Submitted by
CHARLES H. TUTTLE

IN THE

Supreme Court of the United States

October Term, 1951

Nos. 744, 745

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*, REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION and SHEFFIELD STEEL CORPORATION, BETHLEHEM STEEL COMPANY, *et al.*, JONES & LAUGHLIN STEEL CORPORATION, UNITED STATES STEEL COMPANY, and E. J. LAVINO & COMPANY,

Petitioners,

vs.

CHARLES SAWYER,

Respondent.

CHARLES SAWYER, Secretary of Commerce,

Petitioner,

vs.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*,

Respondents.

BRIEF FOR ARMCO STEEL CORPORATION
and
SHEFFIELD STEEL CORPORATION
Petitioners in No. 744 and Respondents in No. 745

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BRIEF FOR ARMCO STEEL CORPORATION and SHEFFIELD STEEL CORPORATION

On April 30, 1952, the District Court for the District of Columbia (Pine, J.) granted preliminary injunctions (R. 76), with opinion (R. 65). Petitions by both sides for certiorari were granted on May 3, 1952, under 28 U. S. C., §1254(1).

I

The Constitutional Issues. Their Utmost Gravity.

(1) On April 8, 1952, Congress was in session and had been for months.

On April 8, 1952, the appellant informed these respondents and the other respondents constituting the steel industry of the country that he took possession of their "plants, facilities and other properties for operation by the United States in order to assure the continued availability of steel and steel products during the existing national emergency proclaimed on December 16, 1950."

He stated that this seizure included (R. 22):

> "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 and in the distribution and sale of the products thereof."

The appellant stated that he thus acted (R. 22)

> "By virtue of the authority vested in me by the President of the United States under an Executive Order dated April 8, 1952, 'directing the Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies.' "

The appellant further stated that he reserved the right to make "regulations and orders" for the operation, and to continue possession and operation until "*such time as he may find* that such possession and operation are no longer required in the interest of national defense" (R. 23). (Italics ours.)

The Executive Order, to which the appellant referred and which cited no statute, provided (R. 8):

> "The Secretary of Commerce *shall determine and prescribe terms and conditions of employment* under which the plants, facilities and other properties, possession of which he has taken pursuant to this order, shall be operated." (Italics ours.)

The Executive Order further provided that *"except so far as the Secretary of Commerce shall otherwise provide from time to time"*, the managements of the plants shall continue in the "usual course of business", and "existing rights and obligations of such companies shall remain in full force and effect" (R. 8).

(2) On Saturday, May 3, 1952, in an official statement made by the President at the White House to representatives of the steel mills and union workers, and released to the press and the public, the President said that unless an agreement as to terms and conditions of employment was immediately arrived at

> "The Government will be prepared on Monday morning, or as soon as we can get ready, to order changes in terms and conditions of employment to be put into effect. * * * But we will have no choice if you cannot agree."

These new "terms and conditions" would not be financed by public funds appropriated by Congress but by *private funds* confiscated for the purpose by the appellant from these and the other respondents.

(3) The many constitutional issues thus raised are among the gravest in our history. They are recognized by all as involving the whole substance and philosophy of our fundamental form of government as one solely of delegated, distributed and balanced powers, and with all other powers "reserved to the States respectively, or to the people".

The appellant's counsel have conceded that neither the Executive Order, nor the appellant's own action of

April 8, 1952, nor the proposed action as promulgated on May 3, 1952, derive authority from or proceed in accordance with any statute.

The appellant's sole claims are that there is somewhere a body of residual and inherent powers possessed by the President *ex officio* which entitle him to take such actions whenever in his judgment the general welfare and common defense so requires; and that such actions by the President endow themselves with due process of law, legislative efficacy and an immunity from judicial scrutiny and adjudication which extends even to all persons who are designated agents of the President in the effectuation and continuance of such actions on his part.

No limitations other than the President's own appraisement of the general welfare and common defense are recognized, admitted or stated. Powers expressly delegated to the Legislative or Judicial Branches of the Government are thereby transferred to the Executive Branch. Powers expressly reserved to the States or to the People are thereby assumed by the Executive Powers expressly prohibited to the Federal Government by the Constitution and the Bill of Rights are thereby, in the case of the Executive, emancipated from the constitutional prohibitions.

What is now at stake is rule by law in these United States. The power now claimed is, in its extents, essence, indefinite duration, and predicates, the power to rule indefinitely by personal edict. It is the reverse of constitutional rule under law enacted by Congress through whom the people speak and to whom the people have given their consent for the making of the laws for their government.

The powers now claimed derive not from the Constitution but from the doctrine of expediency and from the principle that the end justifies the means. Such doctrine and principle once accepted break through the walls of the Constitution and the Bill of Rights and open the way for the erosion and disintegration of American constitutional institutions under pressure of a superior power of presidential absolutism.

Presidential seizures by sanction of supposed "residual power" may simplify government; but such simplification, once accepted, can speedily become the opiate of free democracy.

Senator Daniel Webster in an historic speech upon the floor of the Senate, resisting claims of power assumed by President Jackson, declared (*Congressional Globe* (pp. 1674-5), May 7, 1834):

> "The first object of a free people is the preservation of their liberty; and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. * * * The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. * * * If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism."

II

The Appellant's claims as stated in his brief in the District Court.

(1) Judge Pine, in referring to the basic contentions in the Attorney General's brief as submitted to him, said (R. 73):

> "Enough has been said to show the utter and complete lack of authoritative support for defendant's position. That there may be no doubt as to what it is, he states it unequivocally when he says in his brief that he does 'not perceive how Article II [of the Constitution] can be read * * * so as to limit the Presidential power to meet all emergencies,' and he claims that the finding of the emergency is 'not subject to judicial review.' To my mind this spells a form of government alien to our constitutional government of limited powers."

(2) In that brief the appellant advocated (p. 28) what he referred to as "the 'stewardship' theory of the Presidency".

In support and elaboration of that theory he quoted and adopted its definition in Theodore Roosevelt's "*Autobiography*", pp. 388-9 (pp. 28-9):

> "My belief (as to the Presidency) was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. * * * In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition."

In support of this "stewardship" theory the appellant's brief in the District Court (p. 28) also quoted and of necessity took issue with the following contrary statement by President Taft in his treatise entitled *"Our Chief Magistrate and his Powers"* (p. 139):

> "The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. *Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest,* and there is nothing in the Neagle case and its definition of a law of the United States, or in other precedents, warranting such an influence. The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist." (Italics ours.)

In his decision Judge Pine stated that he took his stand on the above formulation by Chief Justice Taft "as a correct statement of the law" (R. 70); and, referring to "the stewardship theory" stated by President Theodore Roosevelt *supra,* and advocated by the defendant, Judge Pine said (R. 73):

> "That is defendant's only support for his position and for his 'Stewardship' theory of the office of President, but with all due deference and respect for that great President of the United States, I am obliged to say that his statements do not comport with our recognized theory of government, but with a theory with which our government of laws and not of men is constantly at war."

(3) In consequence and according to the logic of "the stewardship theory", the appellant's brief further claimed that this alleged power to act in any manner for the public welfare ("unless prevented by direct constitutional or legislative prohibition") was *"a residual power in the President"* (p. 30), who thereby acquired inherent power to exercise it in accordance with his own judgment and under such circumstances and for such duration as in his discretion he might deem required by "the needs of the Nation".

In further consequence, and in order properly to style the repository of these extraordinary powers, the appellant's brief (p. 27) referred to the President as *"Chief of State"*,—a title unknown to our Constitution and laws,—precisely as the brief's coined phrases "residual power" and "residuum of power" are also unknown to our Constitution and laws. This new title "Chief of State" savors of an executive absolutism familiar in other nations where such title has been deemed significantly descriptive. In our constitutional system, the people themselves are "the Chief of State", for this is a "government of the people, by the people and for the people"; and all residual power is reserved to the people and their respective States. The Constitution recites itself as ordained and established by "We the People of the United States."

(4) All these new phrases, now minted outside of the text of the Constitution but now sought to be superimposed upon it, were gathered up in one pronouncement in the footnote on page 27 of the appellant's brief in the District Court, and were there made the basis of all the new theories of government which that brief seeks to derive from its substituted phraseologies. That footnote is as follows (p. 27):

> "It should be noted that we do not contend that the President has a residuum of powers outside of the Constitution inherent in his position as Chief of State, as plaintiffs would have this Court believe our position to be. We contend only that he has such powers under the Constitution and concede that his actions are subject to constitutional limitations. In the instant case, the applicable limitation is that just compensation be paid for the taking of plaintiffs' properties in accordance with the mandate of the Fifth Amendment."

In other words, we have here the bald contention by the appellant in his brief below that the President as "Chief of State", and in the exercise of "a residuum of powers" allegedly remaining after and over and above the Constitution's system of delegated powers, can brush aside even the guaranties of the Bill of Rights with no possibility of judicial interference and with no consequence other than a possibility that the outraged citizen may secure monetary compensation from some unstated source.

(5) Any lingering thought that under these new doctrines the Judicial Branch could by injunction prevent the President from thus using a so-called "residual power" to invade the field of the Bill of Rights, is expressly ruled out by the appellant's brief in the District Court, which stated (p. 19):

> "The suggestion that the judiciary will use the force of an injunction to restrain the President in action which he believes to be necessary to the welfare of the nation is in itself somewhat startling."

In other words, although the Judicial Branch of the Government has, for over a century, been adjudicating void and restraining action taken under Acts of Congress

which the Judiciary finds to be contrary to the Constitution or the Bill of Rights, the appellant's brief below declares "startling" any exercise of like judicial power in the case of like action taken by the President's subordinates at his direction!

Indeed, the appellant's brief below goes so far as to say expressly (pp. 44-5) that the President, in the exercise of this supposed "residuum of power" *"has similar inherent powers in the nature of eminent domain and police power without statutory authorization."*

The appellant's brief below also pushed its contention so far as to claim that, because the courts will not proceed against the *person* of the President, such individual and personal immunity extends to all his subordinates from the highest to the lowest on the theory that each is the President's *alter ego.*

In pointing out the untenableness under the Constitution of such a claim of unfettered executive power, Charles Warren, in his treatise on *"Congress, The Constitution, and The Supreme Court", truly said* (pp. 251-2):

> "Yet it is well known that if a case arises in Court in which an action of the President violative of the Constitution is set up by a party to the suit, either as a defense or as a ground of action, the Court will not hesitate, and in the past has not hesitated, to declare such Presidential action to be void and of no effect and hence incapable of affording to any person a valid defense to the suit or a valid basis for recovery in the suit."

(6) If these claims of unlimited powers and of unlimited power of delegation are upheld, and can become a precedent, then our federal government ceases to be a Government of enumerated delegated powers only, with careful and adequate checks and balances and with the reserva-

tion to the States and to the people of all undelegated powers; and, instead, it becomes a Government of powers wholly plenary and unlimited and undefined in content and duration save to such extent as there may be express, enumerated prohibitions.

Furthermore, if the basic guarantee of the Bill of Rights against depriving citizens of their liberty and property without due process of law can thus be set aside by one man, whose personal fiat must be deemed due process of law, then all the other guarantees in the Bill of Rights are also subject to be superseded and taken away by the same unlimited personal power and by the same extraordinary process of reasoning; and this plenary power, thus postulated as "the residuum of power", becomes an open highway for a march to Executive absolutism.

(7) Obviously, if this unlimited power to seize an entire industry rests in the discretion of the Executive, it may be used as readily against the employees and their unions as against the employers, their plants and the investments of the stockholders.

As said in the last few days by James P. Shields, Grand Chief Engineer of the Brotherhood of Locomotive Engineers (*Time Magazine,* "Labor", April 28, 1952, p. 20):

> "In the light of the Cleveland decision, and the seizure of the steel industry, this nation is faced with the specter of continuing and expanding involuntary servitude unless present seizure tactics are wiped out on constitutional grounds."

III

The Attorney General's oral assertions in confirmation and extension of the foregoing new theories and terminologies in his brief below.

In the argument before Judge Pine, the Assistant Attorney General (Mr. Baldridge) made specific and unequivocal the numerous corollaries which follow from the aforesaid extraordinary claims and new terminologies in his brief below.

The following are some of his stark and startling statements, as recorded in the official minutes:

"A Preferred Plane"

Pages 139-140:

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

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

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

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

The Court: What statute would protect you?

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

The Court: But on the question of the deprivation of your rights you have the Fifth Amendment;

that is what protects you. I would like an answer to that—what about that?

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

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

"Unlimited Power"

Pages 154-155:

"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 Courts cannot review"

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"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."

No Judicial Precedent

Page 156:

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

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

The Court: I mean where the Courts approved it.

Mr. Baldridge: I do not know of any—

The Court: I do not think a seizure without judicial interference is relevant. The fact that a man reaches in your pocket and steals your wallet is not a precedent for making that a valid act."

"Rather not answer" as to the effect on the Bill of Rights

Pages 163-164:

"The Court: That may have been a hard case that I used as an example. Let me put a case to you that is not quite so difficult: Supposing the President should declare that the public interest required the seizure of your home and directed an agent to seize it and to dispossess you: Do you think or do you contend that the court could not restrain that act because the President had declared an emergency and because he had directed an agent to carry out his will?

Mr. Baldridge: I would rather, Your Honor, not answer a case in that extremity. We are dealing here with a situation involving a grave national emergency. I think that in determining the question whether the courts can enjoin executive power, it is essential that you look at the circumstances which give rise to the exercise of that power. I think that here, particularly in view of the affidavits that have

been filed in support of the position—that certainly there has been no attempt made to deny that there was and that there is a grave national emergency that requires the exercise of rather unusual powers in these particular circumstances. I do not believe any President would exercise such unusual power unless, in his opinion, there was a grave and an extreme national emergency existing.

The Court: Is that your conception of our Government?

Mr. Baldridge: Our conception of the powers of the Executive, Your Honor, is that under the doctrine of separation of powers—which I shall discuss a little more at length after a while—that, except for an occasional overlapping, there have not been and are not any instances of importance where one branch of the Government attempts to encroach upon the power and authority of the other."

Only "legislative powers" are limited by and enumerated in the Constitution

Pages 164-165:

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

Mr. Baldridge: That is correct.

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

Mr. Baldridge: That is true, Your Honor, with respect to legislative powers.

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

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

The Constitution has limited the powers of the Congress and of the Judiciary but not of the Executive

Pages 165-166:

"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."

Expediency justifies the unlimited powers claimed

Pages 235-6:

"The Court: Then you assail the efficacy of our Government procedures set up by the Constitution?

Mr. Baldridge: I beg your pardon?

The Court: You assail the efficacy of our Government procedures set up by the Constitution?

Mr. Baldridge: Not at all, Your Honor. I just say, to have employed them on the night of April 8th would have resulted in a strike which would have stopped steel production which is so necessary to the national defense.

The Court: Do you think that is an answer to my question?

The Court: You have lack of confidence in the procedure set up by the Constitution to deal with an emergency situation?

Mr. Baldridge: No, I do not, Your Honor. I just say that as of midnight on April 8th this seizure procedure appeared to be the only effective way to avoid a strike and to avoid a cessation for an indefinite period of production of steel necessary to national security and national defense.

> The Court: Well, we have had crises before in this country, and we have had governmental machinery that was adequate to cope with it. *You are arguing for expediency. Isn't that it?*
>
> Mr. Baldridge: *Well, you might call it that, if you like. But we say it is expediency backed by power.*"

In short, the Executive's conception of expediency creates its own effective and plenary constitutional power! The principle that the end justifies the means must be deemed implicit in the Constitution in the case of the Executive but not in the cases of the Legislature and the Judiciary!

The Executive may ignore statutory provisions enacted for the very purpose.

The appellant's brief below further stated (p. 64) that the President had an inherent power to elect to choose the statutory procedures provided by the Congress or to "invoke his emergency powers under the Constitution"; and that any contention to the contrary "would amount to holding that the President is powerless to alter his own policy."

In other words, the bald claim as now made by the appellant is that the President is not bound to respect, use and execute the statutes and public policy enacted by the Congress as the repository of "*all* legislative powers", but may proceed in disregard thereof, may create and enforce his own concepts of public policy, and thus by his own bootstraps may lift himself free from his Constitutional duty to "take Care that the Laws be faithfully executed."

The appellant's brief below ignored the "Emergency Powers Interim Continuation Act", approved April 14, 1952.

This Act extended to June 1, 1952, certain emergency powers of the President enacted during the previous state of war; but it specifically provided:

> "Sec. 5. Nothing contained herein shall be construed to authorize seizure by the Government, under authority of any Act herein extended, of any privately owned plants or facilities which are not public utilities."

Here was an express statutory restriction and prohibition on the powers of the President—a legislative declaration of public policy which he was bound to respect. Although enacted after this seizure commenced, it expressly excludes any statutory authority for its continuance, and leaves such continuance dependent solely on a claim that the President can ignore the enactments of the Congress and continue his own public policy after the Congress has spoken to the contrary.

Furthermore, the President's declaration at the White House on May 3, 1952, that the appellant would in the next several days take the funds of the steel companies in order to finance new and more expensive "terms and conditions of employment", assures a new seizure, a fresh confiscation, *after* the taking effect of the above statute, and hence a new ignoring of its provisions and its public policy.

IV

The Acting Attorney General's restatement before the Court of Appeals of the foregoing claims.

The press has carried some seeming attempt by representatives of the Executive to water down or to veneer with somewhat smoother phraseology the foregoing stark claims advanced by the Department of Justice before Judge Pine.

But, before the Court of Appeals, Mr. Perlman, the Acting Attorney General, reiterated and reemphasized the basic contentions essential to the appellant's case, namely: that the President may determine in his best judgment what constitutes an emergency and the measures necessary to deal with it, and that such determination and measures thereupon acquire the force of law and due process; and that actions thereunder by his designees or agents are beyond review by the courts. Mr. Perlman said (Tr. pp. 132-3):

> "Mr. Perlman: Now, the District Court has undertaken—and I do not say this hostilely, but I want to emphasize it—has undertaken, so far as I know, for the first time in the histoy of this nation, to issue an injunction against the President of the United States and the Commander in Chief of the Armed Forces and—
>
> Judge Edgerton (interposing): I thought the injunction was against Mr. Sawyer.
>
> Mr. Perlman: Yes; he is acting under the Executive Order of the President and Commander in Chief of the Armed Forces and the District Court is, in essence, acting against the President of the United States. * * *

> The Chief Judge: It seems to me that the Government is suggesting that an act of the President performed through an agency of the President, like the Secretary of Commerce, that the question of whether he is acting legally or illegally is not one for the Court to determine; and that the Court could not legally stop that action if it was found to be illegal. We have never been told that before."

V

The many Constitutional barriers to the assumptions of these extraordinary powers.

(1) The basic constitutional principles and provisions which invalidate the actions taken and about to be taken by the appellant were classically expounded in the foundational case of *Ex parte Milligan,* 4 Wallace (71 U. S.) 2, decided in 1866. There this Court held that the constitutional guaranty of trial by jury "was intended for a state of war as well as a state of peace," and "is equally binding upon rulers and people, at all times and under all circumstances."

The argument to the contrary by the Special Counsel for the United States rested precisely on the very principles which the present appellant now advances, to wit: that the right to deny *habeas corpus* to the accused needed no legislation by Congress but was "clearly within his (the President's) power as Commander-in-Chief" (p. 16), and that (p. 18):

> "This right and power thus granted to the Federal government is in its nature entirely *executive,* and in the absence of constitutional limitations would be wholly lodged in the President as chief executive

> officer and Commander-in-Chief of the Armies and Navies. * * * During the war his powers must be without limit."

Thereupon, this effort to regard the Executive as possessing, in time of war, a residual and inherent power "without limit" was utterly rejected by this Court, which said (p. 121):

> "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. *Such a doctrine leads directly to anarchy or despotism,* but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." (Italics ours.)

And again (p. 121):

> "They (the military commission) cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."

And again (p. 126):

> "The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. *Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable.* But, it is insisted that the safety of the country in time of war

> demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so." (Italics ours.)

If these constitutional principles could not be breached by the Executive in time of active and declared war on the very soil of this country, how can they be lawfully breached by the Executive when there is no declared war here or elsewhere?

(2) Recently these basic principles were reaffirmed and epitomized by this Court in the following classic language expressing the full essence of the American concept of Government confined by and to delegated, balanced and enumerated powers (*Home Building Loan Association* v. *Blaisdell,* 290 U. S. 398, 425):

> "*Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.* The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency." (Italics ours.)

There is no room in our Constitution for power in one man, by his own pronouncement as to expediency, to suspend the Constitution or any part of it, to endow himself with so-called "residual power," to create or abrogate "due process of law," and to exclude the Judicial Power from discharge of its supreme and exclusive jurisdiction over "all Cases, in Law and Equity arising under this Constitution, the Laws of the United States,

and Treaties made, or which shall be made, under their Authority'' (Article VI, Sec. 1).

These basic verities lie at the threshold of numerous constitutional provisions which invalidate the actions and threatened actions of the appellant in this case.

Provision "for the Common Defense and the General Welfare"

The Preamble to the Constitution of the United States includes among the stated objects the purposes to ''provide for the common defense, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity.''

But these purposes are not left floating unanchored among the three established Branches of the Government, or relegated to any ''residual'' and undefined prerogative of the Executive. *On the contrary, they are expressly reposited in the enumerated powers of the Legislative Branch,* which is the spokesman of the people.

Subdivision 1 of Section 8 of Article I of the Constitution includes among ''The General Powers of Congress'' the exclusive assertion that ''Congress shall have power * * * to provide for the common Defense and general Welfare of the United States''; and subdivision 18 of the same Section implements that delegation by the further provision that

> ''The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.''

In other words, the power to provide for the Common Defense and General Welfare of the United States is not

an inherent or implied residual power of the Executive but is expressly delegated to Congress and can be carried *"into Execution"* only through laws which Congress shall deem "necessary and proper" for the purpose.

The sole duty and power of the Executive is to function in the execution of such laws,—not to create them, or to replace or supersede the power and duty of Congress to provide and enact them.

The exclusive legislative power of Congress

Section 1 of Article I of the Constitution immediately follows the Preamble. It carries the heading "Legislative Powers vested in Congress"; and it declares

> *"All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The words "herein granted" obviously refer to the Constitution as a whole; and this necessary interpretation is confirmed by the fact that no "Legislative Powers" are therein granted to either the Executive or the Judiciary, and by the further fact that the Constitution itself reserves to the States and to the people all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States."

The function of the Executive is to "take Care that the Laws be faithfully executed" (Art. II, Sec. 3),—not to create the laws for the enforcement of which he shall "take care".

The Founding Fathers were united in drawing from history the lesson that the progeny of any union of legislative and executive power was tyranny.

"Due process of law" is a legislative and judicial subject

The power to create "due process of law" is a legislative power and the power to determine "due process of law" is a judicial power.

If the power of "carrying into Execution" the laws created by the legislative power implied or included as inherent either the power to create due process of law or to dispense with it, then there would be no meaning in the provision in Article VI of the Constitution that

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

In such an event "due process of law" would mean anything or nothing, according to the will of the Executive; and the Bill of Rights and its respective guarantees of individual liberty would all be within the protection of the Judicial Power only by grace of the Executive.

The Executive's relation to "due process of law" is solely that of assistance to the Legislative and Judicial Powers.

The guarantee of "due process of law" is more than an invocation of the Legislative and the Judicial Powers

It is also a roadblock against the Executive,—an unbreachable bulwark for the complete protection of life, liberty and property, against government by personal prerogative rather than by impersonal law. It is the freeman's castle erected by the Constitution within which every individual may be secure for himself, his posterity, his goods, his immunities, and his enjoyment of "the Blessings of Liberty" to which the Constitution is dedicated by its Preamble.

This ancient rampart against executive prerogative and government by personal edict was nearly 600 years old when, at the instance of the Founding Fathers, the States adopted it in 1791 as an embodiment of the provision in Article 39 of Magna Carta that

> "No freeman shall be taken or imprisoned, or *disseized* or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, *unless by the lawful judgment of his peers, or by the law of the land.*" (Italics ours.)

From that ancient day to this it has been a basic principle of Anglo-Saxon law and tradition (to quote *Case of Proclamations,* 12 Coke's Reports 74) that

> "The King hath no prerogative, but that which the law of the land allows him."

This constitutional guarantee of "due process of law" is one which the Executive is not only bound by Section 3 of Article II of the Constitution and by his constitutional oath of office to "preserve, protect and defend" (Art. II, Sec. 7), but it places upon him the affirmative duty of aiding and not obstructing both the Legislative and Judicial Powers in the preservation, protection and defense of that high right and immunity possessed by every individual in our country, whether great or small.

As said by Chief Justice Taney in *Ex parte Merryman,* 17 Fed. Cas. 144 (decided in 1861) at p. 149:

> "With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, *except in aid of the judicial power.* He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ

> of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law." (Italics ours.)

Hence it was that the Founding Fathers included "life, liberty and the pursuit of happiness" among the "certain unalienable rights" which all men possess by endowment, not from the State but from "their Creator"; and also included in their denunciations of the "repeated injuries and usurpations practiced against the people of these Colonies by the King of Great Britain in combination with others", an arraignment

> "For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."

In the Preamble of 1789 to the Bill of Rights, there was a recital that the enumerated guarantees therein were directed against encroachment by the *"government"*,—not against the Legislative or Judicial Branches only. The Preamble expressly said:

> "The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or *abuse of its powers,* that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence *in the government* will best insure the beneficent ends of its institution." (Italics ours.)

Thus, these "further declaratory and restrictive clauses" were enacted for the very purpose of removing any possibility of misconstruction whereby doctrines of residual or inherent power, or of royal prerogative, or of personal government or unlimited power, could by any possibility of interpretation, paraphrase or encroachment become superimposed upon the Constitution and thereby cause a loss "of public confidence in the government."

The power to provide, support and maintain armies and a navy

Although Subdivision 1 of Section 2 of Article II of the Constitution declares that "The President shall be Commander-in-Chief of the Army and Navy of the United States", nevertheless the power to declare war and to provide, support and maintain armies and a navy are, by subdivisions 11, 12 and 13 of Section 8 of Article I of the Constitution, delegated exclusively to the Congress. The Executive can participate in these powers only in so far as the Congress, by express legislation, so provides.

The President cannot by confiscating private funds take from Congress the effective and exclusive control of "the purse strings", or its exclusive power to control policy by fixing and limiting appropriations (Article I, Sections 7, 8 and 9).

The Executive Order of April 8, 1952, neither specifies nor relies on any such legislation. It is, in its essence, a stark assertion by the Executive of powers to raise and support armies and to provide and maintain a navy not under powers, provisions and appropriations enacted by the Congress but under some undefined "residuum of powers" residing in himself,—and to provide such support and maintenance not out of the public funds of the United States or out of moneys appropriated by Congress *but out of private properties and funds expropriated, committed and expended by himself for the purpose and for such duration of time and to such extent and on such terms and conditions as he shall see fit.*

Moreover, such private funds so expropriated by Presidential edict are handed over, not to the Army or to the Navy but to various individuals who are not enrolled in the Armed Forces or as a Militia and who are not subject

to his military orders in his capacity as "Commander-in-Chief of the Army and the Navy".

All this adds up to naked confiscation by personal decree. It offends every provision and instinct of the Constitution and of the Bill of Rights.

The President is "Commander-in-Chief of the Army and Navy of the United States", but he is not Commander-in-Chief of *the People* of the United States!

The duty to "take Care that the Laws be faithfully executed"

These words concerning the President in Section 3 of Article II of the Constitution are words of limitation, not of enlargement. Much less are they words of exemption from the limitations of the delegated, distributed and balanced powers.

These words place the President under the laws and not above them. They make him the agency for the enforcement of the laws enacted by Congress in furtherance of its possession of "*all* legislative powers".

Not even in England is the Crown exempted from the limitations imposed by the very name and definition of executive power, or can the Crown's acts be rendered legal upon the plea of the King's commands or state necessity.

In *Eastern Trust Co.* v. *McKenzie, Mann & Co., Ltd.* (1915 A. C. 750) the court made the following declaration, quoted in Halsbury's Laws of England, 2d Ed., p. 455, footnote (p. 759):

> "It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, Courts are open to the Crown to sue *and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.*" (Italics ours.)

The same textbook by Halsbury states this constitutional principle in the following equivalent language directly pertinent to the present case (p. 455):

> "Claims made by the Crown cannot be supported by mere pretence of prerogative, since the Courts have power to determine the extent and the legality or otherwise of any alleged prerogative; *nor may illegal acts be rendered justifiable by the plea of the King's commands, or State necessity.* The Crown is bound to observe the law both by statute and the terms of the coronation oath, which embodies the contract between the Crown and people upon which the title to the Crown originally depended, and still in large measure depends." (Italics ours.)

The same conception of the Executive as the servant and not the master of the law and as limited to the enforcement of the law and as not himself exempted from the law, is fundamental to our own Constitution. As said in *United States* v. *Lee,* 106 U. S. 196, 220:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

The reservation of residual powers to the States and to the People

Amendments IX and X ordain that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Here, in these two amendments and nowhere else in the Constitution and the Bill of Rights, is there recognition of "residual power" or "residuum of power". These two Amendments flatly exclude the hypothesis of plenary or residual power delegated to any branch of the Federal Government or as possessed by it *sub silentio.*

Hence, what is not expressly delegated is not given at all, but is exclusively reserved to the only source from which all the delegations themselves came, to wit: the States and the people themselves.

The Constitution is a compact between that supreme source of power and the agencies created thereby; and what is not given is withheld. All the branches of Government are, according to our most sacred documents, conceived of as "deriving their just powers from the consent of the governed" and as existing not to create power but to secure the unalienable rights with which all men are endowed not by the State but by their Creator.

Powers which Government does not derive from the consent of the governed, it does not possess at all.

The foregoing constitutional restrictions are the more applicable because the Congress had already provided various statutory means for dealing with the emergency.

We appreciate that the Taft-Hartley Act may be distasteful to the Executive because it was enacted over his veto.

Nevertheless, it was and is part of the laws of the land which, under the Constitution, the Congress had provided for the protection of the common defense and the general welfare in the presence of emergency, and for the faithful execution of which it was his constitutional duty to "take care".

Even if the Executive possessed such "residual power" as is now claimed, such power would by its own terminology be excluded from exercise and cease to be "residual" whenever the Congress made statutory provision for meeting the emergency and thus defined the public policy and provided the procedure to be followed. The Executive would then be bound by express mandates in the Constitution and by its very structure to proceed according to the laws provided by the law-making power, and could not clothe himself with independent plenary power by self-assertion that his own ignoring of the statutory provisions created a vacuum and thus left him no other choice. (Opinion of Chief Justice Marshall in *The Flying Fish,* 2 Cranch [6 U. S.] 170, 176; and the opinion of Mr. Justice Story in *United States* vs. *The Franklin,* 18 Fed. Cas., p. 830.)

In point of fact, the Congress had already provided various methods and procedures for dealing with the problems of protecting the national defense and the general welfare through seizures of productive facilities essential thereto if the necessary materials were not forthcoming (United States Military Training and Service Act, 50 U. S. C. A. Appendix, 468; Defense Production Act of 1950,

50 U. S. C. A. Appendix 2081(b)); and for dealing with strikes or threatened strikes impairing the national health or safety (Labor Management Relations Act of 1947, 29 U. S. C. A. 176-178). In this last Act, the Congress had specifically rejected seizure of private property of citizens in emergency situations created by labor disputes. (See statements of Senator Taft, Congressional Record, April 23, 1947; Representative Case, Congressional Record, March 13, 1947, *Legislative History of Labor Management Relations Act,* Vols. 1 and 2, pp. 577, 832, 833 and 1009, United States Printing Office 1948).

Moreover, this Act was conceived during the great emergency when the Stalinist menace of political strikes and sabotage was before Congress (see *Communications Ass'n.* v. *Douds,* 339 U. S. 382); and, indeed, it was the same Congress which gave the Marshall Plan legislative expression.

Where Congress has repeatedly considered the threat to the general welfare which strikes may present during a national emergency and has provided means and procedures for dealing with them, the President is not at liberty to reject the means with which Congress has equipped him and create for himself other measures more to his taste or to his conception of what should be done. His constitutional duty to faithfully execute the laws excludes any lawful power to ignore or disobey them, *or to veto them by indirection.*

POINT I

The predicates of power, implicit in the appellant's actions taken and to be taken, reverse the established principles of constitutional government and endow the Executive with a personal power over liberty and property, both undefined, unlimited and beyond existing constitutional restraints.

The arguments advanced for these predicates lead to the elevation of the Executive above the Congress and the Judiciary; to the concept that the Executive, rather than the States and the People themselves, is the repository of the residuum of power; and to the ultimate result that rule by law loses all substance, and the country and all its people can pass into the hands of one man.

The contentions advanced for the appellant, when carried to their logical and inevitable conclusion, present this looming reflection of absolutism:

If the powers which the President seeks to exercise, and the appellant's attorney to justify, are in fact exercisable by him alone, without the aid of statute, then there is neither need nor room for the existence or functions of Congress or the Courts, because the President alone, by executive decree and reference to himself as Commander-in-Chief of the Army and Navy, can assume and exercise the power and force to seize private property and whole industries, and, by the same token, manpower; to draft manpower and mobilize the public and private economy; to fix prices; to exercise the legislative and judicial power of eminent domain; to use private funds to pay such wages

and salaries and to defray such expenses as he might determine; to create or dispense with bills of appropriation; to create or dispense with due process of law; dispense with judicial procedure and jury trial; and to extend to all his agents immunity from judicial process.

In short, he could make himself just what the appellant's brief below (p. 27) has already styled him—"the Chief of State". He would be the Commander-in-Chief not merely of the Army and Navy but of the American people.

Little or nothing would be left of our present constitutional system or structure.

(1) The Constitution vests in the Congress alone the power "to declare war", Art. I, Sec. 8, clause 11. But a declaration by the President of an emergency of the character here claimed, and of his assumption of alleged powers as wartime Commander-in-Chief of the Army and Navy, is the equivalent of a declaration by the President of such a state of war in our country that he claims to empower himself to seize, impress, suspend and draft according to his conception of the requirements of the emergency.

The assertion that actions taken under such a Presidential declaration are not even justiciable, runs counter to principles of Constitutional law established by this Court from its earliest day:

Little v. *Bareme,* 2 Cranch. 170;
Ex parte Milligan, 4 Wall. 2;
Mitchell v. *Harmony,* 13 How. 115;
Duncan v. *Kahanamoku,* 327 U. S. 304.

Cf.: *Sterling* v. *Constantin,* 287 U. S. 378;
The Orono, 18 Fed. Cas. 830;
Gelston v. *Hoyt,* 3 Wheat. 246;
Filbin Corp. v. *United States,* 266 F. 911, 916-7.

Even where Congress has acted under the war powers, its action is open to judicial inquiry:

> *Woods* v. *Miller,* 333 U. S. 138, 144;
> *Dennis* v. *United States,* 341 U. S. 494, 511 et seq., and views of Jackson, J., concurring, at p. 567, and Douglas, J., dissenting, at p. 587;
> *Harisiades* v. *Shaughnessy,* 342 U. S. 580;
> *Filbin Corp.* v. *United States,* 266 F. 911, 916-7.

"In the absence of express constitutional or congressional authorization" (*Muir* v. *Louisville & N. R. R.,* 247 Fed. 888), Presidential proclamations have no effect as laws, *Toledo, P. & W. R. R.* v. *Stover,* 60 F. Supp. 587, Black, *Constitutional Law,* 3 ed., Sec. 82, pp. 135-136.

(2) If the President's Executive Order is not subject to judicial scrutiny, then the President, claiming to act in emergency as Commander-in-Chief of the Army and Navy, may, by naked force, seize the property and persons of any individual without other regard for the Bill of Rights than his own choice.

This is graphically illustrated in the classic case of *Ex parte Merryman,* 17 Fed. Cases 152. There, after deciding that a petitioner held by the military should be released, Chief Justice Taney (sitting on circuit) said:

> "These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under

> a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.
>
> "In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."

(3) The power to take private property by eminent domain is exclusively a legislative power:

> 18 Am. Jur., Eminent Domain, Sec. 9;
> *United States* v. *Acres of Land,* 22 F. Supp. 1017;
> *Hooe* v. *United States,* 218 U. S. 322;
> *United States* v. *North American Co.,* 253 U. S. 330, 333.

Yet it is this power which the Executive Order attempts to wield.

(4) The power to conscript is vested exclusively in Congress under its power, Art. I, Sec. 8, Clause 12, "To raise and support armies":

> *United States* v. *Newman,* 44 F. Supp. 817, 822 (E. D. Ill., 1942);
> *United States* v. *Cornell,* 36 F. Supp. 81, 83 (S. D., Idaho, 1940).

To impress labor and management into the involuntary service of the government by executive fiat alone also violates the Thirteenth Amendment to the Constitution which binds both the Federal Government, the States and individuals. See *United States* v. *Gashin,* 320 U. S. 527.

This power, were it to exist, could be used to strangle organized labor itself. Under it, the President could seize the unions, their property and funds, by mere executive decree. Given a differently minded President, such a power could be used to accomplish the "involuntary servitude" which the Thirteenth Amendment forbids.

(5) Were the President to possess the powers claimed, his Executive Order might likewise direct the manpower so drafted not to strike. The power claimed would therefore give him the judicial power of injunction.

Not only could he prohibit concerted action by labor, but also he could prevent a single worker from leaving the government service. Apart from its complete unconstitutionality, the President by his order might nullify at will the prohibitions against injunctions embodied in the Norris-LaGuardia and Taft-Hartley Acts for the protection of labor.

By the same Executive Order he might make punishable any interference, whether by labor or management, with his operation of the industry. Yet it has heretofore been deemed settled that the Executive possesses no power to make violations of his orders or regulations a crime, or to dispense with trial by jury. (*United States* v. *Eaton,* 144 U. S. 677; *United States* v. *George,* 228 U. S. 14, 22.)

(6) Art. IV, Sec. 3, Clause 2, of the Constitution provides that, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting * * * Property belonging to the United States * * *."

This clause applies to *all* property, real and personal, of the United States (*Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 331), and this exclusive consti-

tutional grant of power to Congress may not be encroached upon either by the executive or the courts (*United States* v. *California,* 332 U. S. 19). The appellant, under the aegis of the President's Executive Order, purports to vest in himself for such time as he shall deem expedient "all real and personal property, franchises, funds and other assets" of these and the other respondents.

The purported taking of respondents' property here demonstrates both the basic illegality of the taking itself and also the illegality of the appellant's efforts and threats to fix according to his will "the terms and conditions of employment" in the respondents' plants.

The illegality of the taking is plain because any action designed to place private property under the Government and place its supervision and control, even temporarily, in its hands, requires specific Congressional legislation with respect to such operation and disposition. The exclusive Congressional power to dispose of and regulate government property (which Congress has refused to exercise in this case) extends to *all* of the property so seized and the manpower so impressed and could alone be the warrant and justification for fixing the prices of the steel so seized and the wages and salaries of the employees so drafted. This constitutional power of Congress the Executive Order unlawfully exercises.

Also unlawfully exercised thereby is the implied exclusive Constitutional power of Congress to fix the wages, terms and conditions of employment of Government employees (*Cochnower* v. *United States,* 248 U. S. 405). There the Court said that fixing the compensation of Federal officers and employees (p. 407) "is a legislative function" and "the delegation of such function must have clear expression or implication." See *Glavey* v. *United States,* 182 U. S. 595.

Thus the appellant's proposed action to grant and fix the increased wage and the working conditions violates that Congressional constitutional power also.

(7) The seizure being illegal, use of respondents' property and funds is an executive confiscation of private property in violation of the Fourth and Fifth Amendments to the Constitution.

Viewed as an attempt to vest such property and funds in the Government and to expend them, it is an executive misappropriation of government funds, and on that theory violates Art. I, Sec. 9, Clause 7 and Sec. 8, Clause 1, of the Constitution which confer on Congress exclusively the power to make appropriations of government moneys and the power to pay the debts of the United States.

(8) The Constitution entrusts to Congress exclusively the power to "provide for the common Defense and general Welfare of the United States * * * to declare War * * * to raise and support Armies * * * to provide and maintain a Navy * * * to make Rules for the Government and Regulation of the land and naval Forces * * * to provide for calling forth the Militia * * * " (Art. I, Sec. 8). See *Ex parte Quirin,* 317 U. S. 1; *Hirabayashi* v. *United States,* 320 U. S. 81.

The distinction between the powers of the President as Commander-in-Chief and of the Congress to provide for the common defense is made abundantly clear by the court in *O'Neal* v. *United States,* 140 F. 2d 908, 911 (C. A. 6, 1944) cert. den 322 U. S. 729:

> "We think it is plain, and it is not contested that *the power to allocate materials and facilities for defense* and the power to control the price structure

under the Constitution of the United States *is legislative rather than executive.* While the war power in this country is conferred on the Congress and on the President, *Kiyoski Hirabayashi* v. *United States,* 320 U. S. 81, 93, 63 S. Ct. 1375, 87 L. Ed. 1774, the principal war power of the President arises as Commander-in-Chief of the Army and Navy *and does not include any war power legislative in its nature.* The President also is invested with certain war powers arising out of the treaty-making power, such as the duty of negotiating treaties with our Allies. However, the power to establish shortage rationing, and the power to fix prices upon the entire range of civilian goods is neither expressly nor impliedly included in any war power of the President. Such drastic power necessarily falls within the 'legislative power' with which the Congress is invested (Art. I, Section 1, U. S. Constitution)."

In fact, the court went on to say at page 912:

"In carrying out the constitutional division of the powers, it is a breach of the fundamental law for Congress to transfer its legislative power to the President. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421, 55 S. Ct. 241, 79 L. Ed. 446; *Di Santo* v. *United States,* 6 Cir., 93 F. 2d 948. However, the Congress in the field of its duties may invoke the action of the executive branch in so far as the action invoked is not an assumption of its own constitutional *field of action.*"

The seizure and operation here for what is claimed to be defense production encroaches on the legislative power to provide the sinews of defense, to make and fix the appropriations and to control policy by controlling the purse strings, contrary to the principle laid down in the *O'Neal* case and enforced by the court in *United States* v. *McFarland* 15 F. 2d 823 (C. A. 4, 1926), cert. granted 273 U. S. 688 and revoked 275 U. S. 485.

(9) The historic resistance by this Court to attempts by the Legislative, Judicial or the Executive Branches of the Government to transgress the constitutionally appointed limits on their powers has continued down to this day.

Both this Court and its individual members in recent opinions have vigorously restated their belief in the protections afforded by the Constitution against the vesting of arbitrary and absolute power in the hands of any Branch of the government or of the government as a whole:

> "Even the Government—the organ of the whole people—is restricted by the system of checks and balances established by our Constitution. The designers of that system distributed authority among the three branches 'not to promote efficiency but to preclude the exercise of arbitrary power.' Mr. Justice Brandeis, dissenting in *Myers* v. *United States,* 272 U. S. 52, 293. Their concern for individual members of society, for whose well-being government is instituted, gave urgency to the fear that concentrated power would become arbitrary. It is a fear that the history of such power, even when professedly employed for democratic purposes, has hardly rendered unfounded." Mr. Justice Frankfurter, concurring in *A. F. of L.* v. *American Sash Co.,* 335 U. S. 538, at 545.

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom

than any of man's other inventions." Mr. Justice Douglas dissenting in *United States* v. *Wunderlich,* 342 U. S. 98, at p. 101.

"It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution." Mr. Justice Douglas dissenting in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, at pp. 599, 600.

"Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. See Carl L. Becker, *Freedom and Responsibility in the American Way of Life* (1945)." Mr. Justice Frankfurter concurring in *Pennchamp* v. *Florida,* 328 U. S. 331, at pp. 355-356.

"The very first Article of the Constitution begins by saying that 'All legislative Powers herein granted shall be vested in a Congress' and no part of the Constitution contains a provision specifically authorizing the President to create courts to try American citizens. Whatever may be the scope of the President's power as Commander in Chief of the fighting armed forces, I think that if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority." (Mr. Justice Black dissenting in *Madsen* v. *Kinsella,* 20 U. S. Law Week 4271, at p. 4280; April 28, 1951.)

POINT II

Where illegal actions, violative of the Bill of Rights and other prohibitions in the Constitution and in excess of constitutional power, are being taken by individuals claiming to act under direction of the Executive, the courts are not without power, and they have a constitutional duty, to declare void and to negate such actions.

The claim that such illegal and void actions are remedial only by suits for damages, is unsound, would render illusory the Bill of Rights and other constitutional restrictions, and would deprive the parties aggrieved of any effective, adequate or even enforcible remedy.

(1) Little can be added to Judge Pine's exposition of the jurisdiction of the Judicial Branch of the Government to negate actions by officers of the government which the courts determine to be in excess of constitutional power or violative of constitutional restrictions, even though such persons are acting or claim to be acting under the express order of the Executive.

If the Judicial Branch of the Government did not have this jurisdiction, it would be inferior to instead of coordinate with the Executive; and its supreme function as protector and warden of the Constitution and of the rights of the people and the States thereunder, would be impotent as regards action professing to be under direction of the Executive.

Hence, any contention that the courts are in this case without jurisdiction begs the question or assumes that

the actions taken and about to be taken by the defendant in accordance with the aforesaid announcements of April 8 and May 3, 1952, are not in excess of constitutional power or violative of constitutional prohibitions.

If such actions are of such illegal character, then any contention that the courts are without jurisdiction in this case must mean either (1) that the judicial power expressly conferred on this Court and on the inferior Federal courts by Article III and Section 2 of Article VI of the Constitution is not exercisable in the case of actions professing to be under direction of the Executive; or else (2) that the aggrieved person has no remedy in the Federal courts, no matter how grievous, continuous and annihilative the injury, other than a suit for damages against the individual trespasser,—a remedy the more illusory the greater the injury.

Hence the court below faced, and for jurisdictional purposes was obliged to face, the pivotal question whether or not such actions taken and to be taken by this appellant were in excess of constitutional power or contrary to constitutional prohibitions. Having found that such actions were of both these characters, the court below was obliged to find, and did find, that such actions were "beyond the officers' powers and * * * therefore not the conduct of the sovereign". (*Larson* v. *Domestic and Foreign* Corp., 337 U. S. 682, 690.) In such eventuality, as stated in this *Larson* case, "the Court has repeatedly stated these to be cases in which such (*i. e.,* injunctive) relief could be granted" (p. 699).

And in this *Larson* case, in discussing this Court's earlier decision in *United States* v. *Lee,* 106 U. S. 196, this Court further said (p. 697):

> "The Court thus assumed that if title had been in the plaintiff the taking of the property by the defendants would be a taking without just compensation and, therefore, an unconstitutional action. On that assumption, and only on that assumption, the defendants' possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. *For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be maintained against the defendants as individuals.*" (Italics ours.)

(2) This is not a case where an injunction is sought against the *person* of the President. This Court, although repeatedly upholding injunctions against representatives of the Executive acting under unconstitutional statutes, has never felt that such a determination enjoined or restrained the Congress itself (*Massachusetts* v. *Mellon,* 262 U. S. 447, p. 488). And see discussion by Charles Warren, *Congress, The Constitution, and The Supreme Court,* pp. 252, 253.

Where a statute, even though approved by the Executive, has been judicially held unconstitutional, the issuance of an injunction or the invalidation of executive action thereunder is the normal corollary to such a holding.

As was said in *Massachusetts* v. *Mellon,* 262 U. S. 447, at p. 488:

> "* * * If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

(3) Moreover, whatever may be the *personal* immunity of the President from suit, the cases are legion that this immunity does not extend to any subordinate officers of the

Executive Branch where they are acting beyond their authority either individually or under color of an unconstitutional statute *or Executive or Administrative order.*

The Orono, 18 Fed. Cas. 830, Cas. No. 10,585;
Brannan v. *Stark,* 342 U. S. 451;
Bailey v. *Richardson,* 341 U. S. 918, aff'g 182 F. 2d 46;
Anti-Fascist Committee v. *McGrath,* 341 U. S. 123;
Larson v. *Domestic & Foreign Corp.,* 337 U. S. 682.
Goltra v. *Weeks,* 271 U. S. 536, 544-547;
Utah Fuel Co. v. *Coal Comm.,* 306 U. S. 56, 59-60;
Ickes v. *Fox,* 300 U. S. 82, 96-97;
Sterling v. *Constantin, supra;*
Fleming v. *Moberly Milk Products Co.,* 160 F. 2d 259, cert. denied, 331 U. S. 786;
Colorado v. *Toll,* 268 U. S. 228, 230-231;
Philadelphia Co. v. *Stimson,* 223 U. S. 605, 619;
School of Magnetic Healing v. *McAnnulty,* 187 U. S. 94, 107-111;
Noble v. *Union River Logging Railroad Co.,* 147 U. S. 165, 170-177;
Franklin Township v. *Tugwell,* 85 F. 2d 208 (C. A. D. C., 1936);
United States v. *McFarland,* 15 F. 2d 823 (C. A. 4, 1926), cert. granted 273 U. S. 688 and revoked 275 U. S. 485.

Furthermore, executive officers are punishable by contempt where they refuse to return citizens' property after a judicial determination of illegal seizure and retention (*Sawyer* v. *Dollar,* 190 F. 2d 623 [C. A. D. C.] 1951, cert. granted, 342 U. S. 875).

Accordingly, the cases cited by the Government in its brief below purporting to stand for the immunity of the Executive Branch from judicial process are irrelevant. They relate solely to executive action within the constitutional sphere of executive discretion and judgment.

Thus, in *Mississippi* v. *Johnson,* 4 Wall. 475, where the suit for mandatory injunction named the President *personally* as a defendant, this Court said (p. 501):

> "We are fully satisfied that this Court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."

Mr. Justice Frankfurter characterized the holding in that case, when announcing the judgment of this Court in *Colegrave* v. *Green,* 328 U. S. 549, as standing merely for the proposition that (p. 556):

> "The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson,* 4 Wall. 475."

Myers v. *United States,* 272 U. S. 52, upon which the appellant's counsel rely to support their "residual power" theory of the Presidency, has not only been directly overruled, in so far as it might support this novel doctrine, in *Humphrey's Executor* v. *United States,* 295 U. S. 602; but, also, the dissenting opinion of Mr. Justice Brandeis in the *Myers* case, denying the existence of residual inherent power in the Executive or in any Branch of the Government, has become approved doctrine. *Pennikamp* v. *Florida,* 328 U. S. 331, 356; *A. F. of L.* v. *American Sash Co.,* 335 U. S. 538, 545.

Cases of the type of *C & S Air Lines* v. *Waterman Corp.,* 333 U. S. 103, also relied on by the appellant's

counsel, stand merely for the proposition that in the field of foreign affairs where the Constitution gives express and exclusive power to the Executive, this Court will not interfere. Conversely, the powers here sought to be exercised by the Executive Order and by this appellant have been expressly entrusted by the Constitution to Congress alone. (Article I, Sec. 8.)

(4) In the course of its opinion the District Court stated (R. 74):

> "I first find as a fact, on the showing made * * * that the damages are irreparable."

Obviously, the damages entailed by depriving the respondents of their common law and statutory right of collective bargaining, and by the imposition of a wage rise, new working hours and conditions and a possible union shop would be incalculable and staggering. Since the seizure and such impositions are illegal, the respondents' only possible recourse for damages would be against the officers responsible therefor. No one individual could possibly respond in monetary damage for the purely financial losses thereby entailed, even if they could be calculated and determined.

(5) The contention of the appellant's counsel that plaintiffs would have a claim against the United States founded upon the Constitution and cognizable in the Court of Claims, 28 U. S. C. 1491(1) is irrelevant and also without substance.

United States v. *Causby,* 328 U. S. 256, did not involve a tortious act of taking by an executive officer acting without statutory authority and in violation of constitutional prohibitions. In *United States* v. *Pewee Coal,* 341

U. S. 119, cited by the appellant's counsel below, the issue of the legality of the seizure was neither raised nor considered by the courts. See *Id.,* 88 F. Supp. 426, at 429-430 (Ct. Cls., 1950).

This Court has said that the question of whether federal courts can grant money damages suffered as a result of a violation by a federal officer of the Fifth Amendment "has never been specifically decided by this Court." (*Bell* v. *Hood,* 327 U. S. 678, at p. 684.) But in that case Mr. Justice Black, who delivered the opinion of this Court, said that "* * * it is established practice for this Court to sustain the jurisdiction of federal courts to issue *injunctions* to protect rights safeguarded by the Constitution" (p. 684),—citing *Philadelphia Co.* v. *Stimson,* 223 U. S. 605. The Court went on to state (p. 684):

> "Moreover, where federally protected rights have been invaded it has been the rule from the beginning that courts will be alert to adjust their remedy so as to grant the necessary relief."

(6) That equitable relief is necessary where the act sought to be enjoined is—as in this case—a continuing trespass for such period of time as the trespasser may choose, is inherent in the very doctrine upon which courts issue injunctions to prevent the commission of continuing torts. (Vol. 4 Pomeroy's *Equity Jurisprudence,* Fifth Ed., Sec. 1357). There the author says:

> "* * * the ultimate criterion is the inadequacy of the legal remedy. The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, by one action at law recover damages which constitute a complete and certain relief for the whole wrong,—a relief virtually as efficient as that given by a court of equity."

In no event, even if there existed a right to recover damages against the Government, would such a remedy be adequate. As said in *Osborne* v. *Missouri Pacific Railway Co.*, 147 U. S. 248, 258:

> "Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; *and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded ex debito justitiae.*" (Italics ours.)

Also, this Court said in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 288, quoting from *Pennsylvania* v. *West Virginia*, 262 U. S. 553:

> " 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.' "

(7) Nor do the respondents have a remedy against the Government under the Federal Tort Claims Act.

28 U. S. C. A. 2680 *excludes* claims against the Government which are founded upon an act or omission of a Government employee in the exercise of due care under a statute or regulation whether or not the same be valid, or in the performance of a discretionary function whether or not the discretion involved was abused.

Plainly the Executive Order relied on here as authority for the appellant's action is a regulation within the meaning of Section 2680:

Old King Coal Co. v. *United States,* 88 F. Supp. 124 (S. D. Iowa 1949);

Jones v. *United States,* 89 F. Supp. 980 (S. D. Iowa 1949);

Lauterbach v. *United States,* 95 F. Supp. 479 (W. D. Wash. 1951);

Toledo v. *United States,* 95 F. Supp. 838 (D. P. R. 1951);

Boyce v. *United States,* 93 F. Supp. 866 (S. D. Iowa 1950);

J. B. McCrary Co., Inc. v. *United States,* 84 F. Supp. 368 (Ct. Cls. 1949).

Furthermore, under 28 U. S. C. A. §1346(b), the United States can be held liable under the Tort Claims Act *only* where "a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Since no private person has the power to perform the acts here taken and to be taken the United States could not be held liable under that Act. (*Feres* v. *United States,* 340 U. S. 135, 141-2.)

Summary

At the outset of this Brief, we emphasized the utmost gravity of the issues here involved.

We conclude this Brief by adopting as our summary the following from *George Washington's Farewell Address*:

> "If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment

in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

CONCLUSION

The order of the District Court enjoining the appellant from proceeding further with the actions taken and to be taken should be affirmed.

Respectfully submitted,

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