causby*, 328 U.S. 256, that case involved the use of property by the Government without purchase, without condemnation, without any kind of effort to obtain any kind of rights in it, and it was claimed that by reason of the operation of an airport damage flowed, and the Court there found that the airport was so close to the land involved in the case that the flight of the planes produced the damage—and Mr. Justice Douglas wrote the opinion—and held that that amounted to a taking of and an easement on that property, because the planes flew so low and had to fly so low the damage was caused to the use of the land. In that case, the *Causby* case, there had been no condemnation, no agreement, nothing. But the Court found the Plaintiff in that case had an adequate remedy at law and that it was a taking for which the Government was responsible under Article V of the Constitution of the United States.

There are a number of other cases cited in our brief, among them the case of the *United States* versus *Lynah*, reported in 188 U.S., all of them to the same effect that, where property is taken and damage is done, the Government is liable for it in suits for damages, and the cases have held that in all cases, and an effort to get an inunction to restrain the Government has been rejected.

That is one phase of this case that I treat very briefly because of the shortness of time. Another phase of the case which I must touch on—and I will do so briefly—is that the Plaintiffs here fail entirely to show any irreparable injury. They claim irreparable injury, but they do not show it. There is nothing contained in the affidavits that the Plaintiffs file in this case from which this Court can find that they have suffered or may suffer irreparable injury. The claim is negatived by all of these similar circumstances that have occurred in cases in this country: The taking over of the coal mines; the taking over of the large industries authorized by statute, whether they have been taken over without a statute or under a statute; and none of those companies, and in none of those cases, has anyone suffered irreparable injury.

And they say that Secretary Sawyer may interfere with management, that he may do this and he may do that. They just rise up a bundle of fantastic hobgoblins that they whip into an argument in their affidavits, none of which have any basis.

MR. JUSTICE REED: What do you say about the powers of the President?

MR. PERLMAN: Your Honor, he has powers, full powers. The record shows the issuance of Order No. 1. They have that. Under that Order No. 1, the management is the same. No one is

disturbed and it is not contemplated that anyone will be disturbed. The companies are running as they did before the seizure was effective. They are controlled by exactly the same people. Order No. 1 allows the companies to continue business, even to declare dividends.

MR. CHIEF JUSTICE VINSON: Could that procedure be changed today by Mr. Sawyer?

MR. PERLMAN: It could be changed.

I was coming to one exception that they specify and that is tangible. They say that he may change working conditions, and it is proposed—and frankly, it is proposed—and that is the only basis, the only tangible basis for their fear that something may happen which may cause them damage. It may or it may not cause them damage. If it does cause them damage, then the resources of the United States Government are back of them, and the United States Government is liable for any damage they may suffer.

MR. CHIEF JUSTICE VINSON: How could you determine that? You have an increase in wages—

MR. PERLMAN: Yes?

MR. CHIEF JUSTICE VINSON: Of course, I recognize your position would be that there would be some price increase, but that it may not be a sufficiently large price increase to satisfy the steel companies. How would you determine the measure? What would be the measure of damage with the increase in wages and the accompanying increase, if there be one, in prices? We had that in the *Pewee* case.

MR. PERLMAN: You had that in the *Pewee* case, yes.

MR. CHIEF JUSTICE VINSON: And I do not think it was decided. We had a judgment of the Court, but I do not think that that point was decided.

MR. PERLMAN: I do not want to spend any time on that. I want to get back to Taft-Hartley, if I may. I want to say this about this point—

MR. CHIEF JUSTICE VINSON: Do you want to pass over the question of the measure of damage? How would you determine the measure of damage? You say damages would be recovered?

MR. PERLMAN: Yes.

MR. CHIEF JUSTICE VINSON: Do you want to pass that over?

MR. PERLMAN: I do not want to pass that over. I do not want to pass over anything.

MR. CHIEF JUSTICE VINSON: We did not decide that in the *Pewee Coal* case. That is evident, because there you have a question of increasing wages growing out of an award of the War Labor Board, and recovery was sought in that amount.

MR. PERLMAN: In the *Pewee Coal* case, if Your Honor please, that company had suffered a loss, actually had suffered a loss, and the lower court found that part of that loss was ascribable to the Government, and I think that one of the points was that some of the expenses that were occasioned or that fell upon the company were due to things the Court found were not necessary to be done in the proper operation of the company.

MR. CHIEF JUSTICE VINSON: The only issue there was the question of increased wages. As far as the matter was concerned when it came to us, that was the issue, some $2300 due to increased wages that had to be met in order to comply with the order of the War Labor Board.

MR. PERLMAN: They did not find that we were liable for all the increase. I say "they," but Mr. Justice Reed's concurring opinion did touch on that subject, and he pointed out that some of the charges were not in connection with what was found necessary for the operation of the company. But in each case as it arises where claims were filed, it was found that the court will determine whether or not damages were suffered and the extent of the damages.

There are a lot of other elements. They ignored, if Your Honors please, the fact that they would have suffered great damage if the strike would have been allowed to continue and go on.

But I did want to cover Taft-Hartley if I have an opportunity to do that, because there are so many questions with reference to that that are left. May I have additional time in which to do that?

MR. CHIEF JUSTICE VINSON: Your time has been fixed, Mr. Solicitor General, I believe, at two hours and a half, as agreed upon, and, of course, you have the question of Mr. Justice Frankfurter. Whenever the light comes on, you may have time to answer that question or any other question that may be asked.

MR. PERLMAN: There were a number of questions asked about the Taft-Hartley Act that I have not yet answered. There were also questions addressed to specific situations.

For instance, one of them, I think, was a question that Mr.

Justice Burton asked yesterday, with respect to the holding of the ballot after sixty days, and as to that we have some facts we want to submit on that, the fact that the ballot has never been considered as important. The last time that an effort was made by Congress to amend the Taft-Hartley law, all parties agreed that the facts showed the ballot was of no value whatever in the conduct of management relations, and those grounds upon which the Act was opposed were with respect to other phases that were sought to be agreed to and that would be prevalent, and it was definitely suggested that the situation with respect to the ballot should be repealed, and efforts were made to repeal it.

There have been some important issues that have been left unanswered. I was asked about the effect of the Taft-Hartley Act in its application. I said nine cases existed in which injunctions were issued, and in those nine cases there were strikes either before or during or after the period of injunction. And in one of those cases, the Maritime case, the case involved the Maritime Union, and the strike lasted for three months after the eighty day breathing spell had elapsed. And there was still another case of a strike that lasted some weeks after the eighty day period had elapsed. And in the coal strike, the union kept or stayed away from the mines and did not work despite the orders of the union after an injunction had been issued, and we brought contempt proceedings again in that particular situation, and the court found, I believe, that the union had done all it could do to get the men back to work, but the men were remaining away voluntarily and nothing could be done.

So we have instances of strikes during the period of injunction, and we have instances of strikes that took place after the eighty day period had elapsed. If that answers the question that Mr. Justice Burton asked me on that point, I will stop with that particular comment.

What happened here—and we stated it in our brief—the Committee made it very clear that the President had an alternative and that he had an alternative clearly in this case, and we think the record shows conclusively that the alternative chosen by the President had to be exercised in December.

I think I am finished now.

MR. CHIEF JUSTICE VINSON: That is all right. There are, of course, questions. We want to give you time to answer these questions and we want to get your views, and if you cannot submit them in the time limit that you have and if they are not covered sufficiently in your brief, you may submit a new brief in regard to the Taft-Hartley Act.

What else do you have?

MR. PERLMAN: Oh, I have a lot to say:

We point out that the alternative that the several Acts provide had to be exercised by the President in December of 1951. That was true, because the sixty day notice had been given on November 1st, and the regular procedures for negotiation for collective bargaining had taken place after November 1st.

I want to state to the Court my understanding and information is that that is the usual and normal procedure, that there is not only under the Taft-Hartley Act, but these contracts provide for sixty day notice that it is desired to change the terms of the contract, so that, when the contract is about to expire and the parties desire a new contract to be entered into, there must be that period, there has to be that period. And, when that period is coming to a close or did come to a close, it was necessary for the President to decide whether or not he would apply the Taft-Hartley procedure or whether he would attempt to exercise the authority and perform the duties that had been imposed on him by the Act of 1950, the Act, Title V of the Defense Production Act, which contemplated that collective bargaining procedure, with all its emphasis, should be carried out under the special provisions contained in that Act.

When that Act was passed, it was recognized and the Committee said that they realized that it was providing an alternative method, a method that should be used in the alternative to the use of the Taft-Hartley Act. And then, again in 1959—and this is most germane to this very point—in 1951 an effort was made to amend the Act, and an effort was made—it is the Lucas bill—to withdraw from the Wage Stabilization Board any authority over labor disputes. That Act was introduced because some of the members of the Congress felt that the Wage Stabilization Board ought not to be handling labor disputes. It was considered very carefully and it was defeated, and the defeat of that effort to amend the Wage Stabilization provision is a clear indication that Congress intended that the procedures, which they knew were being followed and which they knew existed in the Defense Act, would be applied, and they desired them to continue and they caused them to continue.

We quote in our brief from a report of the Subcommittee which pointed out that the President had two alternatives that he could use, and that he could use either one of them. That is pointed out clearly. He had the Taft-Hartley Act that he could use, or he could use the procedures set forth under and in the Defense Act of 1950, either one or the other. And then that report said, and I am quoting it substantially, I believe:

"It is conceivable that the same dispute will meet the

requirements of the emergency disputes provisions of both the Taft-Hartley law and of the Executive Order."

And it says that, should such a situation:

"... arise, the President is the initiating factor in both procedures and he will have the responsibility for deciding which route will dispose of the dispute most effectively, or he may use both routes depending upon the circumstances."

Now, that has happened. Both have been used and I call your attention to the situation, and we have a note on it in the brief with respect to the copper industry. There there was a strike and the President referred that labor dispute to the Wage Stabilization Board, and it was discovered when the Wage Stabilization Board went into the matter that the strike was still on. The union declined to accept the offices of the Wage Stabilization Board and remained on strike. The Wage Stabilization Board took the position that it would not consider any dispute while a strike was in progress, and the union declined to terminate its strike, and the matter was sent back to the President, and then the President proceeded to exercise his authority under the Taft-Hartley Act.

MR. JUSTICE BURTON: Does either Act authorize a seizure?

MR. PERLMAN: No, sir, there is no provision authorizing a seizure. The provisions are for handling a dispute, a labor dispute. But there is no provision for a seizure in the Act.

I don't want to come to that question yet, because it is the one that Justice Frankfurter asked me. I want to hold that until I finish the discussion on the Taft-Hartley Act, if I may.

The illustration with respect to copper, the copper industry, is, I think, convincing, and it is in line with my opening—

MR. JUSTICE BURTON: The choice of an alternative does not make it a substitute for the Taft-Hartley Act, but it is merely another method of procedure if the President wants to use it. What use would there be in the Taft-Hartley Act unless seizure is available?

MR. PERLMAN: Well, if Your Honor please, the seizure must be considered with all of the authority that has been given under any one of the Acts, and it cannot be considered until all the authority that has been given under every one of the Acts has been exhausted.

MR. JUSTICE BURTON: That is the point. Therefore, if you use one alternative, can you, after you have exhausted the Taft-Hartley Act, can you use the other? Or, putting it in converse, if you have used one alternative and that does not bring about the desired end, can you use something else?

MR. PERLMAN: I think you can. I am coming to that, and it is an important element of what actually was done.

It was decided in December, and I think it is clear that the President had to make a decision in December when the labor union, the steel union, accepted the findings of the special panel that has been set up, when the management rejected the findings, and when it appeared that negotiations which had been conducted on and off since November were about to terminate with no fruitful result—then the President had to decide what procedure to take. The President then made the decision on what procedure he would take, and it is clear why he made the decision, and it is clear why he did proceed under the Stabilization Board, or the Act of 1950, when he undertook with the aid and support and cooperation of all parties to the dispute. Labor agreed; management agreed.

Labor served on the special panel that was appointed to resolve the dispute, and that seemed and certainly was at that time, in December, the best manner in which to attempt to compose the differences between management and labor in that particular situation. Both of them agreed and both of them promised to follow that procedure.

Now, if he had then undertaken to operate under or exercise the authority he had under the Taft-Hartley law, he would have had to appoint a board, such a board as the Taft-Hartley Act provides for, and wait until that board reported upon the facts, and then he would have had to obtain an injunction, and then he would have had to wait for eighty days to see whether or not during that period the mediation or collective bargaining procedures would have been efective.

Now, the other route seemed to be more advantageous and certainly was and did prove to be more advantageous to the general public. It was more advantageous to the general public for various reasons, among them these:

First, because that special panel met and studied, not for five or four days—they did not make a sham study in a couple of weeks, but it sat and studied the matter for nearly three months and management proceeded in those studies, as did labor. Then, after that long period, they made their report on March 20, 1951.

During all that period, as I tried to emphasize yesterday, a period longer than that provided for in the Taft-Hartley Act—it lasted 99 days instead of eighty days as provided under the Taft-Hartley Act—after that, the union voluntarily remained at

work, with the result that there was no strike at all, and certainly there would have been, judging from what occurred, if the President had proceeded under the Taft-Hartley Act, and a strike would have resulted whatever board had acted. But that strike did not come on and the production of materials continued. The production of materials, I say, continued, and it was important to the Army, to the fleets in the seas, to the soldiers in the field, and to the men in the Air Force; and the President took that alternative.

Now it is rejected. It was rejected and, despite efforts made subsequently to bring about a settlement, up to a minute before the minute the strike had been called for, no settlement was made and the President had to make a decision as to what he would do.

Now, it is suggested, it is suggested by management, Your Honors, that the President ought to use the Taft-Hartley Act. But they did not say that in December. Management participated in the other procedure in December. Now, as an afterthought, they say that he should have used the Taft-Hartley Act, or, if he did not use it then, he should use it now.

Now, if you undertake to use the Taft-Hartley Act now, you invite a strike. You invite a strike the moment you attempt to use the Taft-Hartley Act, and that strike will continue until some settlement is made, and the longer it takes to make the settlement the longer will be the interruption of the production of steel, and this lack of production will continue to the peril of this nation.

MR. JUSTICE REED: Would there have been a strike if the plants were in the hands of the Government?

MR. PERLMAN: We would assume not. We would assume there would be no strike if the plants were in the hands of the Government.

MR. JUSTICE REED: They are in the hands of the Government now and Mr. Sawyer has been stayed and enjoined to a degree. If the plants should be left in the hands of the Government, then would you run the danger of a strike?

MR. PERLMAN: Yes, sir.

MR. JUSTICE REED: Why would that be?

MR. PERLMAN: Your Honor, if you please, I want to tell you why. I want to finish, if I may, with my thoughts in connection with the Taft-Hartley Act, because that is involved in the question Your Honor asked.

Take Taft-Hartley, as suggested. We now proceed under the Taft-Hartley Act, which would have the effect, it is suggested, of adding another eighty day period to the period when there has been no strike. That, of course, assumes that the Government would be successful in obtaining an injunction under the Taft-Hartley Act, and we cannot make that assumption, because we know the labor union will fight our effort to get an injunction under the Taft-Hartley Act.

Remember, that is not an automatic injunction, and we would be up against their contention, the contention of the union—if we attempted to use the Taft-Hartley Act now, we would be up against the contention of the union to the effect that, essentially, the Taft-Hartley Act has already been complied with, that a board made a study, a longer study than is usually made under the Taft-Hartley Act, and any effort to appoint a board under the Taft-Hartley Act now would meet with rebuff; and it would be definitely claimed, I have no doubt, that the recommendations of such a board would be a duplication and a sham, and a duplication of what had already been done, and they would claim that we would be, for those reasons, prevented from using the Taft-Hartley Act, and we could not get an injunction.

I do not say that they would succeed, but we would have to fight them in the courts in order to get an injunction. That is one reason, and there are several other reasons that influence that action, but I cite that briefly. That is a situation that would and could very easily develop, and with it would come the danger that while those proceedings were going on the strike would continue.

Your Honor asked the question: Well, as long as we have seized the property, can they strike? You ask: Is there any danger of any strike?

MR. JUSTICE REED: Not whether there "will" or "may" be, but whether you will be in a position to stop a strike by injunction?

MR. CHIEF JUSTICE VINSON: If you have no power to seize, what right have you to continue to operate?

MR. PERLMAN: If there is no power to seize, we must stay out.

MR. JUSTICE REED: Is that the answer? You are proceeding on a temporary injunction that enjoins Mr. Sawyer. If that were reversed and you were put in the position of the board and had an opportunity to see what you could do, you say there is a danger of a strike?

MR. PERLMAN: No—

MR. JUSTICE REED: Not by law. But I am talking about at the beginning of the lawsuit.

MR. PERLMAN: Perhaps.

MR. JUSTICE REED: So at the beginning of the lawsuit, if you had a temporary injunction set aside, and you were in possession of the property, why could not you go ahead?

MR. PERLMAN: We would go ahead.

MR. JUSTICE REED: —and operate under the Taft-Hartley Act?

MR. PERLMAN: Yes.

MR. JUSTICE REED: Do you think there is danger of a strike or, if there were a strike, that you could get an injunction?

MR. PERLMAN: The answer to that, if Your Honor please, is that the Taft-Hartley Act contemplates a dispute between a private employer and the union, not the Government. The Government would have difficulty, and that is another difficulty that we face in attempting to apply the Taft-Hartley Act if we remain in possession.

How can the Government successfully allege—we may try—but how can we hope to win on a petition for an injunction under the Taft-Hartley Act when we have to allege that there is a dispute between the owners and the union if we ourselves are in possession? How could we successfully make that accusation? Either we are out, and if we are out the question arises whether we can get an injunction, having exhausted the procedures provided by Congress by exercising the possible alternatives available to us—

MR. JUSTICE BURTON: Then you say that by virtue of your procedure you have made the Taft-Hartley Act no longer available? That is, by reason of your seizure?

MR. PERLMAN: No, I am not saying that, if Your Honor please. All I did was that I tried to make it so clear that it is doubtful whether Taft-Hartley was available for the settlement of the dispute between management and the union, and the President decided to use the alternative that Congress provided. Having followed that procedure, there is a grave doubt in my mind if you could now go back, except in the instance where it was done—where the union, for instance, refused to terminate a strike. But where you have exhausted that remedy, and you have gone to seizure instead of the Taft-Hartley Act, I don't think so.

If an attempt had been made at that point, and instead of seizure an attempt was made to use Taft-Hartley, then one thing is certain: That, without seizure, there would be a strike at once, and there would be a stoppage of the supply of steel and of the production of steel, the thing that the President and all agencies of the Government involved in handling the materials and supplies and the arms for the forces, and equipping them, and caring for the soldiers in the field—why, it would have occurred the minute that these other procedures were exhausted, and the union, which had refrained from striking voluntarily, would call a strike, and there would be no way to avoid one until we appointed a board—and we had already appointed one long ago—and then had attempted to get an injunction. And, as I have suggested, our rights to it are extremely doubtful, in view of the fact that all the things that could be accomplished had already been accomplished, and that would be a duplication of what had already been done.

MR. JUSTICE BURTON: Then is there not simply a declaration on your part that the President had rightfully chosen a different course from that prescribed by Congress, and had deliberately by-passed the Taft-Hartley Act, and substituted the Board for the Congressional procedure set up by reason of his action?

MR. PERLMAN: That question and the way you put it contains implications that are not warranted in this case. You said: Instead of following the procedure enacted by Congress. This was the procedure enacted by Congress in 1950, three years after the enactment of the Taft-Hartley law, and the Committees that passed on it, time and time again, have said that this is an alternative way, and he did follow the procedures set out by the Congress of the United States.

MR. JUSTICE MINTON: The Congress has not made the Taft-Hartley Act a secondary procedure?

MR. PERLMAN: No, sir. The President would decide which procedure he would use. Congress said that. If Taft-Hartley was mandatory, why would they not say so?

MR. CHIEF JUSTICE VINSON: Are you ready to get to the question asked by Mr. Justice Frankfurter?

MR. PERLMAN: I could talk more about Taft-Hartley.

MR. CHIEF JUSTICE VINSON: If there is anything further on that that you have not been able to cover, you may file an additional brief.

MR. PERLMAN: Yes. Most of it is in the brief.

MR. CHIEF JUSTICE VINSON: I thought so.

MR. PERLMAN: The question that Justice Frankfurter asked had to do with Section 201 of the Defense Production Act, and that is the Act of 1950. Now, that Act—

MR. JUSTICE FRANKFURTER: To refresh your recollection: Whether you think it is legally available, first; and second, what practical difficulties exist against using it that are in your mind. That is my question.

MR. PERLMAN: There are two Acts, Your Honor, that should be considered in that connection. But take the one suggested by Your Honor: Section 201 of the Act of 1950. It gives the Pesident authority to requisition equipment, supplies and materials and facilities needed for the national defense. There is no question but that the fact that the power to requisition everything that may be needed is contained in that section, but the fact is that in order to do so, in order to comply with the provisions of that Act, it would have taken a long time.

MR. JUSTICE FRANKFURTER: Do you mind telling me why that is so? Why, if a business house can give an order for supplies to an industry and have the order filled, why cannot the United States do that?

MR. PERLMAN: This provision, this one here, Section 201, would probably require the filing of condemnation suits in every district in the United States.

MR. JUSTICE FRANKFURTER: I do not think so. As I read the statute, it does not say anything about it. One reads a statute like that—of course, it has different meanings to different people. But an order can be placed by the Government, and the Government can place an order for everything put out by an industry, or the Government might say eighty percent of everything, then the Government controls eighty percent, or, as I say, if you want to, you can have the whole.

MR. PERLMAN: I think you have confused Section 201 of the Defense Act with the Selective Service Act.

MR. JUSTICE FRANKFURTER: I am talking about Section 201, and I am talking about that as I read it: "Whenever the President determines that the use made of any materials," and so forth, "is authorized"—I take it if such delivery is made impossible because men do not work—I can see the argument for seizure, but when you draw it out of all the incalculable things that you have drawn it from—

MR. PERLMAN: I do not know which you have reference to.

MR. JUSTICE FRANKFURTER: I am referring to the present 2081.

MR. PERLMAN: It was amended in 1951, because Article—

MR. JUSTICE FRANKFURTER: I have taken the citation given in your brief, of the Defense Act of 1950 as amended, U.S. Code Annotated, appendix number 2081.

MR. PERLMAN: That Act was amended in 1951 to provide seizure; any real property may be acquired under the provisions of the section just read, and it would be necessary to invoke the usual condemnation procedure. That is the situation as it is, Your Honor.

MR. JUSTICE FRANKFURTER: It may be so, but it is not that way in the book I have.

MR. PERLMAN: That is the situation.

MR. JUSTICE FRANKFURTER: But even before you start condemnation you can seize—before starting. Condemnation proceedings, as I see them, are often conducted in that way.

MR. PERLMAN: That is what I tried to tell the Court in citing *Hurley* versus *Kincaid*, that no injunction would lie; we did not follow the usual condemnation proceedings there, and the Court held that we were liable under the Constitution.

MR. CHIEF JUSTICE VINSON: You denied that there was anything taken, and no one agreed with you.

MR. PERLMAN: No one at that time thought that the flight of airplanes over land would cause a liability to the Government.

MR. JUSTICE JACKSON: There is the weakness of your side. You have no direct contractual relations and do not seek any with the plants you have seized. You are keeping commerce supplied as a result of your seizure instead of the Government.

MR. PERLMAN: That is the objection to using Section 18. Section 18 contemplates placed orders—

MR. JUSTICE JACKSON: It contemplates contractual relations. But Congress has provided a means by which to seize the plants with which the Government has contractual relations. Here you seize plants that do not have contractual relations with the Government and you do it because you desire to keep it going for the sake of commerce generally. Is that it?

MR. PERLMAN: Not for the sake of keeping commerce going

generally, but for the war effort.

There are two Acts involved here that were available on the books, and one is Section 18 of the Selective Service Act. It contemplates that these orders be filled. And the other one is the one that Mr. Justice Frankfurter called my attention to, and that provides for requisition and condemnation.

MR. JUSTICE DOUGLAS: That refers merely to condemnation of material and supplies. Section 201(b) is for condemnation of other things.

MR. PERLMAN: That is right.

MR. JUSTICE DOUGLAS: Section 201(b) refers to proceedings instituted after negotiations.

MR. PERLMAN: Yes.

MR. JUSTICE DOUGLAS: It seems to me strange that the Government stands here and says that you are indirectly proceeding under 201(b) to bring yourself under (k), when the procedure is so foreign to 201.

MR. PERLMAN: All I say is that I do not say we are indirectly proceeding under 201. There are these two statutes that give the Government authority to acquire personal and real property and they bring it clearly within the *Causby* case. If we condemn property we follow the Selective Act. Under either one of the laws the Plaintiffs have adequate remedy at law, and there must be borne in mind, of course, Section V of the Constitution establishing the liability in the Government.

These acts set out procedures to be followed whenever it is required to get property in that particular manner, and where, as experience has shown, with respect to particular plants, difficulties may be encountered, that is a method of overcoming the particular difficulty.

MR. JUSTICE FRANKFURTER: I suggest that if you authorize me to go to your farm or to your peach orchard, or your cherry farm, and pick the fruit whenever I want to, I do not need any other authority respecting when I should go there; I can go out on a rainy day or a dry day or during your apple season or any other season. You say that I can go any time to pick all the apples and cherries I want, and I do not need permission to do that at any special time.

MR. PERLMAN: That is not the Government's position.

MR. JUSTICE FRANKFURTER: Then I do not understand it.

MR. PERLMAN: I am sorry.

MR. JUSTICE FRANKFURTER: I am sorry, too.

Further, my answer is that that has been attempted by the Plaintiff throughout this case. The Plaintiffs have tried this whole controversy as if it were a normal case, a case in which there would be the normal exercise of authority and power. But that is not this case. This is an extraordinary case and it calls for the exercise of the authority that the Chief Executive has exercised in order to avert a national catastrophe.

Here we have the Secretary of Defense, the head of the Army, Navy and Air Force, in affidavits saying that the very existence of the whole United States is threatened, and that the only manner in which the Chief Executive of this nation can assure the continued production of steel, necessary for the whole war effort—and we are at war, and while some of the cases cited yesterday were treated lightly because they were cases of taking in time of war, nevertheless this is wartime.

MR. JUSTICE JACKSON: Has not Congress categorically disclaimed this as war, but denominates it rather as a police action? It looks like war to me, but Congress has specifically disclaimed this as war. I do not know what you invite us to do. Can we say it is a war when the President says, "No, it is not"?

MR. PERLMAN: You can say without fear of contradiction—

MR. JUSTICE JACKSON: It looks like war; people know it.

MR. PERLMAN: You can say without contradiction to anyone that we are under war conditions, and whether it may be a police action, nevertheless we are engaged with every other nation in an effort to repeal aggression overseas.

MR. JUSTICE JACKSON: You are raising different questions now than when you were dealing with counsel.

MR. JUSTICE FRANKFURTER: I thought you did this yesterday when answering Justice Douglas. Yesterday, when Justice Douglas asked you if you were relying on the War Powers Act, you answered, "No"—you answered his questions quite categorically. You cannot say that you are not in a war on one hand and on the other say that the President is exercising war powers when he is not. I thought that was gone into quite definitely and you answered Justice Douglas categorically.

MR. PERLMAN: No, Your Honor, the order issued by the President, the Executive Order which authorized the seizure, expressly states that he was taking that step under his authority as Commander-in-Chief of the Army and Navy.

MR. JUSTICE FRANKFURTER: But he has said that in the most peaceful era of our country that there ever was.

MR. PERLMAN: We are, unfortunately—

MR. CHIEF JUSTICE VINSON: You had seizures prior to Pearl Harbor that looked toward preparedness for eventualities that did come.

Your time has expired.

MR. PERLMAN: Thank you.

REBUTTAL OF JOHN W. DAVIS, ESQ., ON BEHALF OF THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.

MR. DAVIS: I am in doubt what to do, Your Honors, reply to Mr. Perlman or await any other argument?

MR. CHIEF JUSTICE VINSON: You may close this phase of the case. Then the United Steelworkers of America, CIO, as *amicus curiae*, will follow; and then the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Order of Railway Conductors will follow as *amicus curiae*. Then either Mr. Perlman or yourself may reply.

MR. DAVIS: I am glad Your Honor says that either may respond.

I do not intend to repeat the fundamental statements with which the Court is familiar, and the distinctions which were referred to by the learned Solicitor General in discussing the Defense Act and the Taft-Hartley Act, and I do not intend to say that the President has to make a choice. I do not consider the President is to be put to that rigid alternative of choosing one and substituting it for the other.

Title 5 of the Defense Production Act, after reciting that in the opinion of the Congress due regard should be had to collective bargaining in order to avoid labor disputes, says that the President may then initiate voluntary conferences between management and labor, and do other things that in the Act are designated. There is no compulsive character to be found in these conferences, nor has the Congress set up in the President any power of arbitrary solution. But when we read Section 503 of that Act, the position that the Defense Production Act holds in regard to these conferences is clear, and, if you will bear with me, I will read that Section 503 of Title 5, which has to do with the settlement of labor disputes:

> "In any such conference, due regard shall be given to terms and conditions of employment established by prevailing collective bargaining practice which will be fair to labor and management alike, and will be consistent with stabilization policies established under this Act. No action inconsistent with the provisions of the Fair Labor Standards Act of 1938 as amended, other Federal labor standards statutes, the Labor Management Relations Act of 1947, or with other applicable laws, shall be taken under this Title."

So the President did not, when he invited these voluntary conferences, did not intend to exclude the applicability of the Taft-Hartley Act or make it in any sense less of a Congressional provision than it was in the beginning.

Now, a word about irreparable injury: I gather as to irreparable injury from the learned Solicitor General's argument that we have not been able to prove as yet what our money loss may be by reason of the seizure; hence for that reason we have not shown "irreparable injury."

But Your Honors, I do not understand that to be the predicate for equity action. It is anticipated and threatened injury, not injury that already existed or that already exists, that the courts of equity are empowered to prevent, and here is a provision by which the position to really manage our property is taken away; by which our bargaining power is utterly by-passed and ignored; and by which we are excluded from all and every relationship that we formerly had with our employees. But here the Secretary reports four, five separate times as to what his purpose is, and, in his second order, he sets up a bureaucratic machinery to take care of that.

Why talk about irreparable injury? What more irreparable injury could there be than that which ousted the owner of the property and uses the owner's funds to pay contracts of his own, over which he has no power to dictate?

Now, says the learned Solicitor General, you are asking the Court to treat this as a normal case and to consider the scope of Executive power under normal conditions. We in this industry are not living under normal conditions. We are faced with abnormal acts, and we are faced with a situation that, because of the extension of Executive power—lacking legislative authority—we are deprived of our property and of our rights as citizens of the nation. The situation that is thus dictated is without parallel in American history. Treated as not normal? But it is highly abnormal.

I would like to mention, hastily, the views of the outstanding courts of our land, and of the earliest cases in this country,

dealing with the power of the President in such matters as these, and I mention the case of *Little* versus *Barreme*, decided in 1804, in 2 Cranch 170, when John Adams, represented to be a President of considerable intellectual and personal vigor, is taken to task sharply, and his acts, speaking through Chief Justice Marshall, were rejected when there was an attempt on his part to usurp Congressional power. That case involved an Act passed by Congress in 1799 suspending commercial intercourse between the United States and France during the undeclared naval war between the two nations. The Act provided that no American vessel should be permitted to proceed to any French port under penalty of forfeiture. A further provision of the Act authorized the President to instruct the commanders of United States armed vessels to stop and examine any American vessels on the high seas suspected of engaging in the prohibited traffic, and authorized the seizure of any such vessels sailing to any French port.

But President Adams sent copies of the statute to the commanders of United States vessels, accompanied by written instructions directing them to seize all American ships bound to or from French ports and, acting under these Presidential instructions, Captain Little stopped and seized on the high seas a vessel bound from a French port.

This Court unanimously affirmed an order which restored the seized vessel to its owner and directed that Captain Little pay damages for the seizure on the ground that he was a trespasser. The Court, after first posing the question whether the President would have had the power, in the absence of Congressional action, to order the seizure of vessels engaged in the illicit traffic, pointed out that Congress had prescribed by its legislation the manner in which seizures were to be carried into execution, and had excluded the seizure of any vessel bound from rather than to a French port. And this Court there said:

> "It is by no means clear that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is the Commander-in-Chief of the Army and Navy of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the Act, which declares that such vessels may be seized and may be prosecuted in any district or circuit court, 'which shall be holden within or for the district where the seizure shall be made,' obviously contemplates a seizure within the United States; and that the fifth section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to, a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port."

We have not brought suit for damages yet against Secretary Sawyer. Should we do so, and should the damage reach the extent of the estimates presented in our affidavits, I earnestly hope, because of the high respect and personal respect that I hold him in, that Secretary of Commerce Sawyer's financial condition will enable him to respond. But I feel that I shall experience considerable surprise if a judgment of one hundred or two hundred or three hundred billions of dollars is within his ability to meet.

I do not want to prolong the argument. I trust that I have made clear the position that we have taken. We are confronted with one of the most grave constitutional questions that can be exposed to the light of day, and we look to the Judiciary to hold the balance even between the powers of Congressional fiat and those of non-Congressional fiat.

MR. CHIEF JUSTICE VINSON: Mr. Goldberg?

ORAL ARGUMENT OF ARTHUR J. GOLDBERG, ESQ., ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, CIO, AS AMICUS CURIAE

MR. GOLDBERG: May it please this Court, this Honorable Court:

I am appreciative of the permission granted by this Court to appear on behalf of the United Steelworkers of America, CIO, as *amicus curiae*, to present the view of the union in respect to some of the issues involved in this grave dispute. I want at the outset to express my appreciation to this Court for the permission that has been granted to me to present, as *amicus*, the views of the union in respect to some of the issues in this dispute.

I do not feel it incumbent upon me, in view of the length and the eloquence with which some of the constitutional issues have been argued by Mr. Davis and by the learned Solicitor General, to interpose my argument on any of the issues of this case. I would like to direct my attention, however, to some of the issues that I deem of peculiar interest to the union, and, in that same interest, I believe I can shed some additional light on the issues to this Court.

First and primarily, as to the question that I think was

addressed by Justice Burton to counsel: Was there a remedy available to the President and intended by the Congress, on April 8, 1952, to be used by the President of the United States to meet what has been denominated "this emergency." To that I answer categorically, "No." There was no remedy available to the President of the United States to meet this situation as it existed in April, no remedy provided by the Congress as of April. There was a remedy available to the President of the United States, a remedy available presumably pursuant to Act of Congress, on December 31st, and I would like to talk about that remedy and explain why it was not available to the President of the United States, pursuant to the intent of Congress, on April 8th, when the President seized the property of the Plaintiffs.

In order to do that, Your Honors, it is necessary for me to deal in some detail with the framework of the Taft-Hartley Act as it had to do with the intention of the Congress, and to explain to this Court that all of the intention of the Congress was fulfilled by the President of the United States prior to April 8th, and was, in truth, fulfilled by the union that I have the high honor and privilege of representing.

I must say, most respectfully, to Your Honors, that the facts, I think, have not been made clear, and I think it is highly imperative to realize in this case just what the facts are, and in order to do so, the facts must be made clear to this Honorable Court, because the implication is, Your Honors, that the President of the United States has not exercised the intent of the Congress as prescribed by the Taft-Hartley Act, and the opinion might easily prevail that, first, as a result of the propaganda of organizations of committees, that there has been a concerted effort to avoid the intent of the Congress. Precisely the contrary is the fact. I repeat: Precisely the contrary is the fact.

To understand and to comprehend precisely what the Taft-Hartley Act prescribes, we have to go beyond that fancied date of December 31st. We have to go beyond that, far beyond that, in order to understand the intent of the Act. The Act says that before a contract expires and before a legal strike ensues, there must be served by the union a sixty day notice of intention to terminate, notice of termination of the contract and notice of a proposed strike. Hence this sixty day notice is prescribed, and it is prescribed in order to afford an opportunity to negotiate for that which Mr. Justice Douglas referred to yesterday, things that could be gained under the Wagner Act—an opportunity to afford a full opportunity for collective bargaining, for really and truly collective bargaining.

On November 1, 1951, the union served notice that it desired to engage itself in collective bargaining. Then we met in joint session, later, with management. Thirty days later, as prescribed by the Taft-Hartley Act, we served a notice of desire for Federal conciliation, for the services of the Federal Conciliation Board, to settle the conditions set forth in the various offers that were made by the companies and whereby, because of their then existent state, there was an unresolved dispute. The negotiations continued for the sixty days prescribed by the Taft-Hartley Act and by the collective bargaining agreement of these companies.

In those sixty days, incident to the sixty days notice, the terms of our contract and the terms of our notice were given to the Conciliation Service of the United States. The consultations and conferences of the said Conciliation Service of the United States expired on December 31, 1951. Prior to that time, prior to December 31, 1951, the President of the United States did not—well, wait. The President did not wait until December 31st. On December 22, 1951, the President of the United States addressed a notice to us in which he said—and to the companies, in which he said—he said:

> "I am certifying this case to the Wage Stabilization Board. I am calling upon you to refrain ..."

from what was our right under the Taft-Hartley Act, because under the Taft-Hartley Act, having given the sixty day notice, we would be entitled to strike on December 21st. The President of the United States, on December 22nd, addressed a communication to us and to the companies, and said that he had referred the matter to the Wage Stabilization Board, and told us that you, meaning "we," and the companies would have to refrain from interrupting working conditions and production conditions, pending an adjudication by the Wage Stabilization Board on the merits of the case.

Now, on December 17th, the union had a meeting. We had called in the members of our Wage Policy Committee, the rank and file of the members of the various districts all over the country, those representing the employees, and they reported on December 17th that the companies were unwilling to resolve their difficulties with us. They reported to us that they had received no offers from the companies, and that they were unable to conclude anything of an equitable nature between the union and the Committee.

What did that Committee instruct the officers of this union then to do? They instructed the officers of this union to strike on December 31, 1951, and on that date there was ordered a strike on the part of the members of this union. Then the President intervened.

I ought to say to Your Honors, in all candor, that we

understood the intervention of the President of the United States. The act of intervention on the part of the President of the United States made it very clear. It was clear by his action, through the principles of the implication of his move on December 22nd, that if we did not agree to continue at work on December 31st—or perhaps before—the President of the United States would invoke all the provisions of the Taft-Hartley Act against us. There should not be any doubt about that question; there was no doubt about it. It was obvious to us. We understood it in full measure. We understood that the President of the United States was not presenting us with any real choice. The President of the United States was stating his intention, as the Executive of the nation, and he was stating that the extension of the Executive power would be to the fullest extent by him as President of the United States, under his duty to faithfully see that the laws of the United States were carried out, and that if this union did not—and I quote it—"voluntarily" agree to the request, the President of the United States would at once resort to the exercise of all the provisions of the Taft-Hartley Act against us.

What did we do? We got the request from the President of the United States on December 22nd. We pondered that request. We called our Policy Committee into session on December 27th.

What was our choice? And, Mr. Justice Burton, in response to your question, I say that we may have said, "No" to the President of the United States; we may have said, "Go ahead. Use the Taft-Hartley Act against us." And then what would be our rights in the matter? We would have the right to strike on December 31st, unless we were enjoined. If we were enjoined, then eighty days thereafter we would either repeat the strike at the expiration of eighty days, or press for our demands—and the companies have said that our original demands exceeded sixty cents an hour in wages.

But we had an alternative posed by the President of the United States: Go to the Wage Board. Go to the Wage Stabilization Board—that is what the President said: Defer your strike and go to the Wage Stabilization Board, and confer and have a recommendation made by that Board. And then, after the recommendation of the Wage Stabilization Board, which is not binding, which is not an absolute arbitration, we agree with our learned friends that we have a right to strike.

But when would we have the right to strike? Usually, we would be faced with a compromise, a recommendation made by the Wage Stabilization Board predicated on the original demands, but constituting a compromise recommendation to be made by the Board which would have its ultimate and very definite effect.

Say that that were a theoretical compromise. No, we have had experience with this industry. We have had experience with this industry throughout our history before, in 1949, before the emergency developed, before there was any Wage Stabilization Board, and we have had precedents in respect to our disputes with the steel industry.

However that may be, the Wage Stabilization Board did confer. It conferred, as has been stated ably by more experienced counsel than I ever shall be, and the Board made a recommendation as to the issues in dispute. But back in those other days the Board denied a wage increase, recommended a pension agreement, and then we had to strike for six weeks against the industry to try and get the compromise recommendation of the public Board created by the President, and had to settle for less than the amount recommended by the public Board. That was a grave question for the union. It was something for the union to ponder, in this instance, since it had had this previous experience.

What did we do? We called a special International Convention of the union, and there were present 2500 delegates, because we did not feel rightfully empowered to make a decision with the grave conditions attendant on a decision that would be so effective to promote or destroy the efforts of our nation. So we, we 2500 delegates, gathered from all over the country in Atlantic City.

We were faced with this: On the one hand, with the powerful office of the President, armed with the compulsion of the Taft-Hartley Act, saying, "Agree with the Wage Stabilization Board," and on the other hand, "No; use the Taft-Hartley Act against us if you will at the end of eighty days." That is our free time, the extent of our periods of negotiation for the original demand.

At Atlantic City, with these 2500 delegates, we said: "Here is a request of the President of the United States. Here is our problem. What is your resolution of it?"

Well, 2500 hundred steelworkers said that we are in a state of emergency; the President may use the Taft-Hartley Act against us; we are a responsible union; we will go the road the Government requests us to go, even though we know that our demands will be compromised, and once compromised, as we all know, will never be met in full. But in the light of public opinion, we will do that, because the President has declared the nation to be in a state of national emergency and we are conscious of the fact that the nation does face a national emergency and we must respond to the Government of the United States. And so we went that road.

Now I go back to the Taft-Hartley Act. Then the Board held hearings, held lengthy hearings, and held hearings beyond those encompassed by the Taft-Hartley Act, because the Taft-Hartley Act, we all know, looks into the condition of the parties and

reports the condition of the parties, but does not make any recommendation. Nevertheless—and I point this out specifically, that the Wage Stabilization Board did precisely what the Taft-Hartley Board would do, and they finally issued a report, summarizing the condition of the parties, reporting on all of those conditions. And we say to Your Honors that we have an exact parallel, a final report and a full report summarizing the conditions of our respective interests.

Then what happened? The whole purpose of the Taft-Hartley Act, if it retains any support in the old Wagner Act, is to preserve an opportunity for collective bargaining. That is what Congress intended would happen in the eighty days after the notice was entered, an eighty day delay for the purpose of collective bargaining. Did we enjoy that period? Yes, we bargained as best we could.

When the report came down, at the request of the Government, again we postponed the calling of a strike and made, again, efforts, the members of the union did, to compose our differences with the industry, and we made those efforts and tried to negotiate a settlement and failed. Later I will talk about that failure and why it came about. Eighty days expired and we had failed. Nineteen additional days expired and we had failed.

The Government then got us together in New York. The representatives of the Government worked desperately—I say this in fairness to all the agencies of the Government—the Government worked desperately, worked desperately and earnestly, and without cessation, until the last minute of April 8th, looking to a successful resolution of our efforts for collective bargaining, and we were in session almost until ten o'clock on April 8th—and I speak from personal knowledge, because I was there—in an attempt to consummate a settlement in order to avoid a seizure of the plants, which we did not welcome and which we do not welcome, and which I will talk about later, to avoid any action on the part of the Government.

Now, when I say that there was no remedy available to the President of the United States, as intended by Congress, on April 8th, I say that in the sense that every intent of the Congress had been fulfilled, every purpose and every procedure had been followed. We had been engaged in negotiations for the full eighty days and more—

MR. JUSTICE BURTON: Does it make any difference that they just made a recommendation or reported?

MR. GOLDBERG: The panel did not—I was referring to—

MR. JUSTICE BURTON: The Board did, and that was not the procedure contemplated.

MR. GOLDBERG: No; that was something which might have helped for a settlement, and I think they should have.

MR. JUSTICE BURTON: It may have helped or it may have hurt.

MR. GOLDBERG: Yes, it may have helped or it may have hurt. We had a panel report, a fully accomplished report.

Counsel for the Bethlehem Steel Company, Judge Bromley, in the Court of Appeals said that there would be a delay in setting up a board under the Taft-Hartley Act. They said they did not need it. They said that the Wage Stabilization Board was familiar with the case. They recognized the Board, and, as a matter of fact, the Board performed every function that the Taft-Hartley Act could possibly have performed.

Now, when we concluded—

MR. JUSTICE BURTON: You say that there was no secret election under the statute?

MR. GOLDBERG: Yes, and I was surprised that the company put in question the matter of a secret election at this late date. They did not argue it before, and I did not think they would. We treat with that.

Now, gentlemen, the same Congress that enacted the Taft-Hartley Act set up the watchdog Committee under the Chairmanship of Senator Pastore, and I commend to Your Honors what was said in the hearings in the Senate concerning these matters. We had considerable discussion over this legislation, and finally the amendments proposed by Senator Taft were eliminated and the legislation came out of the Congress as we find it on the statute books.

The 2500 representatives of our union now in Philadelphia at this minute are in convention—and I will talk about that in a few minutes—but there is a realization that what is before the Court at the moment is highly relevant to the subject of the Taft-Hartley Act, and the uniform view of all of the workers has been that every requirement of the Taft-Hartley Act has been met and has been met in a manner that is highly, and must be highly, acceptable to the Court. What the President has done may have been done arbitrarily, but notwithstanding that, the members of the union have gone along with it.

MR. CHIEF JUSTICE VINSON: Are you speaking of April 8th or in December?

MR. GOLDBERG: He did it in April, but threatened to the country that the order would be issued long before that.

MR. JUSTICE FRANKFURTER: But he did not see fit to use it before?

MR. GOLDBERG: No, he did not.

Now, on the 8th of April, presumably, it appeared he used it, the power under the Acts of Congress available to him, and it is my firm conviction, and I am a strong believer in the fact that no court of equity will consider that what was done has been wrongfully done.

MR. JUSTICE FRANKFURTER: I understand from the point of view of the union, on the equities of the situation, that it would have been unfair, cruel or unjust to impose these conditions.

Is my understanding of your last statement correct that, in the exercise of the discretion and the power vested in the Executive, in issuing or enforcing such an order as has been enforced, an action that would be unfair, that, as a matter of law, in December when the matter was referred by the voluntary agreement, as you say, of all the parties, you have a choice; and as a result of that opportunity to exercise a choice, you chose the road that the President thought best? Did the President thereby close the door to the Taft-Hartley Act by taking the other road?

MR. GOLDBERG: Everything that could have been done under the Taft-Hartley Act was done.

MR. JUSTICE FRANKFURTER: I understand that, and I understand your position. But I want to know, as a matter of law, if the Taft-Hartley Act had ceased to be the cause of the controversy when the matter was put in the hands of the Wage Stabilization Board.

MR. GOLDBERG: Not ceased to be, but it had been complied with.

MR. JUSTICE FRANKFURTER: You said he had the power and that a court of equity would sustain that power.

MR. GOLDBERG: Yes. The situation is the same as I have confronted before with courts of equity on petitions for injunction. I have appeared in many cases of various types, and one question always propounded to me when I appeared and represented the union is: "Will you agree that this court does not issue a writ and we will preserve the status quo?" And in many instances I have agreed, and that is precisely the situation we are in.

MR. JUSTICE DOUGLAS: Your argument is what, that the President had the power to seize or did not?

MR. GOLDBERG: I will say that I did not express myself on that, but whatever my time may be—and I know it is limited—

MR. JUSTICE FRANKFURTER: If we agree with your brief, would you comply with the order?

MR. GOLDBERG: Certainly.

MR. JUSTICE DOUGLAS: Then what would be the value of your argument?

MR. GOLDBERG: The value of the argument is this: He puts us in a state of emergency, and if we are in a state of emergency they say that there has been a failure to avail ourselves of the Taft-Hartley Act.

May I develop it to a rather significant implication of the companies' action and clear that up?

The reason that I asked to appear is that the major posture of the other side, in regard to this case, is that there is no emergency case and that the Taft-Hartley Act is there. I do not want to enter into that. They say there that maybe the powers did not arise in the absence of the President following that course.

MR. JUSTICE FRANKFURTER: I read your brief with a great deal of interest. But after all, it does not lead up to the conclusion that the power was vested in the President to seize.

MR. GOLDBERG: That is right.

MR. CHIEF JUSTICE VINSON: Are there different criteria followed by the Wage Stabilization Board than are followed by the Taft-Hartley Act?

MR. GOLDBERG: Yes, there is a little difference. The Wage Stabilization Board is empowered to proceed in any controversy affecting the national defense and make recommendations, but the Taft-Hartley law, that is wholly an industrial Act. It deals with industry only, and to that extent there is the difference.

MR. CHIEF JUSTICE VINSON: Is it tied in in any respect to the inflation program?

MR. GOLDBERG: Yes. Under Title 4 of the Defense Production Act, the President established a Wage Stabilization Board with direct power to administer and stabilize the wages on defense products. That Board has also—and this I call to the attention of the Court. This is not Title 5, which contemplates the management-labor source which may lead to the reconstitution of the War Labor Board, but Title 4, with which Your Honors are all familiar.

It is my understanding that the President, under Title 3, could act in regard to the necessity of wage stabilization, and the duties of the Wage Stabilization Board, but would also consider the effects of his acts with respect to the national defense.

Then there is Section 7 of the Act, which provides that the President is authorized to consult, and pursuant to that section the President followed the procedure of consulting with an advisory committee composed of members of labor, representatives of the public, and representatives of the industry and representatives of agriculture, and this group made recommendations to the President, by a twelve to four vote, industry dissenting, and the Wage Stabilization Board was named to take care of national defense as well as policies, and it was on that basis that a Wage Board was created.

MR. CHIEF JUSTICE VINSON: Does the board of inquiry under the Taft-Hartley Act have those powers?

MR. GOLDBERG: None at all, and in reference to that it has not.

So the President of the United States, among all the other problems that he had on April 8th, had to consider this, whether he was proposing to invoke the Taft-Hartley Act to put the nation in a position where it could meet its problems better, or whether he would do that by means of the Wage Stabilization Board. We know of no other case going the route prescribed by the President, and knew of none when we went to the Wage Stabilization Board for a resolution of our problems. The President had the practical problem where he was going to deal with this alarming situation, and he decided to throw the whole thing into the Stabilization machinery and into the hands of the Government committee, agreed to pursuant to the Act of Congress in this national emergency.

Now, we have been confronted by the problem of going the route requested by the President, and then we are faced by the suggestion of going the Taft-Hartley route, which would cover the ground again, right over the very things that the President has done, with the penalty on the union that it would work throughout this new period on the wage contract of 1951, when all of the things that could possibly be done have already been done. This case has been postulated to this Court on the assumption of a labor dispute between our labor union and the industry and the public, and I say that the factors involved in this labor dispute have been canvassed, and this is not a dispute between labor and the public, but this is a dispute between industry and the union. This is not a dispute between the industry and the Government as to the price regulations of the Government. I have stated what this is about.

I would like, in connection with the steel dispute giving rise to the emergency of April 8th, to say that it was a price dispute between the Government and the industry, and I would like to make reference to a portion of the proceedings had before the Committee on April 15th or 16th, 1952, and in connection with that phase, which is covered in Point II in our brief, at page 14, I would like to quote this from the testimony before the Banking and Currency Committee of the House of Representatives, which was referred to in an affidavit filed in this case. The following colloquy took place between Senator Pastore of Rhode Island and the Director of the Office of Price Stabilization:

> "Mr. Arnall: ... So, as far as I know, this is the first crowd that came in and said, 'We want a price increase. We demand a price increase.'
>
> Senator Pastore: As a matter of procedure, do you mean to tell me that collective bargaining negotiations of the CIO hinged upon what your agency would have done in allowing them to raise the prices first?
>
> Mr. Arnall: Senator Pastore, I regret to say it, I am embarrassed to say this, but the truth of it is that the entire wage negotiations have been based upon what we do in price increases for steel. The reason those negotiations have broken down is because we will not agree to a commensurate price increase to offset the labor cost."

Now, I put this posture to the Court, and this is the posture of the case as I see it, and that is this: What can the Taft-Hartley Act do if we follow the Taft-Hartley procedures again as we already have done? What purpose would the Taft-Hartley Act achieve, or would it have achieved on April 8th?

We were to be enjoined, and industry and labor could no longer bargain together with the Government taking over jurisdiction of the prices, the policies and all that had to do with the Government. Everything that could have been done under the Taft-Hartley Act had already been done, and both the industry and labor were faced with the injunction.

MR. JUSTICE BURTON: But if the price is not decreased or increased, is it a wage controversy?

MR. GOLDBERG: If they made an offer; but your industries are not out of the hands of the owners and in the hands of the Government.

MR. JUSTICE BURTON: But if the Government stands pat.

MR. GOLDBERG: Then they have no offer to us. That is why we have had no active collective bargaining. That is why we have had

no bargaining for any of the length of time that this matter has been going on recently, and—

MR. JUSTICE JACKSON: That infers a discussion of the merits of the case.

MR. GOLDBERG: Only on the Taft-Hartley Act, whether it was available to the President.

MR. JUSTICE JACKSON: Do you think the question is as important as the importance of the question of seizure before us in this case? Ought we not go into the legality and the power of the Executive under the Constitution and the laws, rather than to look into the particular merits of the Taft-Hartley Act?

MR. GOLDBERG: No, I do not think so. The companies do.

MR. JUSTICE JACKSON: If you get to the merits, the things that you are mentionng are of relevant interest. But at the moment they are of relevant unimportance. In the long run both labor and the companies will have to get together.

MR. GOLDBERG: I agree.

They say that no emergency exists because there is available the Taft-Hartley Act. My reply to that is that everything that could have been done under the Taft-Hartley Act has been done, and to repeat it would be a sham, as has been said, I think, by some members of the Court already.

MR. JUSTICE JACKSON: If we got to the merits of the case, the fact that the Government had the steel companies "at both ends" might be greater justification for intervention.

MR. GOLDBERG: I would say that the Taft-Hartley Act is out of the case. That is my point, and this Court is addressing itself to some other point.

MR. JUSTICE DOUGLAS: Taft-Hartley is only designed to handle disputes between labor and the employer.

MR. GOLDBERG: Yes.

MR. JUSTICE DOUGLAS: The point of view of the companies is that they must have either one or the other, either the Taft-Hartley route or the other route.

MR. GOLDBERG: I say—I do not address myself to the constitutionality of the remedy available to them or otherwise available to the President. I merely say that Taft-Hartley has been complied with in principle.

MR. JUSTICE DOUGLAS: What is the Taft-Hartly Act designed to care for?

MR. GOLDBERG: So far as Taft-Hartley is concerned, at this posture of the case, that is up to the Government and industry to decide.

MR. JUSTICE DOUGLAS: But you also say that it is exclusive, that we must take one course and not the other.

MR. GOLDBERG: Not exclusive, Your Honor, but under the circumstances the Taft-Hartley Act is not now properly available.

MR. JUSTICE MINTON: The statute does not contemplate a substitution?

MR. GOLDBERG: I have asked the Court for expedition. This Court has acted with expedition. We are in a position where action must be taken.

Presumably, under the stay our negotiations are with the company, but experience with the White House last week shows how listless that hope must be, because the moment that the Government was restrained from doing anything about wages in this controversy, at that moment negotiations ceased.

MR. CHIEF JUSTICE VINSON: You did not get along so well prior to the action of this Court—a few weeks ago, for instance.

MR. JUSTICE FRANKFURTER: Ultimately, you have to bargain with them, unless you want the seizure to be permanent.

MR. GOLDBERG: We do not want the Government to impose a settlement upon us. We look to it with distaste. Industry will not bargain with us because of the Government's price policy, and when the President indicated, "I am going ahead," under his authority to change the conditions existing, then for the first time industry backed down and would do nothing.

Now in closing, let me ask just this: What about this question of irreparable injury? What about the irreparable injury to our steelworkers, who are being forced to work under conditions of employment existing in 1950 and not under the conditions that should exist in 1952?

I am an advocate. I do not want labor troubles and labor disputes. But Your Honors, we have sustained a net loss in cost of living of sixteen cents an hour. But I say to you, and I say to you earnestly, that the net loss in the living standards of these people, the steelworkers, is not compensable in damages. The net loss will fall on them far heavier, and will never be retrieved, than the net loss of the great sums that the companies say will be sustained by them.

MR. JUSTICE REED: Can we—

[Whereupon, at two o'clock p.m., the Court recessed, to reconvene at 2:30 o'clock p.m. the same day.]

AFTERNOON SESSION

[2:30 p.m.]

MR. GOLDBERG: I was trying to emphasize that we have been resolutely engaged, as a trade union, in an effort to bargain out an agreement. We cannot do this so long as we find that this case remains unresolved. This is not something of our asking or our choosing, and that is why we think that you should let us have a voice in having this question resolved and the matter settled.

MR. JUSTICE JACKSON: Your suggestion is that the matter be decided somewhat as a Presidential election. I think it important that no false hopes be raised on that score and that your people understand that thoroughly.

It frequently happens—and I mention it for your information—that I change my own opinion after the opinions prepared by some of my brethren, and very often I stand alone against some people, and sometimes I do not win out, and other times I am convinced by reasons given to me in conference and that satisfy me.

We are dealing with a problem that either has meaning or it has no meaning to you and your people, and I do not think you should build up false hopes. I speak for myself, but I would oppose handing down any opinion, or, I should say, handing down any decision until the opinions are rendered, because opinions sometimes prove to be more important than decisions. I think it well to say that and to caution you not to build up hopes and to have your people think there is something wrong because the decision in the case has been deferred.

MR. CHIEF JUSTICE VINSON: I thought that you were speaking as a representative of your group, Mr. Goldberg. Of course, I do not consider that you figure it would cause any undue haste on our part.

MR. JUSTICE JACKSON: You understand of course; but your people may not understand. Those of us in this room understand the situation thoroughly, but I say what I have said because there is importance in being assured that there is no misunderstanding elsewhere.

This is something that cannot be decided, it is not a case that can be decided, in one day. After your discussions here come the arguments, as a matter of fact; the arguments have just then begun.

MR. CHIEF JUSTICE VINSON: And without any time limitation.

MR. GOLDBERG: We have tried, in concert with all our people, to take no action in the meantime, in deference to the President and to the Court.

MR. JUSTICE JACKSON: I wanted to give you that thought just now.

MR. GOLDBERG: May I also suggest that my prayer was in the alternative: That the stay be modified to provide some measure of relief, if necessary. You will recall that I suggested that possibility, and that because of the very great need that has developed in the course of our discussion, the very great need for some definite action, and because of the nature of our present relations with industry, I cannot but emphasize the importance of some action, because the impression has arisen that we welcome the action of the Executive, when, as a matter of fact, we are not doing that. We want a bargained settlement of this case. We have responded to the plea of the Government, and there has been no interruption in operation.

MR. JUSTICE BURTON: Well, would you concede that a retroactive award of wages would meet the needs? Why would that not meet the needs?

MR. GOLDBERG: It would, in a way, meet the needs. But they, the companies, are bitterly resisting that. We have other contract provisions which, by their very nature, cannot be retroactive; and there, we would sustain injury.

MR. CHIEF JUSTICE VINSON: Mr. O'Brien?

ORAL ARGUMENT OF CLIFFORD D. O'BRIEN, ESQ., ON BEHALF OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND THE ORDER OF RAILWAY CONDUCTORS, AS AMICI CURIAE

MR. O'BRIEN: May it please this Honorable Court:

It was moved on behalf of the Petitioners in the case of *Brotherhood of Locomotive Firemen and Enginemen, et al.,* versus *United States,* No. 759, this Term of the Court, in order to protect their interests against possible adverse precedent insofar as

their case involves questions in common with the questions that arise in cases Nos. 744 and 745, that the petitioners in Case No. 759 have an opportunity to appear before the Court as *amicus curiae*. The petitioners for whom I speak are the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Order of Railway Conductors.

The Court has allowed us one hour, and we propose that that hour be divided between myself and Mr. Harold C. Heiss. I will be the counsel to speak on the question of eminent domain and its relation before Your Honors, and Mr. Heiss will present our views with respect to the President's lack of power, by apparent seizure, to set aside the effect of the statutes of the United States, particularly the Norris-LaGuardia Act, and too, the Labor Management Relations Act and the Railway Labor Act, insofar as they provide the right of collective bargaining.

We believe that we have a new and different view respecting the eminent domain problem that is before Your Honors, and, as a prelude to expressing that view, I call Your Honors' attention to the fact that in the railroad case, as in the steel case, we have an apparent exercise of the right of eminent domain simply to aid the Government in getting labor disputes settled, labor disputes that involve wages and working conditions and working hours. It is clear that that is the purpose of the Government, because the Government says that the point underlying the labor disputes in the steel cases is that the result of the labor dispute will be a threatened interruption of the production of steel, just as they say that the labor disputes in our own cases, the railroad cases, will result in an interruption of transportation.

Now, it has not been claimed by the Government, and we think it cannot be conscientiously claimed by the Government, that the Executive can, without more Congressional legislation, change labor hours, wage conditions, and so forth, which private employers pay and private employees receive and work under. So seizure is resorted to in an effort to bring about a settlement of a labor dispute, thereby assuring continued production of steel, or any commodity, or assuring the continued operation of transportation.

MR. JUSTICE REED: Is it a corollary that it takes a situation of a strike or an impending strike to bring about that situation?

MR. O'BRIEN: We so maintain that the ability to strike is the nearest assurance to free collective bargaining at the bargaining table that we have against the employer, and the economic forces themselves make for the resolution of these disputes with collective bargaining as the only reasonable avenue by which that can be reached.

MR. JUSTICE REED: But when the Government has the possession of the plants, of the facilities, there is no lockout.

MR. O'BRIEN: That is right. Under those conditions, Mr. Justice, production is then maintained by an assertion of Government authority, whether Legislative, Judicial or Executive, and that authority is maintained to prevent lockouts or strikes, but may disadvantage one or more of the parties to the dispute.

MR. JUSTICE REED: Is it a question of constitutionality or a question of the propriety of it?

MR. O'BRIEN: We question the constitutionality of it.

MR. CHIEF JUSTICE VINSON: Or is it a question of the application of the Acts passed by Congress?

MR. O'BRIEN: No, there is not a proper statement there, if the Court please.

In the steel case, it is alleged and argued before Your Honors that the Government intends to raise the wages of the employees of the steel companies alone by virtue of action taken under the seizure that is here under review. In our case, the parallel there is that the resemblance that we have or the analogy that we have is to be found through the determination of our labor union, which was expressed in 1948, in that charges and working conditions be determined with collective bargaining and without the ability to strike.

I turn, without further comment on that, to this simple parallel incident, to the question of eminent domain. The field of eminent domain governs the taking of property by the Government, whether the property was real, personal, or personal services. Eminent domain is the exercise of the power of the sovereign over the public, usually without the owner's consent.

I pause momentarily to say that in "personal services" we have a human right.

As early as in the time of Blackstone's Commentaries, it was established in the common law that the sovereign could not take property against the owner's will except when authorized to do so by Acts of Parliament. The Constitution of the United States itself makes no mention of the power of eminent domain, and the Fifth Amendment does not make any mention of eminent domain, but does describe and outline the fact that private property cannot be taken without just compensation. It may be said, however, by virtue of court decisions, it is assumed that there is power to take property.

However—and on this I shall be quite clear—because of the failure to include the power of eminent domain in the enumerated

powers given the Federal Government by the Constitution, and despite the Fifth Amendment, for almost a century there was grave doubt of the existence of any power of eminent domain in the Federal Government, except in the application of such a principle to the District of Columbia, where the Government exercises general powers. Because of the failure to include the power of eminent domain, as I say, in the enumerated powers given to the Federal Gvernment by the Constitution, for almost a century after the adoption of the Constitution it was seriously doubted that the Federal Government had any power of eminent domain, except in the District of Columbia, as to which the Federal Government exercised the powers which in the rest of the country had been reserved to the States.

I am giving now, Your Honors, a brief resume of the history of this:

During the pre-Civil War period, whenever the Federal Government desired to take property, it applied to the State governments for a delegation from the State to the Federal Government of the power of eminent domain, which it was assumed had been reserved exclusively to the States. The State supreme courts uniformly followed the English practice and held that the power of eminent domain is a legislative power, and can be exercised by the Executive only for the purpose, to the extent, and by the procedures established by an act of the legislature. We find the language in the Supreme Court reports of Illinois in 1887, and we set that forth in our brief, and the Supreme Court held that the power of eminent domain was a strictly legislative function.

By 1874 this Court held that the Federal Government had the power of eminent domain as an inherent part of its sovereign powers. By 1874, and not before 1874, there came to this Court the question as to whether the Federal Government had that power, an inherent power, and it was so held in the case of *Kohl* versus *United States*, in 91 U.S. 367.

Since that date, this Court has never been called upon to squarely determine the precise issue of whether that power is vested in the Executive to any extent. It has stated that it is a legislative function, not designed to be exercised by the Executive. That was stated in the case of *Hooe* versus *United States,* 218 U.S. The lower courts, the lower Federal courts, have uniformly followed the numerous and consistent State decisions to the effect that eminent domain is exclusively a legislative power, a State power, and it is today hornbook law that all eminent domain powers, both Federal and State, are exclusively legislative.

Of the more notable cases arising in this regard and respecting the question of eminent domain, was the case having to do with the battlefields of Gettysburg when the attempt was made to establish the Gettysburg National Monument. It was the case of the *United States* versus *A Certain Tract of Land*, and it is reported in the Federal Reports, 70—940. There it had been determined by the Congress that it could appropriate funds for markers, tablets, and so forth, in the National Monument, but there was no express authority to acquire real estate. And the matter came to your Court on appeal, it being contended that the right was not exercisable in the absence of legislation authorizing it, and the Court then referred to the general statute prescribing the procedure for taking, and said that the power to acquire real estate is not to be found anywhere before the procedure of taking.

MR. CHIEF JUSTICE VINSON: What do you say about the *Calhoun* case?

MR. O'BRIEN: I do not know that case.

In the Gettysburg matter, subsequently the Congress authorized the taking of that plant. That matter came before the Court later in the case of *Gettysburg Electric Railway Company* against the Government, and one of the findings was that the uses contemplated were public uses, but only after a specific statute had authorized the taking.

We do not find any more modern case in the lower Federal courts in substantial difference than what has been stated here, and that is that the power of eminent domain is exclusively a legislative power and not an Executive power.

The most recent case was the *United States* against *Montgomery Ward*, in 1945. There the facilities of Montgomery Ward were seized, properly, under the War Labor Disputes Act, which Judge Sullivan held it was not—that it was not the type of establishment held within the definition of the War Labor Disputes Act, and since there was not any legislative authority for the seizure which was before the court by Government request for declaratory judgment, it was held that the seizure was not lawful. In this case an application for *certiorari*—

MR. CHIEF JUSTICE VINSON: The case went to the Court of Appeals.

MR. O'BRIEN: Yes, Your Honor, but on a different ground than the one to which I referred.

MR. CHIEF JUSTICE VINSON: You say that the Executive Order whereby Montgomery Ward was seized was an order issued in reliance on the statute?

MR. O'BRIEN: That is the way we read the case.

MR. CHIEF JUSTICE VINSON: Did you read the order?

MR. O'BRIEN: No; the case.

MR. CHIEF JUSTICE VINSON: You will find it broader than that.

MR. O'BRIEN: There may have been a purported war power by the President. We believe that the court below and the Court of Appeals held inherent power in the Executive to seize a domestic establishment did not exist if the establishment was not in the theater of war.

MR. CHIEF JUSTICE VINSON: You think it should be in the central part of the theater of war? Do you think that is what Judge Sullivan said in his opinion?

MR. O'BRIEN: We think in some of his alleged war power cases, prior to 1874, prior to that case, the case which referred to eminent domain, that there may have been a reaching out, a broadening of the war power, to include this type of thing, and that the later case did not confine that power.

MR. CHIEF JUSTICE VINSON: Do you agree with Judge Sullivan that the plant would have to be at the center of the war operation before the application of these powers would be effective?

MR. O'BRIEN: I think you actually have to be in war.

MR. CHIEF JUSTICE VINSON: I may be wrong. However, you have answered the question from your viewpoint.

MR. O'BRIEN: I quote you from a case on this point, a fairly recent case, containing an expression of this Court, contained in 253 U.S. Reports, the case of the *United States* versus *North American Company*, reported in 253 U.S., and I call your attention to the language of Mr. Justice Brandeis, speaking for the Court, where he said:

> "In order that the Government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do either directly by Congress or by the official upon whom Congress conferred the power."

There is a clear implication that power must emanate from the Legislative Branch, and not be created by any inherent power of the Executive.

MR. JUSTICE REED: That is not true of requisition; take war requisitions, for instance.

MR. O'BRIEN: We had to distinguish about powers in emergency, in an actual theater of war, and the powers vested by statute incident to domestic economy, such matters as were referred to this morning particularly in reference to the questions asked by Mr. Justice Frankfurter. I think to take a domestic corporation for war purposes there must be some implementing power from the Legislative Branch different than exists in connection with the theater of war, and the principles governing eminent domain must be recognized. We cite numerous cases to support our theory of eminent domain, and set forth what transpires in the theater of war, which is justified under the war powers and not under the power of eminent domain.

It is true, of course, that just compensation must be paid for those seizures, as in eminent domain cases.

As we read the cases, in the theater of war, other conditions being present, it is within the Executive's power to take private property in the interest of war, whereas, not in the theater of war, the taking must be under the power of eminent domain, which is a power that rests in the Legislative Branch to exercise, not in the Executive Branch, under our tripartite form of government. We submit, therefore, that, on a parallel with our railroad cases, that in the steel cases a decision sustaining the alleged power of the Executive here would deprive us of an important point in our favor in the railroad cases.

I hope that the submission of this point has been of some aid to this Court in the matter before you.

MR. CHIEF JUSTICE VINSON: You only get the point here if you lose the point you rely on in your own case?

MR. O'BRIEN: No, we rely on every point in our cases. I think that we are correct that the court below lacks jurisdiction to issue a preliminary injunction, of which we complain. It is not necessary to reach our point that there was no power in the Executive for the exercise of eminent domain if we are correct. Our attack is, in large part, based on our belief that Congress has fully and properly exercised its power in the *Panama Refining* case—

MR. JUSTICE REED: That is a statutory factor that is not present to us in this case.

MR. O'BRIEN: That is right; we do not see it in the steel case.

ORAL ARGUMENT OF HAROLD C. HEISS, ESQ., ON BEHALF OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND THE ORDER OF RAILWAY CONDUCTORS, AS AMICI CURIAE

MR. HEISS: Your Honors, the basis of my closing argument to the Court is that the President possesses no power to take property except as authorized by Congress. We take it that this is not the attitude of the Government, nor the Government's position, because the Government, as we understand their argument, seems to assert that the power to seize or the power to exercise eminent domain is primarily legislative; but the Government finds a secondary power in the hands of the President until the Congress has acted, and that, in the absence of Congressional action, the President may act, so the Government asserts, until the Congress shall have acted.

It is our position here, and it is the burden of my argument, that Congress has already acted in the Labor Management Relations Act, and in the Railway Labor Act, and that that action by Congress, being of such a character as to entirely preclude Executive seizure of any transportation or industrial facilities, vitiates the claim of the Government. The existence of this war situation, and the legislative history of the express Congressional intent, is such that, in our opinion, would completely negate the existence of any power in the President.

MR. JUSTICE BURTON: Is that the same power as under the Wage Stabilization Act, or the Taft-Hartley Act? The Taft-Hartley Act excludes the right of seizure.

MR. HEISS: I am here in the railroad case.

MR. JUSTICE BURTON: Yes.

MR. HEISS: Which is predicated on the Act of 1916, which is a one sentence Act giving the President power and control over transportation.

MR. JUSTICE BURTON: Is that the way the Congress took away the right of seizure?

MR. HEISS: Under the Railway Labor Act—

MR. JUSTICE BURTON: You do not rely on the Taft-Hartley Act?

MR. HEISS: We do rely on the Taft-Hartley Act. We are here in the steel case as friends of the Court, and to show the parallel between the railroad situation and the steel situation as far as legislation is concerned.

MR. JUSTICE FRANKFURTER: You are acting under an independent regime. You are functioning under the Railway Labor Act.

MR. CHIEF JUSTICE VINSON: And the Taft-Hartley Act excludes you.

MR. HEISS: Yes, the Taft-Hartley Act excludes us; yes, Your Honor. But we are drawing the parallel, and we will show, particularly in our brief, that the cases cited under the Labor Act and—

MR. JUSTICE REED: You say the Railway Labor Act is not sufficiently broad?

MR. HEISS: That is right.

MR. JUSTICE REED: That he could take under it?

MR. HEISS: He cannot take under the Rail Labor Act or his inherent power. He lacks statutory power to seize the railroads, and he lacks inherent power to seize the railroads; hence he cannot seize the railroads at all, and he does not have Congressional authority to seize the steel plants and lacks the inherent power, likewise, Your Honor.

Seizure, as I say, is inconsistent, in our judgment, with the Congressional intent as manifested by the Railway Labor Act, which is our statute, and also is inconsistent with the Railway Management Act or with the Management Act which is applicable to the steel industry. With your permission, I will discuss first the Railway Labor Act and its provisions with regard to the settlement of a railway dispute.

The sponsors of the Railway Labor Act told the Congress when that Taft-Hartley Act was up, that its provisions for handling national emergencies are broader than any provisions under the Railway Act, and I hope that nothing inferentially will be drawn from that.

The national emergency provisions of the Labor Management Relations Act are modelled upon the emergency board provisions of the Railway Labor Act. Both statutes provide that the President may, in the event of a national emergency, appoint a board

of inquiry, and it sets up procedures for conferences, followed by mediation under Government auspices. There is the availability of voluntary arbitration, which the parties must agree on, and there is provided a national mediation board, and the general provisions of conferences and mediation are not too dissimilar.

At the beginning of the Labor Act history—not the beginning of the Railroad Act history—it was not contemplated that the emergency board should make recommendations as to the terms of settlement to agree on. That was departed from, and they not only investigated and reported, but they made recommendations. It should be clear that these recommendations are not obligatory on the parties.

The detail of the working of the respective boards will be set up definitely in our brief, and the facts with respect to the course of bargaining negotiations in both the steel case and in the railway seizure case demonstrate that Congress was correct in its assumption that bargaining negotiations are a sham and a fiction when one of the parties at the bargaining table has no power to inflict any economic loss on the other because it must continue to operate without the right to close down operations, either by a strike or a lockout.

But there is provision for a period in status quo that must be maintained by statute, amounting to sixty days—

MR. JUSTICE DOUGLAS: This sounds to me like an argument on the merits of your case.

MR. HEISS: No, it is not, Your Honor. In the next few sentences I will show that after the emergency board has handed down its report, and thirty days have expired, the employees are free to strike. If that is to be followed by seizure, then, Your Honors, the right to seizure is obliterated—the right granted by the freedom to strike following thirty days; if that be eliminated, then the intent is frustrated by the exercise of seizure.

MR. JUSTICE DOUGLAS: It is still the merits of your case that you are discussing.

MR. HEISS: I am discussing only the Labor Act, and I think it has a parallel under the Taft-Hartley Act.

MR. JUSTICE DOUGLAS: I do not want to hear you on the merits of the Railroad Act.

MR. HEISS: I will not bore you with that. You will not hear me discuss the merits of the Railway Act at this time.

I will discuss one thing, and that is whether the President possesses the power of seizure, either under statutory sanction or from any inherent power, whether he possesses any right of seizure either over the railroads or the steel plants, and it is important to show that he does not, and he does not have that position at all here, and it must be shown here, for this reason, among others: If you find the President has an inherent power to seize the steel plants, it may carry over to our dispute, and if we should succeed in destroying and vitiating the powers that are sought to be exercised under the Act of 1916, the Government may feel content to rely on the theory of inherent power, particularly if that theory is established as a matter of law by this Court in the instant cases.

MR. CHIEF JUSTICE VINSON: That is where your interest lies.

MR. HEISS: Yes, that is where our interest lies.

The Government counsel, in district court, has said he relied on the Act of 1916 for authority to seize the railroads. But there is nothing to preclude them from changing their position and saying that they rely on the inherent power of the President to seize the railroads, should they lose on the other point and wish to assert such a position.

I am attempting to adhere closely to one thing, and that is that neither the statutory nor the inherent power exists to warrant the seizure of any facilities.

MR. JUSTICE FRANKFURTER: The suggestion is that you discuss the inherent power condition, rather than the statutory condition. You invite us to consider the statutory situation, and there is no statutory situation that we should consider, I think, at this stage of the case, so far as you are concerned.

I understand you to say that the existence of any statutory power to do anything is in the Taft-Hartley law. Nevertheless, you multiply the problem for us when you go into the question of the Labor Act, and the Railroad Act, and the Wagner Act, and whatnot. I think, with my brother, clearly that "inherent power" is about what you should talk.

MR. HEISS: If I had taken that approach to it, that direction, then I would have been shunted off to a discussion of the Taft-Hartley Act.

MR. JUSTICE FRANKFURTER: You are not talking about Labor, or about the Railroad Act. We have not yet acted on your petition for *certiorari*.

MR. HEISS: No.

MR. JUSTICE FRANKFURTER: And all the Court can consider at the moment from your standpoint is your views with regard to

the inherent power—to bring those views to us as *amici*.

MR. HEISS: I am trying to show to the best of my ability what the two statements mean, the statements which deal with the labor dispute and the railway dispute and an industrial dispute, that they are all connected, and if there is existence of power in the President to seize in the one instance, it is not unlikely that it will be claimed and perhaps held that it exists in the other.

MR. JUSTICE REED: Your position is that there is no inherent power in the President because Congress has given other remedies.

MR. HEISS: Not only that; it has said in debates and reports that seizure is not the remedy which Congress would approve.

MR. JUSTICE JACKSON: If he has the inherent power to seize, Congress cannot take it away from him; so the statute, or a discussion of the statute, does not help us. You could win your case on all the other points that you raise, and if the Court should say that the President has inherent power, then you have no victory. That is why you are here, on the point which may decide your case before you get it here. It is inherent power that you are discussing, or that you should discuss—unless, of course, you claim there is no power in the Government, even in that combination, to proceed to seize.

MR. HEISS: It is true: Our contention is that the President has no inherent power.

MR. JUSTICE FRANKFURTER: Why not stick to that, then, if you have any time left?

MR. HEISS: I will do that.

I do want to go into this Labor Management Relations Act a little more, with the permission of the Court. The Taft-Hartley Act—and it is only on the seizure power that I am discussing this—it has been argued to the Court by the Solicitor General, and he says that the power of seizure is granted and exists. If you accept the Government's argument, as being power that does exist, and if the Government's argument is correct, then we see that it must necessarily lose in our case, because then you will find the power of seizure exists under the Labor Act—

MR. JUSTICE FRANKFURTER: But did you not argue that he did not derive his defense of power of seizure from the Taft-Hartley Act? Do you not argue that he has no power of seizure in the Taft-Hartley Act, and did you not argue that he is blocked from the exercise of seizure through the different actions of Congress?

MR. HEISS: We say it actually negates the power of seizure.

MR. JUSTICE FRANKFURTER: He tries to answer that.

MR. HEISS: If he prevails, then we are in a desperate position in the Labor Act case.

MR. CHIEF JUSTICE VINSON: That is why we wanted to hear your viewpoints in respect to the so-called inherent power of the President, while you are here today. It is the so-called inherent power of the President that we hope you will discuss.

MR. JUSTICE BURTON: You argue that, even if there is any inherent power, that if Congress has acted with respect to a given matter, the inherent power, if it did exist, has been eliminated; is that it?

MR. HEISS: That is right.

The argument of the Solicitor General yesterday was that the power to seize rests primarily in the Congress, but until such time as Congress shall have acted, then the President may act. My purpose is to show in reply that Congress has acted, so their argument fails, and, since the Congress has acted, the President has no power, because he is precluded by Congressional action from acting.

We say that under the Labor Act, from the Congressional debate—they were long and exhaustive—in 1925 and 1926, with respect to the power of the employee to strike—and Congressman Barkley, who sponsored the bill, made a thorough historic review of the entire matter; said it was the intention of the sponsor of the bill that there should be no—

MR. CHIEF JUSTICE VINSON: But as to the wages, even the bill did not pass; even the Railroad Act was passed, and in the amendment of it, now it is definitely determined that there is a penalty in respect to wages—

MR. HEISS: It does not do that, Your Honor, as I understand it.

MR. JUSTICE JACKSON: What do you think of the inherent power of the President at San Francisco with regard to troops there going to Korea, if Congress says they shall go, and there is no railroad that can take them out? What about his power?

MR. HEISS: The railroad is not stopped by the dispute—

MR. JUSTICE JACKSON: Why not? That will get us to the question, perhaps, that we are considering.

MR. HEISS: He does not have the power because he does not have the constitutional grant of authority in the first place. The right has been taken away from him by the statute governing the railway industry, and the President can go to Congress and get the troops to San Francisco—President Wilson did it in thirty-six days—can get authority to seize railroad labor and settle the dispute, and he can do that quickly by Congressional action.

MR. JUSTICE JACKSON: That is the point we want to hear from you.

MR. HEISS: Now, in discussing the labor management relation, the Labor Management Relation Act, and what that was doing, starting in 1947, in explaining the rejection of seizure, Senator Taft said:

> "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 such a process than it would receive in collective bargaining, and it will back out of collective bargaining."

MR. JUSTICE MINTON: That is a recognition of power.

MR. HEISS: That is a recognition of power, yes, the power of the President to act.

MR. JUSTICE MINTON: You say the President has no power to act?

MR. HEISS: No.

MR. JUSTICE MINTON: The Congress does?

MR. HEISS: Yes, Your Honor.

MR. JUSTICE MINTON: Without inherent power?

MR. HEISS: After the Fifth Amendment—well, in the Fifth Amendment there is a statement to the effect that public property may be taken if just compensation is paid for it.

MR. JUSTICE MINTON: You say Congress has inherent power?

MR. HEISS: I say Congress has inherent power in the language of the Fifth Amendment; Congress may authorize seizure.

MR. JUSTICE MINTON: Congress has the inherent power?

MR. HEISS: Congress has the inherent power.

MR. JUSTICE MINTON: Has anyone disputed that this Court has inherent power?

MR. HEISS: No, no.

MR. JUSTICE MINTON: So, when there was established a tripartite system of government under the Constitution, the Constitution gave inherent power to Congress and to the Court, but not to the President? The President is on the job 365 days every year.

MR. HEISS: I think, as a matter of fact, recourse to the courts can be had rather expeditiously. Of recent years, Congress has been in session practically all the time.

MR. JUSTICE JACKSON: But suppose some six Senators started a filibuster and the troops were started to war and suddenly stopped at San Francisco; can the President do nothing?

MR. HEISS: The President must follow the dictates of Congress. That has been established from time immemorial.

MR. JUSTICE JACKSON: Yes? With debate going on all the time?

MR. HEISS: It is part of the democratic process that all of us are acquainted with, and that has been so patriotically explained and expounded, and you cannot change only one part of our system of government and have it work harmoniously, and the fact that six or seven Senators would do any such thing is quite unlikely in the event of an emergency, and it is manifest, with a knowledge of our country's history, and with the policy that would have to be pursued, that such a group of Senators would seriously be rebuked and there would be no such impediment as you suggest, Mr. Justice.

MR. JUSTICE BURTON: What are the Executive powers of the President, if he has any?

MR. HEISS: They are those powers that rise out of the needs of faithfully carrying out the law of the land.

MR. CHIEF JUSTICE VINSON: You do not think that that comes within what we are discussing, or that this comes within that?

MR. HEISS: No.

MR. CHIEF JUSTICE VINSON: You find no statute that needs to be enforced to the point of the power to exercise seizure?

MR. HEISS: No, not even in the steel matter; and we say, so far as the Railway Act is concerned, any seizure would be unconstitutional and invalid on those grounds, because of the points already made in that connection.

I have only one additional point that I would like to leave with you at this time, and that is the effect of the seizure on collective bargaining, and I may emphasize it, perhaps, by pointing to a question that came from the left of the bench a little earlier.

MISS WEYAND: The "left" geographically.

MR. HEISS: The left of the bench geographically, yes.

We regard the seizure as a complete deprivation of the benefits of the Act providing for collective bargaining, granted by the Congress, both under the Labor Act and all other Acts. We find, on the question of seizure, that collective bargaining is stopped, and, since seizure became the vogue in this country, collective bargaining has definitely stopped.

My experience goes back about twenty-two years, and for the first ten or eleven years of that experience there was a sort of dignity and a fitness that pervaded our discussions then. Prior to 1940 strikes were not common. The technique of strikes was not used and was unnecessary to be resorted to.

But starting in 1942, this technique began to be applied in the railroad industry, and almost at that moment collective bargaining came to an end. There was an unwillingness, in large measure, to proceed on that basis, and the efficacy of collective bargaining was lost. In 1941, we had the seizure of the Peoria Railroad, and then we had eighty different seizures. We had seizures in 1948, 1950 and 1951.

MR. CHIEF JUSTICE VINSON: Did the 1943 seizure get into court?

MR. HEISS: It did not.

MR. CHIEF JUSTICE VINSON: How long were the railroads operated by the United States after that seizure?

MR. HEISS: In 1943?

MR. CHIEF JUSTICE VINSON: Yes.

MR. HEISS: A very short time. Settlements were made from 1942 through and including 1947 in relatively short order, and I think Your Honor had some experience with one of those.

MR. CHIEF JUSTICE VINSON: Yes, the 1943 incident.

MR. HEISS: Settlements were made in short order upon the seizure. I shall not cite each one of them, but I can certify to the Court that in no instance was the settlement satisfactory to the employees.

MR. CHIEF JUSTICE VINSON: Does the settlement have to be satisfactory to both sides to be an appropriate settlement?

MR. HEISS: No, Your Honor. I do not argue that. But what I mean when I say the settlement was not satisfactory to the employees, I mean that it is something that we had to swallow, something that we had to take, something that was distasteful.

MR. CHIEF JUSTICE VINSON: There was a war on and a strike by the railroad employees.

MR. HEISS: Yes.

MR. CHIEF JUSTICE VINSON: Is that right?

MR. HEISS: Yes.

MR. CHIEF JUSTICE VINSON: And a seizure.

MR. HEISS: There was no contract in 1943. There was in 1946 by two brotherhoods, the Engineers and the Trainmen.

MR. CHIEF JUSTICE VINSON: There was no strike in 1943?

MR. HEISS: No.

MR. CHIEF JUSTICE VINSON: What was the occasion for the seizure?

MR. HEISS: A threatened strike.

MR. CHIEF JUSTICE VINSON: The employees, the union, had served notice?

MR. HEISS: Yes.

MR. CHIEF JUSTICE VINSON: So then, what was done in that case was done as a preventive measure?

MR. HEISS: Yes.

MR. CHIEF JUSTICE VINSON: And the roads were seized, and not a single schedule was departed from in connection with the movement of trains; is not that right?

MR. HEISS: I think that is correct. But, Your Honor, that does not demonstrate that the employees were satisfied.

MR. CHIEF JUSTICE VINSON: I am personally well aware that they were not.

MR. JUSTICE FRANKFURTER: What you say was the process by which the result was reached does not leave them with a feeling that the process was right.

MR. HEISS: That is right.

MR. JUSTICE FRANKFURTER: And there has been substituted a technique of fixing the wages by the Government, rather than a settlement between the employers and the employees.

MR. HEISS: That is my own view of it, yes.

MR. JUSTICE BURTON: But that occurred because of the country being in a fighting condition.

MR. HEISS: That is true.

MR. JUSTICE BURTON: But there is no war now?

MR. HEISS: No, not now.

MR. JUSTICE BURTON: There is no war in Korea?

MR. HEISS: Whatever there may be in Korea, I can say this: My boy is there and my boy told me that he is far more interested in the preservation of the fundamental freedom of this country than he is in anything in Korea. He knows that this country will last for many years to come, and will for all time stand upon the fundamentals that its founders created.

In 1943, in 1950, and in 1951 there has been court injunction.

MR. JUSTICE JACKSON: Your theory is that free labor and management can settle these questions among themselves?

MR. HEISS: That is right.

MR. JUSTICE JACKSON: And that that process of free labor, or free management and labor, cannot exist under Government seizure?

MR. HEISS: That is right. That is our whole contention, and that is the manifested contention of Congress, as demonstrated in the legislative history of the two Acts.

So I must say we find nothing in the Constitution or in the statutes for the varying of the system that we are talking about in this case. There is no inherent power in the President to accomplish it.

MR. CHIEF JUSTICE VINSON: Mr. Solicitor General?

MR. PERLMAN: No, Your Honors; we have nothing further.

MR. CHIEF JUSTICE VINSON: Mr. Davis?

MR. DAVIS: We have nothing to add, Your Honor.

[Whereupon, at 3:30 o'clock p.m., the case was submitted.]