

## GOVERNMENT BY INJUNCTION AGAIN

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FIFTEEN years ago Congress put itself on record in the Norris-LaGuardia Anti-injunction Act to the effect that federal judges should no longer be trusted with their equity power in dealing with labor disputes. Thus what Congress had previously given to the federal district judges it took away in part, leaving them a very much restricted equity jurisdiction over certain aspects of labor disputes, under carefully defined conditions. And when any such dispute involved merely economic coercion such as a strike, the power of the federal district judges was entirely eliminated.

This law was adopted during a Republican administration. Although its effect was to help unions to extend their organization through the exercise of economic coercion, it must not be assumed that Congress passed the act only to do something for the unions. The most compelling slogan in the campaign leading up to this statute was the cry of "government by injunction," which exemplified the feeling of all classes of responsible citizens that federal judges through their equity powers were wielding a control over the activities of private groups without the guidance or restraint of law. Too many citizens feared the continuance of an uncontrolled judicial device which circumvented the constitutional guaranties of due process and fair trial in cases where admittedly illegal conduct had occurred and which side-stepped all law whatsoever when only economic coercion was involved.

The restrictions of the Norris-LaGuardia Act were to take effect only in cases involving or growing out of labor disputes. The method of restriction was that no federal court "shall have jurisdiction to issue any restraining order or temporary or permanent injunction"<sup>1</sup> in any such case. Section 13<sup>2</sup> of the act then defined labor dispute in generic language to show that it must involve terms and conditions of employment and that it might arise between almost anyone having mutual interests in such matters, stating that the proximate relationship of employment need never have existed between such disputants.

While the Norris-LaGuardia Act was being debated in bill form, there

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<sup>1</sup> 47 Stat. 70 (1932), 29 U.S.C.A. § 101 (1942).

<sup>2</sup> 47 Stat. 73 (1932), 29 U.S.C.A. § 113 (1942).

were attempts to include a section to the effect that the United States government would not be prevented by it from securing injunctive relief in labor dispute cases. These attempts were defeated, possibly because some of the most flagrant assumptions of extra-legal power at which the bill was aimed had occurred at the instance of the federal government as party plaintiff. Examples of this are *In re Debs* in 1895<sup>3</sup> and the railroad shopmen's injunction in 1922.<sup>4</sup>

The recent *Lewis* case<sup>5</sup> has introduced a new note into the picture. That is, to what extent does its seizure of a particular enterprise put the federal government into a position to get around the provisions of the Norris-LaGuardia Act? In the majority opinion of that case the Supreme Court seems to concede that there was a labor dispute involved and that even the government is disabled by the Norris-LaGuardia Act from securing injunctive relief in labor dispute cases when it requests such relief not in the capacity of employer but merely on behalf of the public in what its officials in power believe to be an emergency. The Court affirms, however, that when government comes in as an employer—pointing out that seizure under the War Labor Disputes Act<sup>6</sup> so qualifies it with respect to the seized enterprise—it may request and secure injunctive relief even in cases involving or growing out of labor disputes, the Norris-LaGuardia Act notwithstanding.

Mr. Justice Frankfurter, who concededly is more familiar with the background and purpose of the Norris-LaGuardia Act than any of his colleagues on the Court, says that this last conclusion is not so. Furthermore, he says it in one of the most brilliant and distinguished opinions ever handed down from that bench. No attempt will be made here to review his opinion, since its text carries more conviction than a summary can inspire. Anyway, the point of this article is to show in a general way that the Supreme Court has lent itself to the destruction of a legislative policy so clearly stated that its misconstruction seemed impossible.

In the first place, the Norris-LaGuardia Act was aimed at the exercise of judicial power and not at employers. Its policy was effected by depriving the federal courts of jurisdiction to act at all in certain ways with respect to certain types of cases. Nothing is said in the act about who may

<sup>3</sup> 158 U.S. 564 (1895).

<sup>4</sup> *United States v. Railway Employees' Dept. of the AFL*, 283 Fed. 479 (D.C. Ill., 1922), 286 Fed. 228 (D.C. Ill., 1923), 290 Fed. 978 (D.C. Ill., 1923).

<sup>5</sup> *United States v. United Mine Workers*, 67 S.Ct. 677 (1947).

<sup>6</sup> 57 Stat. 163 (1943), 50 U.S.C.A. App. (1944).

or may not ask for injunctive relief in labor disputes. How, then, can the Supreme Court seriously take the position that the federal government *as employer* was not included in the terms of the act, on the grounds that restrictive legislation never applies to the sovereign unless the sovereign is expressly covered? Had the act been couched in terms of restrictions on employers seeking equitable relief, and not in terms of deprivation of jurisdiction of the federal courts, there might have been some point to the Court's argument based on sovereignty.<sup>7</sup> But this point seems idle as the act is worded.

And the question asked above has an added significance when it is recalled that the basic policy of the Norris-LaGuardia Act was to prevent a certain kind of governmental interference in labor disputes—government by injunction through the equity powers of the courts. Certainly it is reasonable to infer that this same policy held good against government interference from any source, from the executive down, especially when such interference was to be implemented only through the exercise of the equity powers of the federal courts. Anyone would think that this would have been fairly obvious or that a stricture against federal courts might at least have given the Supreme Court—itsself a federal court—pause for some reflection concerning what Congress had in mind.

The majority's opinion seems inconsistent insofar as it depends on the immunity of the sovereign from the application of restrictive legislation unless it is expressly covered. If this maxim of sovereign immunity is applicable at all, why is it not applicable to the federal government under any circumstances, whether or not it is in the position of an employer? For it is certainly a half-hearted doctrine of sovereignty that cannot work under all circumstances. The Court apparently introduces the doctrine of sovereignty into this case through the statutory meaning of labor dispute in Section 13 of the act. Congress had in mind, it says, labor disputes between unions and employers, to put it categorically. And by employers, it meant only private employers; for the government as employer could not have been intended unless it was expressly mentioned as such. It then went on to point out that the jurisdiction of federal courts to issue injunctions in labor disputes had been eradicated only with respect to those disputes mentioned in Section 13 of the act. Since that section meant disputes involving private employers, then the deprivation of jurisdiction did not operate in a labor dispute between a union and the government *as*

<sup>7</sup> But use of the notion of exception by sovereignty seems rather dubious, indeed. See the remarks of Mr. Justice Roberts in *Nardone v. United States*, 302 U.S. 379, 383-84 (1937).

*employer*, although it would operate when the dispute was with a private employer and the government was seeking the injunction on behalf of the public.

Such an analysis, of course, places terrific importance on the legislative intent focused on Section 13, in the definition of labor dispute. What this intent was is a perfectly plain matter of record. It was an attempt to make it clear in generic terms of employer, industry, union, employee, etc., that Congress was not confining its restriction of federal equity powers to disputes arising only between employers and their particular employees who were out on strike. Everybody who knows anything at all about this subject knows that this is so. I repeat: The only purpose of Section 13 was to show that by the term "labor dispute," Congress meant more than simple and direct strikes by organized employees against their employers.

If this is true so far, then the props are knocked out from under the majority's position. For the majority of the Court has already said that the Norris-LaGuardia Act applies even to the government when it requests injunctive relief as plaintiff in a labor dispute arising between a union and a private employer. And it has just been shown that since Section 13 was not an attempt to define the scope of the restrictions on jurisdiction in the act in terms of who was or was not an employer, it really does not make a bit of difference whether or not the government sought the injunction in the *Lewis* case as an employer.

From this point on, then, it becomes apparent that the majority of the Court was just trying to dream up some sort of rationalization under which it could argue that while *In re Debs* was no longer good law, there was still a way in which the government could appear as plaintiff to request and secure an injunction in a labor dispute case. Would it not have been more honest of the Court simply to say that the Norris-LaGuardia Act does not apply at all whenever the government as sovereign seeks an injunction in a labor dispute, regardless of who are the disputants and whether or not the government appears as employer? For this is what the Court seems to be driving at in substance, anyway, in view of the purely artificial manner in which the government appeared in the *Lewis* case as employer—under a purely technical "paper" seizure, provided under the War Labor Disputes Act to permit the government to commit the real employers to contractual obligations which they did not want and to compel union acceptance of such contractual commitments under threat of criminal punishment.

The burden of this argument is, then, that because of the Norris-

LaGuardia Act, the federal courts were not really intended to have jurisdiction to issue injunctive relief in a situation like the *Lewis* case. Since such jurisdiction did not exist under a proper construction and application of the act, then Lewis and the union were free to ignore it with impunity. Indeed, the only serious qualification on this privilege to ignore a judicial order, even after the *Lewis* decision, is that the federal courts still have jurisdiction to issue injunctive relief when the government *as employer* requests it. Admittedly this was one of the matters in doubt when the *Lewis* case was being litigated.

It was in connection with this qualification, however, that Mr. Chief Justice Vinson shows the Court's real position. While admitting that if the Norris-LaGuardia Act *did* apply to the government in the *Lewis* case, absence of jurisdiction of the federal courts to issue the injunction would result automatically in setting aside any judgment for civil contempt based on disobedience of the injunction, he declared that this would not be true as far as the judgment for criminal contempt was concerned. While the injunction was outstanding, he said, it merited obedience until it could be set aside on appeal, whether or not the court issuing it had jurisdiction to do so. This, he claimed, was necessary, since absolute respect is required of judicial acts of this sort—at least pending resolution of the doubt as to whether or not the court issuing the injunction had jurisdiction to do so. Any other view, he felt, would breed disrespect of the judiciary and would obstruct the administration of justice.

Mr. Justice Frankfurter, who disagreed so completely with the majority of the Court on the main point of whether or not jurisdiction to issue the injunction existed, felt impelled to agree with it on this last point. He and Mr. Justice Jackson shared with the majority of the Court the feeling that Lewis and his union should not be left free with impunity to flout the trial court's order, while there was still any doubt concerning its validity on jurisdictional grounds. In a way, this position is somewhat understandable in a case where the "doubt" was so close that a majority of the Court finally resolved it in favor of jurisdiction and the validity of the restraining order. But Mr. Justice Frankfurter carefully stated that this consideration could not be accorded a restraining order or injunction frivolously sought and granted. Under such circumstances, he said, the trial court's order might be safely ignored, presumably because it so obviously did not have jurisdiction to act. And these sentiments were echoed faintly in the majority opinion.

Now with all due respect to Mr. Justice Frankfurter's high regard for

the dignity of trial courts, this position is downright alarming. For a skillful trial court willing to lend itself to the suppression of union economic activities, no matter who is plaintiff in the action, can arguably build up a plausible doubt concerning its jurisdiction in the case before it. This doubt may be with respect to the nature of the case before it or with respect to the correct interpretation of some part of the Norris-LaGuardia Act as it applies to the facts of that case. And the ingenuity of counsel for the plaintiff may certainly be counted on to aid in raising this doubt, especially in view of the encouragement offered in the *Lewis* case itself.

After all, counsel seeking injunctive relief in labor dispute cases only want delay. That is all that is necessary to break up strikes, as long as this delay is backed up by the sanction of criminal contempt, even if the court issuing the order is ultimately shown not to have had jurisdiction to do so. And even if the Supreme Court had not committed itself this far in the dicta, its main position still provides a technique which enables government to break up strikes by injunction with the help of a simple statute empowering the President to seize any strike-bound industry whenever he believes the public interest will be served by doing so. For such a seizure would place the government in the position of an "employer." Thus, the doctrine of the *Lewis* case enables Congress to pay lip-service to the Norris-LaGuardia Act, while undermining it by a simple statute permitting government seizure of plants and mines in times of national emergency. And this can be done without changing a comma of the Norris-LaGuardia Act!

Stephen Decatur was a member of the armed services and naturally had to stand by the slogan: "My Country, right or wrong." But the Supreme Court is under no such duty. It is supposed to be the defender of the law and of the people—if necessary, against the abuses of the government in power. The Norris-LaGuardia Act was a Congressional mandate insuring against certain abuses of official power—against government by injunction. And in a world where the abuses of governments in power have been so dreadful during the past two decades, the duty to carry out this mandate to the letter is no idle task.

The Supreme Court may have believed, as thoughtful men with the interests of the nation at heart, that the country would be bound for hell in a hay-rick if Lewis and his union were not stopped in their tracks. But that, I humbly submit, is none of their business. Their business is to apply the law as it is written and to let Congress do the worrying about matters of economic convenience. If Congress is slow or inept in assuming this task, that's too bad. But that's the way it is—or should be.

If Congress wants to pass a seizure law or any one of several variations on the theme of compulsory arbitration, backing up such measures with injunctions against strikes, let it be done by the open political process of legislation. Much can be said in the public interest for such a course; but whether or not people agree with this observation, at least they must admit that we would then know where we stood under the law. But until that is done, it is impossible not to agree with Mr. Justice Murphy and Mr. Justice Rutledge that too great a principle is at stake in the *Lewis* case not to stand four-square on the policy of the Norris-LaGuardia Act, as it was written, against any possibility of a return to government by injunction.