THE DIVINE RIGHT OF GOVERNMENT BY JUDICIARY

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Wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and acting without authority may be opposed, as any other man who by force invades the right of another.—JOHN LOCKE[†]

THE great *John L. Lewis* case is history. Lawyers and judges, students and scholars, labor leaders and corporation executives will read it and study it, praise it and damn it, cite it and miscite it, apply it and distinguish it. For the *John L. Lewis* case is now a lengthy set of opinions delivered by the Justices of the United States Supreme Court, an historical document gathering dust on many shelves. But it is more than this. As a social force of incalculable potential it affects and will continue to affect the lives of millions of people in this country and throughout the world. Whatever it means and may be found to mean, people must live with it, knowing that as law it will ever gain new meaning. No matter how long it lies unused, or how often used only to be gently distinguished,² until laid finally to rest by its creators it will remain a force—explosive ammunition for future social combat.

*United States v. United Mine Workers of America*³ may collapse as quickly as the *Gobitis*⁴ opinion, the conscience of judges giving expression to saner views when the crisis of the moment is over. Or become another *Swift v. Tyson*,⁵ shaping the law through a century of "error." An "unprecedented situation," though, it may end in near oblivion—with *Crowell v. Benson*,⁶ a judicial aberration filed and willingly forgotten. Or

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[†] Of Civil Government, Book II, at 219 (Everyman's ed.).

² See the concurring opinion of Rutledge, J., in *Penfield Co. of California v. SEC*, 67 S. Ct. 918, 927 (1947), in which he finds the Court's handling of the civil-criminal contempt distinction in that case difficult to reconcile "with what was done in the Mine Workers decision."

³ 67 S. Ct. 677 (1947).

⁴ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), overruled in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁵ 16 Pet. (U.S.) 1 (1842), overruled in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶ 285 U.S. 22 (1932).

like *Dred Scott*⁷ it may help foment the very strife violently to overrule it. The history of the *John L. Lewis* case lies ahead.

Mr. Justice Murphy in dissent warns that its implications "cast a dark cloud over the future of labor relations in the United States."⁸ They may be even more fearsome. Both the result and the methods of reaching that result must give us pause, to reflect not alone on the future of labor relations but on the future of democratic government itself. The sovereign in its wrath has broken a strike. In so doing it has disregarded and has persuaded its judges to disregard the "text, context, content and historical setting"⁹ of a statute, one of the most important of generations, the "culmination of a bitter political, social and economic controversy."¹⁰ Not without cause did John L. Lewis describe the result in the lower court as the "ugly recrudescence of 'government by injunction.'"¹¹ But more, the Justices have sired a doctrine—a rule of law, if you will—which can best be described as the doctrine that "the Court can do no wrong." Given the role of courts in the American constitutional system and the dynamics of a highly unstable social order, this doctrine may prove to be a judicial formula for repression and reaction.

And it is well to recognize at the outset that we are not here dealing with a skirmish in isolation. The clash between Lewis and the government is part of a greater struggle—a battle which now has reached the stage of an all-out assault upon the trade union movement. The leaders of that attack are eager to restore to the federal courts some or all of the injunction power exercised so effectively against labor for forty years. In May of 1946, at the time of the railway strike, President Truman proposed to Congress a Temporary Industrial Disputes Settlement Act which would have authorized, where the government had taken possession of the plant or industry involved, the issuance of an injunction at the petition of the Attorney General.¹² Passed by the House, this proposal died in the Senate. Six months later the government asserted against John L. Lewis the right to injunctive relief without specific legislative authority, a sudden about-face which perhaps reveals too much as to the legal thought processes of the Truman administration. The proposal of last May at least

⁷ *Dred Scott v. Sandford*, 19 How. (U.S.) 393 (1857).

⁸ *United States v. United Mine Workers of America*, 67 S. Ct. 677, 717 (1947). Reference to the opinion will hereafter be only to the appropriate page in the Supreme Court Reporter.

⁹ Frankfurter, J., at 706.

¹⁰ *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91, 102 (1940).

¹¹ Record, at 318.

¹² 92 Cong. Rec. 5861-62 (1946).

had this obvious merit—it urged the Congress to change the law and not the courts to flout it.

The Congress now has before it numerous proposals which would re-introduce under varying circumstances the labor injunction. Whatever some of the participants and judges may have thought, the decision in the *Lewis* case has not abated these insistent demands that the Norris-LaGuardia Act be scrapped or emasculated. Rather it would seem to have reassured the Congress, to have encouraged it in the adoption of ever more drastic means. The *Lewis* decision is the first breakthrough of this offensive—a salient pointing directly at the heart of labor's rights. It is strange—no, frightening—in an economy already beginning to stagger from uncontrolled prices and exorbitant profits, to see the Executive, the Congress, and the courts join together to shackle the economic strength of the millions, whose purchasing power alone can save the structure from a dizzy fall.

Perhaps no case of recent times has so stripped bare the working of law in acquisitive society. The sharpness of the conflict, its world-wide repercussions, the pressures for its resolution, and the narrow and technical legal points to be decided—here was drama and an opportunity for men and judges to “live greatly in the law.”¹³ But hysteria and political expediency triumphed. Precedents were misread, statutes abused or disregarded, settled legal principles ignored, procedural safeguards abandoned. The Court then set about the task of trying to show that nothing of the sort had happened—that the path of the law was not strewn with the tortured remains of principle and procedure. In thus “vindicating the process of law,”¹⁴ Mr. Justice Frankfurter and his colleagues, it would seem, were vivisectioning it.

I

A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms.

—CARDOZO, J.¹⁵

The beginning was a dispute in contract. From there the controversy quickly spread to graver matters, the original issue being all but lost in the mêlée. In the final test of battle, “the fight for mastery in . . . the

¹³ Oliver Wendell Holmes, Jr., quoted in Lerner, *The Mind and Faith of Justice Holmes* 31 (1943).

¹⁴ Frankfurter, J., at 705.

¹⁵ *Doyle v. Hofstadter*, 257 N.Y. 244, 268, 177 N.E. 489, 498 (1931).

court,"¹⁶ the sovereign won, and those who had failed to heed its command were punished. The point of contract, though, is yet unsettled, and the labor dispute which gave the contract birth, still unresolved.

In the spring of 1946, in the face of a dispute between the miners and the mine operators, the President, "to insure the operation of [the] mines . . . and to preserve the national economic structure in the present emergency," authorized government seizure of the mines.¹⁷ The Secretary of the Interior, as operator of the mines under the President's order, negotiated an agreement with the United Mine Workers to cover "for the period of Government possession the terms and conditions of employment. . . ." This was the famous Krug-Lewis Agreement of May 29, 1946.¹⁸

At various times in the ensuing months, the United Mine Workers complained that the government had not observed its agreement. On October 21 Lewis wrote to Secretary Krug stating that the government's "unilateral misinterpretations" constituted a breach of the Krug-Lewis Agreement and characterizing the government's position as one of "adamant refusal to correct these errors." Lewis thereupon requested a "joint conference . . . for the purpose of negotiating new arrangements affecting wages, hours, rules, practices . . . and all other pertinent matters. . . ." ¹⁹ Such a conference, according to Lewis, could be called by either party under Section 15 of the National Bituminous Coal Wage Agreement of April 11, 1945,²⁰ the terms of which had been carried forward and preserved by the Krug-Lewis Agreement "except as amended and supplemented" therein.²¹ Section 15 provided that either party might give "ten days' notice in writing of a desire for a negotiating conference," which the other party agreed to attend. "At the end of fifteen days after the beginning of such negotiating conference" either party might serve "notice in writing of the termination of this Agreement, to be effective five days after the receipt of such notice."²²

To these contentions Coal Mines Administrator Collisson replied, denying any breach of the Krug-Lewis Agreement by the government and asserting that the demand for a conference was unwarranted, since Section 15 of the National Bituminous Coal Wage Agreement had been superseded by the Krug-Lewis Agreement, which by its explicit terms was ef-

¹⁶ Oliver Wendell Holmes, Jr., quoted in Lerner, *op. cit.* supra note 13, at 39.

¹⁷ Executive Order 9728, 11 Fed. Register 5593 (1946).

¹⁸ Record, at 10.

¹⁹ *Ibid.*, at 26-27.

²⁰ *Ibid.*, at 18.

²¹ *Ibid.*, at 11.

²² *Ibid.*, at 18.

fective for "the period of Government possession." The Administrator urged that any negotiating conferences for a new agreement "be had with the representatives of the owners of such mines."²³

Lewis countered with a telegram to Secretary Krug insisting that the Krug-Lewis Agreement expressly bound the parties to meet upon the request of either party. He warned that failure "to honor this meeting will constitute another breach of the contract, and will void the Krug-Lewis Agreement."²⁴ Secretary Krug, at that time absent from Washington, requested Lewis by wire to meet with Coal Mines Administrator Collisson on November 1 or any other agreeable date.²⁵ Lewis promptly accepted, stating that he esteemed Krug's telegram as compliance with his original request of October 21.²⁶

Meetings between representatives of the United Mine Workers and the Coal Mines Administrator began on November 1 without prejudice to the conflicting claims of the parties as to the continuing vitality of Section 15 of the National Bituminous Coal Wage Agreement. Secretary Krug returned to Washington in time to attend the fifth conference, on November 11, apparently the first at which Lewis presented specific demands as to wages, hours, and other conditions. Further meetings were held on November 13 and 14, with Secretary Krug trying to persuade Lewis "to sit down at once with the operators," and Lewis reminding the government that under Section 15 time was "running out."²⁷

On November 14, Secretary Krug wrote to Lewis: "... certain of your proposals are of such a fundamental nature that they should be directed to the owners and private operators of the bituminous coal mines rather than to the Government, which is only the interim custodian of these properties."²⁸ He then outlined a proposal for negotiations between the operators and the United Mine Workers, to begin on November 16, looking toward a new agreement and the return of the mines to private operation within a period of two months. The Attorney General, he advised Lewis, had officially concurred in the government's interpretation of the Krug-Lewis Agreement.²⁹ With regard to Section 15 of the National Bituminous Coal Wage Agreement, relied upon by Lewis in demanding the conference, the Attorney General had written: "In my opinion the provision . . . is no longer in force."³⁰

On the following day, November 15, in reply to Secretary Krug's

²³ *Ibid.*, at 27-29.

²⁴ *Ibid.*, at 29.

²⁵ *Ibid.*

²⁶ *Ibid.*, at 30.

²⁷ *Ibid.*, at 298, 222.

²⁸ *Ibid.*, at 30.

²⁹ *Ibid.*, at 31.

³⁰ *Ibid.*, at 32.

letter, which he referred to as "your ukase of yesterday," Lewis observed that the Secretary had "graciously given" of his time, "in full and private conference, to the extent of three hours and fifty-eight minutes," and condemned the proposal for a conference with the operators as "sheer folly." He concluded by asserting that the mine workers did not propose "to deal with parties who have no status" under the Krug-Lewis Agreement.³¹ On that day, too, Lewis sent a second letter to Secretary Krug: "Fifteen days having now elapsed since the beginning of said conference, the United Mine Workers of America, exercising its option hereby terminates said Krug-Lewis Agreement as of 12:00 o'clock P.M., Midnight, Wednesday, November 20, 1946."³² The Secretary replied: "... you have no power, under the Krug-Lewis Agreement of May 29 or under the law, by unilateral declaration to terminate the contract which by its terms 'covers for the period of Government possession the terms and conditions of employment.'"³³

Though tempers were short and language tart, the legal problem was still one of contract. A neat one too and squarely put—the pity is we still have had no answer.

Lewis meanwhile was distributing to the membership of the United Mine Workers, for their "official information," copies of his letter to Secretary Krug purporting to terminate the Krug-Lewis Agreement.³⁴ In accordance with the "no contract, no work" policy of the United Mine Workers, a walkout commenced on November 18, quickly closing most of the nation's bituminous coal mines.

On November 18, therefore, the government filed in the United States District Court for the District of Columbia a complaint asking for a declaratory judgment and injunctive relief.³⁵ Without notice or hearing and without entry of the findings which would have been required by the Norris-LaGuardia Act, Judge Goldsborough issued a temporary order, restraining the United Mine Workers of America and John L. Lewis and "their agents, servants, employees, and attorneys, and all persons in active concert or participation with them . . . pending further order of this Court,"

from permitting to continue in effect the notice heretofore given by the defendant, John L. Lewis, to the Secretary of Interior dated November 15, 1946; and from issuing or otherwise giving publicity to any notice that or to the effect that the Krug-Lewis Agreement has been, is, or will at some future date be terminated, or that said agree-

³¹ *Ibid.*, at 304.

³² *Ibid.*, at 34.

³³ *Ibid.*, at 34-35.

³⁴ *Ibid.*, at 284-85.

³⁵ *Ibid.*, at 1.

ment is or shall at some future date be nugatory or void at any time during Government possession of the bituminous coal mines; and from breaching any of their obligations under said Krug-Lewis Agreement; and from coercing, instigating, inducing, or encouraging the mine workers at the bituminous coal mines in the Government's possession, or any of them, or any person, to interfere by strike, slow down, walkout, cessation of work, or otherwise, with the operation of said mines by continuing in effect the aforesaid notice or by issuing any notice of termination of agreement or through any other means or device; and from interfering with or obstructing the exercise by the Secretary of the Interior of his functions under Executive Order 9728; and from taking any action which would interfere with this Court's jurisdiction or which would impair, obstruct, or render fruitless, the determination of this case by the Court. . . .³⁶

The temporary restraining order was to expire at 3:00 P.M. on November 27, the government's motion for a preliminary injunction being set for hearing at 10:00 A.M. of the same day. Since the defendants took no action to withdraw the termination notice, the government filed a petition on November 21, together with an affidavit of the Coal Mines Administrator, for a rule to show cause why the defendants should not be adjudged in contempt.³⁷ The rule was issued, with November 25 as the return day and November 27 as the day for trial if the contempt had not been purged.³⁸ On November 25 the defendants appeared in court to state that they had "done no act nor spoken any word pertaining to said notice or in reference to permitting it to continue in effect."³⁹

On the following day the defendants moved to discharge the rule to show cause, on the ground that the temporary restraining order was beyond the jurisdiction of the court in view of the Norris-LaGuardia Act and in that it deprived defendants of their constitutional rights. They contended further that if the petition for a rule had for its object the institution of criminal contempt proceedings, the statutory requirements for criminal contempt had not been met.⁴⁰ After hearings on November 27 and 29, the court determined that the Norris-LaGuardia Act did not apply and overruled the defendants' motion to discharge the rule.⁴¹ In view of the time taken to dispose of this matter, there having yet been no argument on the government's petition for a preliminary injunction, the court, on the government's motion and over the strenuous protest of the defendants, extended the temporary restraining order for an additional ten days.⁴²

The defendants pleaded "not guilty" and waived an advisory jury.⁴³

³⁶ *Ibid.*, at 61.

³⁷ *Ibid.*, at 66.

³⁸ *Ibid.*, at 72.

³⁹ *Ibid.*, at 503.

⁴⁰ *Ibid.*, at 82.

⁴¹ *Ibid.*, at 202-4.

⁴² *Ibid.*, at 85.

⁴³ *Ibid.*, at 205.

Trial took place on November 29, December 2, and December 3. The court found that the defendants United Mine Workers and John L. Lewis had "committed" civil contempt and were "guilty" of criminal contempt, having "wilfully, wrongfully and deliberately disobeyed and violated the terms of the said temporary restraining order and . . . obstructed and interfered with the determination of this case by this Court."⁴⁴

On December 4, the Assistant Attorney General pointed to the "great injury . . . inflicted on the people of the United States by the action of these defendants" and to the courts of law which had been established by the "founders of this Republic" as a "constitutional safeguard . . . basic to our democratic form of government," urging that these two aspects of the public interest be given consideration in imposing sentence.⁴⁵ Judge Goldsborough termed the act of the defendants "an evil, demoniac, monstrous thing that means hunger and cold and unemployment and destitution and disorganization of the social fabric; a threat to democratic government itself" and "one of the most serious situations that has ever developed in a republic."⁴⁶ He imposed fines of \$10,000 on John L. Lewis and \$3,500,000 on the United Mine Workers of America—the precise amounts recommended by the government on the previous day.⁴⁷

The theory of the government's case—and of Judge Goldsborough's decision—must be distinguished from the position later taken by the Supreme Court. In fact, with respect to the Norris-LaGuardia Act, the Supreme Court adopted a view that had not even been argued. And much that was argued at length was barely mentioned.

The government's theory was really quite simple, although its desire to envelop the Norris-LaGuardia Act from all possible angles lent some impression of confusion. The government's petition asked for a declaratory judgment determining whether or not the defendants had the right unilaterally to terminate the Krug-Lewis Agreement and also for injunctive relief. On the theory that Lewis' letter purporting to terminate the agreement, which the defendants had circulated among the membership of the United Mine Workers, really constituted a strike notice, the government asked that the defendants be restrained from permitting this notice to remain in effect.⁴⁸ The temporary restraining order was thus "to prevent irreparable injury to the interests of the people of the United States"⁴⁹

⁴⁴ *Ibid.*, at 99.

⁴⁵ *Ibid.*, at 320.

⁴⁶ *Ibid.*, at 328.

⁴⁷ *Ibid.*, at 329. Judge Goldsborough also issued the preliminary injunction on December 4, 1946, in virtually the same terms as the temporary restraining order. *Ibid.*, at 102.

⁴⁸ *Ibid.*, at 8, 51-52.

⁴⁹ *Ibid.*, at 56.

and to protect the court's jurisdiction pending final determination of the disputed contract question.

"The entire case," the government contended, "falls well outside the area designed to be covered by the Norris-LaGuardia Act."⁵⁰ The controversy is not a labor dispute—rather it is a dispute as to the proper interpretation of the Krug-Lewis Agreement. Nor can the government as sovereign be held "to be engaged in a labor dispute with private persons."⁵¹ Moreover, the act itself does not in specific terms apply to the government. Therefore a well-known canon of construction is applicable to the effect that statutes in general terms which take away pre-existing rights or privileges do not apply to the sovereign unless there are very clear words to indicate such an intent. In this manner the government disposed of the Norris-LaGuardia Act.

Along with its request for temporary injunctive relief "pending a peaceful judicial determination of a disputed legal problem,"⁵² the government urged the need for an injunction to restrain an unlawful act—breach of the Krug-Lewis Agreement and violation of the War Labor Disputes Act. The government also resurrected the case of *In re Debs*,⁵³ asserting that its basic doctrine was still valid and applicable, entitling the government to "judicial protection of its rights lawfully to exercise its sovereign functions without interference and obstruction."⁵⁴ Here, it urged, the sovereign, in the exercise of the war power, had taken possession of and was operating the coal mines. It now asked the court to prevent interference with the effective exercise of these "essential sovereign powers."⁵⁵

Now clearly, only the government could ask for equitable protection of its sovereign functions. But the government's contention that it was entitled to injunctive relief simply to preserve the status quo pending judicial determination of the dispute over the terms of an agreement is an argument that any private employer might make. If a disagreement over the meaning of a contract does not constitute a labor dispute, then obviously an easy detour around the provisions of the Norris-LaGuardia Act is at hand. The employer need only ask for a declaratory judgment, asserting that the parties have come to conflict over the meaning of an agreement, and request a temporary restraining order maintaining the subject-matter of the litigation pending the court's decision. Pushed by

⁵⁰ *Ibid.*, at 57.

⁵¹ *Ibid.*

⁵² *Ibid.*, at 56.

⁵³ 158 U.S. 564 (1895). In its brief in the Supreme Court (at p. 22), the government described the Debs case as "the only analogous case ever considered by this Court."

⁵⁴ Record, at 55.

⁵⁵ *Ibid.*

Justices Jackson and Reed in oral argument before the Supreme Court, Assistant Attorney General Sonnett rather lamely admitted as much, though labelling the argument a "straw man" and saying that there was no need to reach it.⁵⁶

Nonetheless, Judge Goldsborough appears to have adopted the government's argument in toto. The Norris-LaGuardia Act, he ruled, did not apply because it was not clearly intended to cover the government; consequently the canon of construction applied to protect the government's pre-existing rights.⁵⁷ To the defendants' arguments that the sweeping character of the restraining order deprived them of constitutional liberties and imposed on the miners involuntary servitude, the court replied that it did not "so understand the order"⁵⁸ and that "the miners are not in this case."⁵⁹ The purpose of the order, the court said, was "to maintain the status quo. . . . What the Court was commanding was that this statement that the contract between the Union and the Government had expired should be rescinded, and that other matter in the order was simply ancillary."⁶⁰ . . . The Court does not think that the contention that freedom of speech has been violated is a matter for serious consideration."⁶¹

In the course of the argument and in its memorandum, the government contended that even if the Norris-LaGuardia Act did apply the defendants could still be punished for contempt in refusing to obey the court's order. Should the defendants object that the court had no jurisdiction, "such an objection would at best be only an arguable contention which would pose an issue for decision by the Court. Pending a decision of that very issue, the Court was and is clearly empowered to protect its jurisdiction to pass on the question."⁶² Although by his ruling that the Norris-LaGuardia Act was not applicable it became unnecessary for Judge Goldsborough to pass on this contention, it was obvious that he was in complete agreement, saying that no other rule "would accord with a sound system of jurisprudence."⁶³ The court, he said, is "the judge of its own jurisdiction," and if the defendants "disregarded entirely that restraining order then they are guilty of contempt of Court, whether the Norris-LaGuardia Act applies or does not apply. That, in this Court's opinion, is the law."⁶⁴

Judge Goldsborough disposed with equal dispatch of the defendants' objections as to the adequacy of the means employed for initiating crimi-

⁵⁶ Oral Argument, at 53.

⁵⁷ Record, at 203.

⁵⁸ *Ibid.*, at 173.

⁵⁹ *Ibid.*, at 178.

⁶⁰ *Ibid.*, at 172, 204.

⁶¹ *Ibid.*, at 204.

⁶² *Ibid.*, at 76.

⁶³ *Ibid.*, at 144.

⁶⁴ *Ibid.*, at 144-45.

nal contempt proceedings. The Federal Rules of Criminal Procedure require that criminal contempt be prosecuted on notice, which notice must "state the essential facts constituting the criminal contempt charged and describe it as such."⁶⁵ The government's petition for a rule to show cause and the supporting affidavit of the Coal Mines Administrator failed to meet this precise requirement. Nowhere were the proceedings being instituted described as criminal contempt. Judge Goldsborough held, however, that if it were "a mistake not to have charged that the contempt was criminal specifically, it is not sufficient at all to vitiate the proceeding."⁶⁶

An air of unreality emerges from the record of the District Court proceedings. Behind the polite pretense that the sole purpose of the injunction was to maintain the "status quo," the rambling discussions as to whether or not the government was here performing a "sovereign function," the argument that this was no "labor dispute," and the assurances of the government that the only reason for coming to court was to determine "the proper legal construction" of the Krug-Lewis Agreement—"for that purpose we came into court"⁶⁷—behind this not too imposing façade of formality and forensics were the stark realities of a head-on clash between powerful forces. The government was bound and determined to end the strike. Lewis and the Mine Workers, obviously stunned by the government's suit for injunctive relief, were equally determined to resist the return, under a slightly different name to be sure, of the old iniquitous labor injunction.

The disputed contract point gave the government a convenient entrée, a plausible basis for urging the court to protect its jurisdiction, to preserve the subject matter of the litigation—the contract. Actually, the government was little interested in the contract. What if the disputed point were resolved in Lewis' favor, and as a matter of contract law Lewis may have had the better of the argument? Presumably then the government would have relied exclusively on *In re Debs*. If, on the other hand, the court had ruled that Lewis had no right unilaterally to terminate the Krug-Lewis Agreement, it seems unlikely that the matter would have been settled. If the United Mine Workers persisted in their walkout, the government would still be in need of injunctive relief, relying again on the *Debs* case and the plea that equity restrain an illegal act.

Likewise there is something not quite real in the court's stating again and again that the effect of the injunction was simply to preserve the status quo, that questions of constitutional rights were not involved, and that apart from the requirement that Lewis withdraw his termination

⁶⁵ Rule 42(b), Fed. Rules of Crim. Procedure, 18 U.S.C.A. § 687 foll. (Supp., 1946).

⁶⁶ Record, at 204.

⁶⁷ *Ibid.*, at 180.

notice, the provisions of the restraining order were simply "ancillary."⁶⁸ Actually the terms of that order seem sufficiently broad to constitute a most effective muzzle. The defendants and all others associated with them could not, without committing contempt, so much as discuss the dispute or the legal matters arising from it. The miners, in turn, would appear to have been prevented from meeting to decide whether or not to continue with the walkout and from taking such action, normal to labor disputes, as picketing. "Any action which would interfere with this Court's jurisdiction," it is clear, covers a multitude of sins.

II

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend.
—HOLMES, J.⁶⁹

In reviewing the judgment of the lower court on petitions for certiorari presented by the government and the defendants, the United States Supreme Court was faced with a complex series of issues. They may, however, be summarized under four principal headings.

First, did the Norris-LaGuardia Act apply? The majority, consisting of Mr. Chief Justice Vinson and Justices Reed, Burton, Black, and Douglas, held that it did not. The District Court was therefore within its jurisdiction in issuing the temporary restraining order. Justices Frankfurter and Jackson disagreed. Justices Murphy and Rutledge dissented.

Second, assuming that the Norris-LaGuardia Act did apply and that the District Court's order was beyond its jurisdiction and would have been reversed upon appeal as void, could the defendants be punished for criminal contempt in refusing to obey the order? The majority, consisting of Mr. Chief Justice Vinson, and Justices Reed and Burton, joined on this point by Justices Frankfurter and Jackson, held that the defendants were properly punishable. In reaching this conclusion the majority enunciated what I shall call the "doctrine of the void but non-frivolous order." Justices Black and Douglas found it unnecessary to decide this point. Justices Murphy and Rutledge dissented.

Third, were fines of \$10,000 on John L. Lewis and of \$700,000 on the

⁶⁸ *Ibid.*, at 204.

⁶⁹ Dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-1 (1904), quoted by Rutledge, J., at 720 n. 1.

United Mine Workers of America appropriate and not excessive as punishment for criminal contempt? The majority, consisting of Mr. Chief Justice Vinson, and Justices Reed, Burton, Frankfurter, and Jackson, upheld the imposition of these fines. Justices Black and Douglas dissented on the ground that such criminal punishment was "inappropriate and improper," being the exercise of far more than "the least possible power adequate to the end proposed."⁷⁰ In their view only coercive sanctions were justified, sanctions, that is, designed to coerce the defendants into obedience. Justices Murphy and Rutledge dissented on the ground that the fines were excessive by constitutional and statutory standards. In upholding the imposition of an additional coercive fine of \$2,800,000 on the United Mine Workers "conditional on the defendant's failure to purge itself within a reasonable time,"⁷¹ the majority, consisting of Mr. Chief Justice Vinson, and Justices Reed, Burton, Black, and Douglas, accomplished the division of the lump-sum fine levied by the District Court into its constituent parts: a punitive fine for criminal contempt and a conditional fine as a civil remedy to coerce the defendant United Mine Workers into obeying the court's order. Mr. Justice Frankfurter's opinion would seem to oblige him to dissociate himself from this part of the Court's judgment, since on his view of the applicability of the Norris-LaGuardia Act the government as petitioner in a civil action was not entitled to relief in the form of a sanction to coerce the defendant. Although Mr. Justice Jackson did not state his views in full, the logic of his position would require that he join with Mr. Justice Frankfurter. Justices Murphy and Rutledge dissented from the majority's decision on this point as on all the others.

Fourth, was the procedure used to initiate the criminal contempt proceedings prejudicial, and was it proper to prosecute the civil and criminal contempt charges in one proceeding? The majority, consisting of Mr. Chief Justice Vinson and Justices Reed, Burton, Frankfurter, and Jackson, held that the procedure followed had not resulted in "substantial prejudice" to the defendants. The position of Justices Black and Douglas is not entirely clear on this point, but presumably they concurred with the majority. Justices Murphy and Rutledge dissented.

Several points should be immediately apparent. The majority upholding the conviction for criminal contempt and the imposition of punitive fines is different from the majority sustaining the imposition of coercive penalties for civil contempt. The Vinson-Reed-Burton-Frankfurter-

⁷⁰ Black and Douglas, JJ., at 715.

⁷¹ Vinson, C. J., at 702. The miners, of course, had returned to work on December 7, 1946.

Jackson majority, in punishing for criminal contempt, necessarily rests on the "doctrine of the void but non-frivolous order," violation of which may be punished. The Chief Justice and Justices Reed and Burton also rest their judgment at this point on the non-applicability of the Norris-LaGuardia Act. The Vinson-Reed-Burton-Black-Douglas majority, imposing coercive civil sanctions, is doing so on the theory that the Norris-LaGuardia Act does not apply. The government as petitioner for civil relief is therefore entitled to the relief requested, and the defendants may be coerced into obeying the order of the court granting this relief.

The majority upholding the punishment for criminal contempt could not rest its judgment on the non-applicability of the Norris-LaGuardia Act alone since Justices Black and Douglas considered that only coercive and not criminal penalties were justified. Of course it may be argued that the majority upholding the conviction for criminal contempt on this point and the majority imposing the penalty need not be the same. Clearly they are not the same. The thing to notice, however, is this. Without the concurrence of Justices Frankfurter and Jackson, who believe that the Norris-LaGuardia Act clearly applies, the Court could not have imposed any punishment for the criminal contempt already committed, since Justices Black and Douglas believed in coercive measures only.

Since Justices Frankfurter and Jackson had to adopt a position which justified upholding the punishment for criminal contempt, it was necessary for the Chief Justice in his opinion to announce that "there are alternative grounds which support the power of the District Court to punish violations of its orders as criminal contempt."⁷² These grounds were that, even though the Norris-LaGuardia Act rendered the injunctive relief beyond the jurisdiction of the District Court, that court "had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt."⁷³ This is the "doctrine of the void but non-frivolous order."

It does not seem to me correct, therefore, as has been suggested,⁷⁴ to consider this portion of the majority's opinion as dictum. It is true that adoption of this position exclusively would have required the vacating of all relief for civil contempt, coercive or compensatory, since the position

⁷² Vinson, C. J., at 694.

⁷³ Vinson, C. J., at 695.

⁷⁴ Comment, 45 Mich. L. Rev. 469, 501 n. 43 (1947). This comment contains a useful collection and discussion of authorities bearing on the case. I am indebted to the Editors of the Michigan Law Review for access to this comment prior to publication.

begins with the assumption that the Norris-LaGuardia Act is applicable. If the act applies, the government is clearly not entitled to the civil relief it requests. But had not the majority of Chief Justice Vinson, Reed, and Burton, joined by Justices Frankfurter and Jackson, spelled out these "alternative grounds" there would have been no way of imposing criminal penalties. Since punitive fines were assessed which could not have been assessed without the support of Justices Frankfurter and Jackson, it would appear clear that the "alternative grounds" stated to bring them over to the majority side in support of criminal penalties are not dictum.

I have attempted to analyze the various positions taken by the Court at some length, because such an inspection is necessary to an understanding of what happened and of what the decision means. Two positions adopted by members of the Court were decisive: Justices Black and Douglas would not support criminal penalties; Justices Frankfurter and Jackson would not rule the Norris-LaGuardia Act inapplicable. Yet at least two of these four were essential to the majority on all points.

It appears likely, then, that Mr. Justice Frankfurter was the key to the entire decision. His long and well-known association with the fight to secure an anti-injunction statute, his reputed draftsmanship of the Norris-LaGuardia Act, his intimate knowledge of its purpose and legislative history, and his repeated authoritative pronouncements on the subject made it unthinkable that he should hold that the act did not apply to this case. But Mr. Justice Frankfurter doubtless felt that the defendants should be punished. The means lay at hand—the doctrine of the void but non-frivolous order.

The irony of the situation is obvious. The man who labored so magnificently to abolish the labor injunction finds himself forced to help reintroduce it. And reintroducing it means tying it up with a really incredible concoction—the doctrine of the void but non-frivolous order—the theory that "the Court can do no wrong."

APPLICABILITY OF THE NORRIS-LAGUARDIA ACT

The key to the majority's holding that the Norris-LaGuardia Act does not apply is the determination that the government *as employer* is not covered. The Chief Justice concedes at the beginning of his opinion that the characteristics of the present case would bring it within the provisions of the Norris-LaGuardia Act "if the basic dispute had remained one between defendants and a private employer, and the latter had been the plaintiff below."⁷⁵ And, the Court admits, in view of the act the United

⁷⁵ Vinson, C. J., at 685.

States could not "continue to intervene by injunction in purely private labor disputes."⁷⁶ This cuts the ground out from under the position argued by the government and adopted by the District Court, although nothing in the Chief Justice's language says so. The Assistant Attorney General had admitted to the Supreme Court that the government's contention amounted to saying that the Norris-LaGuardia Act impliedly kept the *Debs* case alive.⁷⁷ With a sentence or two the Chief Justice completely disposes of the argument. This is reassuring. Whatever else the Norris-LaGuardia Act failed to accomplish—at least it killed *In re Debs*. The Chief Justice goes on, however, to distinguish the circumstances of the 1894 and 1922 railway strike injunctions secured by the government as vastly different from those involved here, "in which the Government is seeking to carry out its responsibilities by taking action against its own employees."⁷⁸

To establish the basic proposition that the government as employer is not covered by the act, the Chief Justice first makes use of the rule of construction already applied in the lower court. Since the act took away pre-existing rights and privileges it did not apply to the sovereign in the absence of express words to that effect. This rule, the Chief Justice stated, had been invoked in cases "closely similar to the present one"⁷⁹ and must have been known to the Congress in drafting the Norris-LaGuardia Act.

The policy of the act as set forth in Section 2,⁸⁰ the Chief Justice found, lent support to this view. There it appeared that the act was concerned with the position of the "individual unorganized worker" confronted by the organized strength of "owners of property." Its purpose therefore was to contribute to the worker's freedom to organize and to bargain collectively without interference. These considerations, the Court considered, "obviously do not apply to the Government as an employer or to relations between the Government and its employees."⁸¹

Moreover, the provisions of Sections 4 and 13⁸² of the act indicated

⁷⁶ Vinson, C. J., at 688.

⁷⁷ Oral Argument, at 44. He also spoke a good deal of the war power, although declining to rely on it exclusively as a justification for the resort to the injunctive remedy. *Ibid.*, at 41-43.

⁷⁸ Vinson, C. J., at 688.

⁷⁹ Vinson, C. J., at 686.

⁸⁰ 47 Stat. 70 (1932), 29 U.S.C.A. § 102 (1942).

⁸¹ Vinson, C. J., at 687.

⁸² 47 Stat. 70, 73 (1932), 29 U.S.C.A. §§ 104, 113 (1942). Sec. 13. When used in this Act, and for the purposes of this Act (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same

that the power of the courts to issue injunctions was withdrawn only in cases "involving or growing out of any labor dispute." A labor dispute, according to the Chief Justice, involved "persons" in certain types of economic situations and in varying relationships to each other, and necessarily "persons" must be engaged on both sides of the dispute. Since the act failed to define "persons," and since in ordinary usage the term "person" does not include the sovereign, it would appear that the labor disputes covered by the act were not those in which the sovereign might become involved. The roles and activities performed by "persons" and "employers" or "associations of employers" were not, according to the Chief Justice, "at all suggestive of any part played by the United States in its relations with its own employees."⁸³ Congress' failure to include any role applicable to the government was therefore a "strong indication that it did not intend that the Act should apply to situations in which [the] United States appears as employer."⁸⁴ What is more, the findings required by Section 7 of the act as prerequisites for the issuance of injunctions were not the sort that could or would be made if the United States as employer were the petitioner. Clearly a finding that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection"⁸⁵ is out of place where the complainant is the government.

The Chief Justice professed to be comforted by the legislative history of the act. While showing that the Congress did not intend to permit the government to secure injunctions like those of 1894 and 1922, the history

employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section). (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation. (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. (d) The term "Court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by act of Congress, including the courts of the District of Columbia.

⁸³ Vinson, C. J., at 687.

⁸⁴ *Ibid.*

⁸⁵ 47 Stat. 71 (1932), 29 U.S.C.A. § 107 (e) (1942).

did indicate that "Congress in passing the Act, did not intend to withdraw the Government's existing rights to injunctive relief against its own employees."⁸⁶ Especially significant in the view of the Court was the statement of Representative Michener, a member of the House Judiciary Committee: "Be it remembered that this bill does not attempt to legislate concerning Government employees. . . . This deals with labor disputes between individuals, not where the Government is involved. It is my notion that under this bill the Government can function with an injunction, if that is necessary in order to carry out the purpose of the Government."⁸⁷ Several cryptic remarks of Representative LaGuardia were thought by the Court to reflect the same view.

The history of the War Labor Disputes Act of 1943,⁸⁸ and particularly of the decisive defeat in the Senate of an amendment proposed by Senator Connally which would have made available to the government the additional remedy of injunctive relief was not—for the Court—even mildly disturbing. Far from indicating the determination of Congress to deny the injunctive remedy, these events seemed to the Chief Justice to disclose no "authoritative expression of Congress directing the courts to withhold from the United States injunctive relief in connection with an Act designed to strengthen the hand of the Government in serious labor disputes."⁸⁹ There was nothing to indicate "any intent to restrict the existing authority of the courts . . ."⁹⁰ nothing which suggests that the Congress intended to bar injunctions sought by the Government to aid in the operation of seized plants."⁹¹ Statements by various Senators expressing their belief that, without an amendment to the legislation then pending, injunctions could not be issued at the suit of the government even where a plant or industry had been seized,⁹² the Court could not accept "as authoritative guides to the construction of the Norris-LaGuardia Act. . . ."⁹³ We fail to see how the remarks of these Senators in

⁸⁶ Vinson, C. J., at 689.

⁸⁷ 75 Cong. Rec. 5464, 5509 (1932).

⁸⁸ 57 Stat. 163 (1944), 50 U.S.C.A. App. § 1501 et seq. (1944).

⁸⁹ Vinson, C. J., at 691.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* In a footnote, n. 43 at 690-91, the Chief Justice argues that the Senate's rejection of Senator Connally's amendment "does not necessarily imply any desire to diminish the contractual rights and remedies of the United States." This comes very close to an acceptance of the government's original contention that since the issue was one of contract interpretation the controversy was not a labor dispute.

⁹² 89 Cong. Rec. 3906, 3907, 3988-89, 5754 (1943).

⁹³ Vinson, C. J., at 690.

1943 can serve to change the legislative intent of Congress expressed in 1932. . . ."⁹⁴ In effect the Court is saying, therefore, that the injunctive remedy was available all the while in the case of government employees, regardless of what various Senators may or may not have said.

Turning to the crucial point as to whether or not miners in seized mines could be considered government employees, the Court said that the workers clearly stood in "an entirely different relationship to the federal Government with respect to their employment from that which existed before the seizure was effected."⁹⁵ It did not matter that they were not Government employees for all purposes. The question was whether "for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee."⁹⁶ The Court was impressed by the extensive changes in the terms and conditions of employment after government seizure as embodied in the Krug-Lewis Agreement, an agreement "solely between the Government and the union."⁹⁷ The government had, it appeared, "substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators."⁹⁸ Lewis' refusal to deal with the coal operators as "strangers to the Krug-Lewis agreement"⁹⁹ was clear recognition of the true situation.

Of perhaps greater significance was the fact that the government, although utilizing the plant managers to operate the mines, retained "ultimate control."¹⁰⁰ It could give the managers any orders and instructions it pleased and could remove them for failure to comply. The regulations providing that none of the earnings or liabilities of the mines were to be on the account of the government, that the companies were to be liable for all taxes and were to remain liable for suit, the Court considered of "little persuasive weight in determining the nature of the relation existing between the Government and the mine workers."¹⁰¹

Thus, as the Court viewed the provisions and history of the War Labor Disputes Act, its net effect was to make every worker in a plant or mine subject to seizure a potential government employee.

The Chief Justice likewise disposed of the contention that the government was not performing a sovereign function, feeling that "it would be difficult to conceive of a more vital and urgent function of the Government

⁹⁴ *Ibid.*

⁹⁵ Vinson, C. J., at 691.

⁹⁶ Vinson, C. J., at 692.

⁹⁷ *Ibid.*

⁹⁸ Vinson, C. J., at 693.

⁹⁹ Record, at 304.

¹⁰⁰ Vinson, C. J., at 693.

¹⁰¹ *Ibid.*

than the seizure and operation of the bituminous coal mines."¹⁰² The Court concluded "that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply."¹⁰³ Killing *In re Debs* was not quite enough.

Although Justices Black and Douglas concurred in this portion of the Chief Justice's opinion, the language they use warrants some attention. In their view Congress was concerned only with labor disputes between private employers and employees. ". . . The attention of Congress was neither focused upon, nor did it purport to affect, 'labor disputes,' if such they can be called, between the Government and its own employees."¹⁰⁴ Therefore specific language would be needed to indicate any Congressional intent to consider "the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense."¹⁰⁵ Moreover, it was perfectly clear that seizure by the government made the miners government employees. Despite the contrary implication of the government mine regulations, Justices Black and Douglas concluded from the War Labor Disputes Act and the President's Executive Order that the government operated the mines "for its own account as a matter of law."¹⁰⁶ The Chief Justice was not quite so clear on this, concluding, in any case, that the point was not decisive.

Justices Black and Douglas also make this significant observation: "If we thought, as is here contended, that the Government's possession and operation of the mines were not genuine, but merely pretended, we should then say that the Norris-LaGuardia Act barred these proceedings. For anything less than full and complete Government operation for its own account would make this proceeding the equivalent of the Government's seeking an injunction for the benefit of the private employers. We think the Norris-LaGuardia Act prohibits that."¹⁰⁷ Justices Black and Douglas seem anxious to reassure themselves that *In re Debs* is really dead.

Mr. Justice Murphy observes at the outset of his dissenting opinion: "An objective reading of the Norris-LaGuardia Act removes any doubts as to its meaning and as to its applicability to the facts of this case."¹⁰⁸ But the Chief Justice and Justices Reed, Burton, Black, and Douglas declined to give it such a reading. Despite its background and clearly-

¹⁰² Vinson, C. J., at 694.

¹⁰³ *Ibid.*

¹⁰⁴ Black and Douglas, JJ., at 713.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Murphy, J., at 716.

stated purpose, they chose to read the statute as though it were concerned with depriving certain types of parties of the injunctive remedy. As the Chief Justice phrased it, there were "no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government as well as from a specified class of private persons."¹⁰⁹

The act was not drafted, however, to withhold remedies from classes of persons. It was intended to define and limit "the jurisdiction and authority of the courts of the United States. . . ."¹¹⁰ By its very title it is an act "to define and limit the jurisdiction of courts sitting in equity."¹¹¹ The act "does not deal with the rights of parties but with the power of the courts. . . . Congress was concerned with the withdrawal of power from the federal courts to issue injunctions in a defined class of cases. Nothing in the Act remotely hints that the withdrawal of this power turns on the character of the parties."¹¹² These cases are defined as those "involving or growing out of any labor dispute. . . ." In such a case, as Section 4 clearly provides, "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction. . . ."¹¹³

This is made abundantly clear by the definition of labor dispute contained in Section 13(c), which reads:

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.¹¹⁴

Obviously, under this provision a labor dispute is a controversy about terms or conditions of employment, and the dispute between the government and the United Mine Workers or the operators and the United Mine Workers meets that requirement beyond any doubt. It is perhaps significant, therefore, that the Chief Justice's opinion does not once refer to Section 13(c), consigning it without comment to the relative obscurity of a footnote.

Reading the act objectively makes it apparent that whether or not the government is a "person," as that term is used in Sections 13(a) and (b), is irrelevant. The term "labor dispute" is defined without reference to the

¹⁰⁹ Vinson, C. J., at 684.

¹¹⁰ 47 Stat. 70 (1932), 29 U.S.C.A. § 102 (1942).

¹¹¹ 47 Stat. 70 (1932).

¹¹² Frankfurter, J., at 706.

¹¹³ 47 Stat. 70 (1932), 29 U.S.C.A. § 104 (1942).

¹¹⁴ 47 Stat. 73 (1932), 29 U.S.C.A. § 113 (c) (1942).

persons involved in that dispute. The only purpose of defining the term "person" is to be sure to include virtually anyone having any connection with a labor dispute, and this is necessary in order to cover all possible cases. "Cases," not "labor disputes," are defined in terms of "persons." According to Section 13(b), if relief is sought against a person or association, and if he is "engaged in the same industry, trade, craft, or occupation in which [the] dispute occurs, or has a direct or indirect interest therein," or is a member or officer of any association of employers or employees engaged in that industry, trade, craft, or occupation, then he is a person "participating or interested in a labor dispute."¹¹⁵ Both Section 13(a), which the Chief Justice relies on, and Section 13(c), which he ignores, clearly show that the employer-employee relationship is not a requisite of a labor dispute. And while one may perhaps accept the Chief Justice's assumption that Section 13 requires that "persons" as there defined be engaged on both sides of the dispute, it is clear beyond question that a "case" poses no such condition. There is no requirement that relief be sought by a "person" participating in a dispute. It is enough if relief is sought *against* such a "person."

The fatal weakness of the Chief Justice's argument is that he tries to interpret the Norris-LaGuardia Act as though it were intended to deprive certain "persons" of their equitable remedies. Since "persons" to him look like private employers or employees or associations of private employers or employees, he cannot see the sovereign masquerading as a "person." And since only those "persons" included in Section 13 can be considered in determining the meaning of a "labor dispute," which the Chief Justice treats as if it were defined in terms of "persons," the sovereign is not involved in the sort of "labor dispute" covered by Section 13. All this effort is without benefit of Section 13(c).

Now the most remarkable thing of all is that implicitly the Chief Justice recognizes that his concern with the meaning of "person" is beside the point. He admits that the government, as an outsider having no part in the dispute, cannot intervene to secure an injunction against any party engaged in a private labor dispute. And the only reason why this must be so—and this step the Chief Justice does not take—is that the party seeking the relief is irrelevant so long as there is a labor dispute and relief is sought against a "person" engaged or interested in that dispute. In no other way could the act have killed *In re Debs*.

But remember, now, the Chief Justice relies on the rule of construction which preserves the sovereign's rights and privileges unless there is a

¹¹⁵ See note 82 *supra* for the text of Section 13.

clearly expressed intent to divest them. This argument, as Mr. Justice Frankfurter points out, proves too much. If the rule applies at all, it must preserve the sovereign's rights in all situations. "Accordingly, the courts would not be limited in their jurisdiction when the United States is a party and the Act would not apply in any proceeding in which the United States is complainant."¹¹⁶ The Chief Justice wants to use the rule to protect the rights of the United States as employer. But if the rule has any efficacy, it must also preserve the rights of the United States to injunctive relief whenever the public interest requires, regardless of whether the United States is an employer, a temporary custodian, or a rank outsider in a labor dispute. If the canon applies, then *In re Debs* is not dead after all.

Reading these two portions of the Chief Justice's opinion together makes his dilemma obvious. He could hardly say that *In re Debs* was still alive and kicking. The purpose and history of the act were too clear on this point to be ignored. But to kill *In re Debs* it was necessary to interpret the act sufficiently objectively to accept its intention of preventing the government, as an outsider in a labor dispute, from intervening to secure an injunction. Section 13(c) is essential to spelling out this intent, but the Chief Justice preferred not to cite it. For to demonstrate that the government as outsider to a labor dispute was deprived of a remedy which the government as insider retained, required showing—a most difficult task—that the act defined "labor dispute" in terms of the "persons" involved in that dispute. It was therefore wise to leave Section 13(c) strictly alone. The canon of construction was then called into play to make sure that the government as employer was really excluded, overlooking entirely the point that if the rule was valid, it excluded the government in all its capacities from the limitations imposed by the act. Thus the Chief Justice's opinion on the Norris-LaGuardia Act is nothing but an elaborate tussle with *In re Debs*, in which that amiable ghost proves mighty hard to lay.

The Chief Justice would have been better advised to confine his remarks on the Norris-LaGuardia Act to the views expressed so briefly by Justices Black and Douglas. Or all three might have written only this: "These miners are genuine, honest, God-fearing government employees, no matter what the government mine regulations say. So the situation is entirely different from *In re Debs*. Anyway *Debs* is dead. How do we know? Because we said so!"

Moreover, the canon of construction which helps the Chief Justice out

¹¹⁶ Frankfurter, J., at 706.

of one difficulty only to land him in another is totally out of place here. As Mr. Justice Frankfurter effectively argues, it is not a rule of law but an aid to the construction of statutes. It necessarily depends for its effectiveness on the subject matter and setting of the statute and clearly cannot be used in defiance of these other aspects of the total statutory environment. Thus the meaning of the statute as derived from its history and purpose "ought not to be subordinated to an abstract canon of construction that carries the residual flavor of the days when a personal sovereign was the law-maker."¹¹⁷

Application of the canon to this case involves a particularly flagrant instance of judge-made political theory. It is bad enough to have the term "sovereign" tossed around with reckless abandon. It is worse, however, to be informed that a statute which has as its express purpose the placing of limitations upon "the jurisdiction and authority of the courts of the United States" does not apply to the sovereign because there are no express words to that effect. How more explicitly could the "courts of the United States" be expressed in statutory language, and as "courts of the United States" are they not an integral part of the government, of the sovereign, if you will? A statute limiting the power of courts does just that, and the limitations can be removed only by the body that imposed them, the Congress. To argue otherwise is to advance the absurd proposition that Congress commanded that courts of the United States should not abuse their equity powers unless requested to do so by the sovereign. And who is the sovereign in this situation? Presumably, on the Court's theory, the Executive is the sovereign, even though orthodox American political theory of a government of limited powers would shudder at the suggestion. The Chief Justice departed from solid ground as soon as he chose to disregard the obvious fact that the Norris-LaGuardia Act limited the power of courts, and that courts are part of the government or sovereign.

The cases relied on by the Court to show the wide acceptance of this rule are anything but "closely similar." In not one instance was a statute involved which expressly prohibited courts from acting in a certain class of cases.¹¹⁸ Obviously, legislation which deprives private parties of certain legal rights or remedies may or may not apply to the government, and a

¹¹⁷ Ibid.

¹¹⁸ *United States v. Stevenson*, 215 U.S. 190 (1909) (sustaining the right of the government to enforce a statute, making it a misdemeanor to assist in the illegal immigration of alien laborers, by criminal indictment where only a civil remedy was specifically authorized); *United States v. American Bell Tel. Co.*, 159 U.S. 548 (1895) (permitting the government to appeal to the Supreme Court in a suit to cancel a patent even though judgments or decrees of

rule of construction, in the absence of explicit provisions, may prove a necessity. But even the resulting presumption that the government is not covered, and therefore that its rights and remedies are not restricted, has been expressly held inapplicable "to acts of legislation which lay down general rules of procedure in civil actions."¹¹⁹ It would seem rudimentary that rules of civil procedure should apply to the government as party as well as to private litigants. In a very real sense the Norris-LaGuardia Act is a procedural statute.

In the expert hands of Mr. Justice Frankfurter, the legislative history of the act constitutes a most effective weapon in refutation of the majority's argument. Admittedly, Congress did not have clearly in mind the situation involved in this case where the government has assumed certain responsibilities in an essentially private industry and has therefore become interested in a labor dispute. The remarks of Representative LaGuardia at most imply that the government would still be free to obtain an injunction against the employees of the Treasury or Post Office Department. By saying that he did "not see how in any possible way the United States can be brought in under the provisions of this bill,"¹²⁰ he apparently meant that the United States was not engaged in an "industry, trade, craft, or occupation." If the remarks of Representative Michener, so helpful to the Chief Justice, meant anything more, they necessarily implied that the government might secure an *In re Debs* injunction at any time the public interest required, regardless of whether it was the employer or not. But the language of the Court's opinion, if not its logic, rejects this contention. In any case, the records of the Senate and of its Judiciary Committee, the driving force behind the bill, yield no similar ambiguities.¹²¹

Even if it be assumed, therefore, that the act was not intended to apply to labor disputes involving employees of the United States, are the miners employees of the United States? As Mr. Justice Frankfurter puts it, their status is a hybrid one,¹²² a description to which the Assistant Attorney General assented in oral argument.¹²³ Their relation to the government is

circuit courts of appeal were to be final in cases arising under the patent laws); *Dollar Savings Bank v. United States*, 19 Wall. (U.S.) 227 (1873) (involving the collection of taxes by an action for debt, where the court appears unnecessarily to have applied the canon of construction inasmuch as the statute authorized the action).

¹¹⁹ *Green v. United States*, 9 Wall. (U.S.) 655, 658 (1869). Cf. *United States v. Rice*, 327 U.S. 742 (1946).

¹²⁰ 75 Cong. Rec. 5503 (1932).

¹²¹ Frankfurter, J., at 708.

¹²² Frankfurter, J., at 709.

¹²³ Oral Argument, at 41.

not the same as that of a clerk in a drug-store, nor is it on all fours with the relation between the government and the employees of the Treasury Department. The role of the government has aptly been described as that of "a receiver that would be charged with the continuity of operation of the plant."¹²⁴ The fact that a business is in the hands of a federal receiver, however, does not make the Norris-LaGuardia Act inapplicable.¹²⁵ Nothing in the War Labor Disputes Act indicates that employees in seized plants were to be considered government employees in the usual sense of the term. In any event they are not quite the simon-pure government employees that Justices Black and Douglas make them out to be.

Thus it is important to look at the legislative history of the War Labor Disputes Act of 1943. The case arose, it must be remembered, since the Court occasionally ignores the fact, as a sequel to government seizure under this statute. The unmistakable conclusion is that Congress considered at length the advisability of granting the injunctive remedy to prevent interference with the operation of seized plants. It unequivocally decided not to grant it. "Remedy by injunction was not given. It was not merely omitted. A fair reading of the legislative history shows that it was expressly and definitively denied."¹²⁶ The statements of various Senators during the debates underscore this intention, and their remarks make sense only by assuming that they really believed that, in the form the War Labor Disputes Act was enacted, the injunction was not an available remedy. They had the coal situation clearly in mind, and they decided against adding the injunction to the other means of enforcement specified in the act. As Mr. Justice Frankfurter says, "to find that the Government has the right which Senator Connally's amendment sought to confer but which the Congress withheld is to say that voting down the amendment had the same effect as voting it up."¹²⁷

If, as the majority assumes, the injunction power was there all the time, safely tucked away in an implied interpolation exempting the government as employer from the Norris-LaGuardia Act, then the great concern and lengthy deliberations on the part of Congress were all in vain.

¹²⁴ Under Secretary of War Patterson at Hearings on S. 2054, Sub-Committee of Senate Judiciary Committee, 77th Cong. 1st Sess., at 14 (1941), quoted by Frankfurter, J. at 709.

¹²⁵ *Anderson v. Bigelow*, 130 F. 2d 460 (C.C.A. 9th, 1942), cert. den., 317 U.S. 690 (1942). But compare the apparently contrary results reached in cases involving § 77B of the Bankruptcy Act. In *re Cleveland and Sandusky Brewing Co.*, 11 F. Supp. 198 (Ohio, 1935), noted critically in 45 *Yale L.J.* 372 (1935), 35 *Col. L. Rev.* 1140 (1935), and 49 *Harv. L. Rev.* 341 (1935); *Converse v. Highway Const. Co.*, 107 F. 2d 127 (C.C.A. 6th, 1939). The labor injunction appears to have had its origin in the case of a railroad in receivership. *Gregory, Labor and the Law* 95-97 (1946).

¹²⁶ Frankfurter, J., at 710.

¹²⁷ Frankfurter, J., at 712.

If Congress passed Senator Connally's amendment, then the injunctive remedy was available in the act. If Congress defeated it, then the injunctive remedy was available outside the act and in the implied exception to the Norris-LaGuardia Act. Whatever it did in 1943, Congress was obviously just wasting its time. The statements and speeches of Congressmen and Senators amounted to nothing more than a lengthy contribution to the New Yorker's Wind on Capitol Hill Department.

On the majority's assumptions there is but one escape from this conclusion. Perhaps Congress knew what it was doing. It voted down Senator Connally's proposal for an injunctive remedy, knowing all the while that win or lose the remedy was there if needed. But Justice Rutledge pointedly remarks: "We cannot attribute to Congress an intent so duplicitous. . . . It would be to find Congress guilty of using a devious method for achieving indirectly exactly the thing it expressly declined to do."¹²⁸

But even if the argument of the majority be accepted with respect to the nature of the relationship created by seizure under the War Labor Disputes Act, it still does not follow that a labor dispute ceases through seizure to be a labor dispute under the terms of the Norris-LaGuardia Act. The question is whether the government's taking possession "changed the private character of the underlying labor dispute between the operators and the miners so as to make inapplicable the Norris-LaGuardia Act."¹²⁹ The Chief Justice, although relegating to a footnote the facts of the underlying labor dispute here involved,¹³⁰ uses language which shows that he recognizes clearly that the War Labor Disputes Act had to do with labor disputes. Thus at one point he speaks of "labor disputes in plants seized by the United States."¹³¹ In this connection the language of Mr. Justice Murphy is worth quoting at length:

In my opinion, the miners remained private employees despite the temporary gloss of Government possession and operation of the mines; they bear no resemblance whatever to employees of the executive departments, the independent agencies and the other branches of the Government. But when all is said and done, the obvious fact remains that this case involves and grows out of a labor dispute between the operators and the miners. Government seizure of the mines cannot hide or change that fact. Indeed, the seizure took place only because of the existence of the dispute and because it was thought some solution might thereafter result. The dispute, however, survived the seizure and is still very much alive. And it still retains its private character, the operators on the one side and the coal miners on the other. . . .

The Government's seizure of the coal mines thus becomes irrelevant to the issue.¹³²

¹²⁸ Rutledge, J., at 721.

¹²⁹ Murphy, J., at 717.

¹³⁰ Vinson, C. J., at 681 n. 1.

¹³¹ Vinson, C. J., at 690.

¹³² Murphy, J., at 717-18.

The efforts of the Court to find support in the words of John L. Lewis only serve as an invitation to dig up some of the gems penned by Secretary Krug. The Secretary, it will be remembered, informed Lewis that certain of his proposals were "of such a fundamental nature that they should be directed to the owners and private operators . . . rather than to the Government, which is only the interim custodian of these properties."¹³³ This mind you, is the sovereign as employer speaking! In fact, the only comic relief in the entire sorry story is in the strenuous efforts of both Lewis and Krug to make each other eat his own words.

It seems to me that the arguments of the dissenting Justices are unanswerable. Yet the fact is that the majority has so interpreted the Norris-LaGuardia Act as to make possible the use of seizure as a subterfuge for breaking strikes. The requirement of Justices Black and Douglas that the operation by the government be full and complete and for its own account would seem to be no real bar. The government could intervene in any private dispute at the request of the owners, seize the plant, secure an injunction on the theory that the employees were now government employees, break the strike, and then return the properties to private hands. "That," as Mr. Justice Murphy wrote, "essentially is what has happened in this case. That is what makes the decision today so full of dangerous implications for the future. Moreover, if the Government is to use its seizure power to repudiate the Norris-LaGuardia Act and to intervene by injunction in private labor disputes, that policy should be determined by Congress."¹³⁴

And before we leave the subject, let us ask two simple questions. Is *In re Debs* really dead? And if so, who, or rather what, killed it?

THE DOCTRINE OF THE VOID BUT NON-FRIVOLOUS ORDER

However much one may deplore the seeming perversion of Congressional intent involved in ruling the Norris-LaGuardia Act inapplicable, it must be conceded that an affirmation of the judgment of the District Court on this ground alone would have been infinitely preferable to the course actually adopted by the Court. The "alternative grounds which support the power of the District Court to punish violations of its orders as criminal contempt"¹³⁵ are so far-reaching in their implications that one cannot help wishing Mr. Justice Frankfurter had turned his back on the

¹³³ Note 28 *supra*.

¹³⁴ Murphy, J., at 718.

¹³⁵ Vinson, C. J., at 694.

plain meaning of the Norris-LaGuardia Act. These "alternative grounds," not John L. Lewis' behavior, constitute the "serious threat to orderly constitutional government."¹³⁶

As I have attempted to demonstrate, I do not believe these "alternative grounds" represent dictum. They are essential to the Court's decision. Essential, that is, unless one is willing to conclude from the opinions that Lewis and the United Mine Workers were found guilty of and punished for criminal contempt by Chief Justice Vinson and Justices Reed and Burton because they violated a valid court order to which the Norris-LaGuardia Act did not apply, and by Justices Frankfurter and Jackson because they violated a non-frivolous order which was void because the Norris-LaGuardia Act did apply. Three plus two equals the necessary majority. But when it is remembered that Justices Black and Douglas supported the Chief Justice and Justices Reed and Burton in holding the Norris-LaGuardia Act not applicable, balking only at the imposition of criminal penalties for the contempt already committed, then it appears that considering the "alternative grounds" as dictum and so not essential to the judgment amounts to saying that the defendants were found guilty by five Justices (Vinson, Reed, Burton, Black, and Douglas) of one thing—violating a valid order—and punished by a different five Justices (Vinson, Reed, Burton, Frankfurter, and Jackson) for another—violating a void but non-frivolous order. It is just a bit hard to see how Justices Frankfurter and Jackson could punish the defendants for something for which they were not found guilty. Even if this were possible, the judgment could have been affirmed without any statement of "alternative grounds" by the Chief Justice. Only Mr. Justice Frankfurter need have stated them, with Mr. Justice Jackson concurring.

The government's complaint sought a declaratory judgment. Pending that determination it asked for a temporary restraining order and a preliminary injunction to preserve the subject-matter of the litigation and to protect the court's jurisdiction. The government, it will be recalled, tried to side-step the Norris-LaGuardia Act by asserting—among other things—that this was not a "labor dispute," but only a controversy about the meaning of a contract. In disposing of the act, however, the Court did not adopt this argument, holding instead that insofar as the controversy

¹³⁶ Vinson, C. J., at 702. This article is in no sense a defense of the course of action adopted by John L. Lewis and the United Mine Workers. At best, that course seems to me to have been extremely ill-advised. Yet the stamp of approval given by the Supreme Court to the measures taken by the government, can have, in Mr. Justice Murphy's words, "tragic consequences even more serious and lasting than a temporary dislocation of the nation's economy resulting from a strike of the miners" (at 717). These possible consequences are what must now concern us.

was a labor dispute it was a labor dispute between the government as employer and its employees, a type of labor dispute not covered by the act.

If, however, we assume that this is the kind of labor dispute covered by the act, the court had no authority to issue any restraining order or injunction. It had no authority, in short, since the case involved or grew out of a labor dispute. But initially the court had to determine whether or not it did have this authority. It had to determine whether or not the Norris-LaGuardia Act applied to take that authority away. While deciding its own authority to grant injunctive relief, it was clearly empowered, the Court holds,¹³⁷ to preserve existing conditions. Mr. Justice Frankfurter dwells on the delicate functions of a court in these circumstances, saying that "no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide."¹³⁸

Since the defendants chose to ignore the order of the court preserving the status quo, they can be punished for criminal contempt. Now the Chief Justice and Mr. Justice Frankfurter take pains to point out that not every order of a court must be obeyed pending the court's decision as to its own jurisdiction. The question of jurisdiction might be frivolous.¹³⁹ Only then, however, "only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper."¹⁴⁰

But in the absence of a clearly frivolous question of jurisdiction and of plain usurpation by the court, the order must be obeyed until it is reversed on appeal. "No one . . .," Mr. Justice Frankfurter informs us, "can be judge in his own case."¹⁴¹ Except, he might have added, a judge.

Now here, the argument runs, the question of the court's jurisdiction in view of the possible applicability of the Norris-LaGuardia Act was a substantial one. The point "had not previously received judicial consideration,"¹⁴² and such jurisdictional questions are "apt to raise difficult technical problems."¹⁴³ Although his superb argument demonstrating that the Norris-LaGuardia Act did apply—that its "text, context, content and historical setting" all lead to this conclusion—might seem evidence to the

¹³⁷ Vinson, C. J., at 695.

¹³⁸ Frankfurter, J., at 703.

¹³⁹ Vinson, C. J., at 695-96; Frankfurter, J., at 704.

¹⁴⁰ Frankfurter, J., at 704.

¹⁴² Vinson, C. J., at 696.

¹⁴¹ Frankfurter, J., at 703.

¹⁴³ Frankfurter, J., at 703.

contrary, Mr. Justice Frankfurter is now constrained to say that "the words cannot be taken quite so simply."¹⁴⁴ The circumstances here "certainly were not covered by the Act with inescapable clarity."¹⁴⁵ The question was not "so frivolous that any judge should have summarily thrown the Government out of court."¹⁴⁶ Courts are set up to decide such questions. ". . . The very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy."¹⁴⁷ This proposition, Mr. Justice Frankfurter gives assurance, cannot be used in an ordinary labor dispute to nullify the Norris-LaGuardia Act, and any judge who used it for that purpose would be "a pretender to, not a wielder of, judicial power."¹⁴⁸ But lengthy arguments, elaborate briefs, and much reflection and consideration were here necessary to decide the question. The court, therefore, could issue appropriate orders "so as to afford the necessary time for fair consideration and decision while existing conditions were preserved."¹⁴⁹ This was a real controversy, it seems, and so the court might issue a real order. Though that order might be reversed on appeal as void, disobedience would entail punishment for contempt.

This doctrine is built on a decision by—of all people—Mr. Justice Holmes, *United States v. Shipp*,¹⁵⁰ decided in 1906. That case arose out of the conviction and sentencing to death for rape of one Johnson in a Tennessee state court. Johnson sought a writ of habeas corpus from the United States Circuit Court in Tennessee, alleging that his constitutional rights had been denied him during trial. The petition was denied, and the petitioner appealed to the United States Supreme Court. The appeal was allowed, and the Court thereupon issued an order "that all proceedings against the appellant be stayed. . . ." Shipp, the sheriff having custody of the petitioner, was notified of this order. It appeared, however, that he conspired with members of a mob which took Johnson out of jail and lynched him. For this action Shipp and other members of the mob were charged with contempt. Their defense was that the Circuit Court had no jurisdiction since the constitutional arguments asserted by the petitioner were frivolous, and that the Supreme Court had no appellate jurisdiction since the case did not involve "the construction or application of the Constitution of the United States." Therefore the order issued without jurisdiction might be violated with impunity. The Supreme Court rejected

¹⁴⁴ Frankfurter, J., at 704.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ 203 U.S. 563 (1906).

this argument as "unsound." Since Mr. Justice Holmes' language is basic to the majority's opinion in this case, it must be quoted in full:

It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. *In re Sawyer*, 124 U.S. 200; *Ex parte Fisk*, 113 U.S. 713; *Ex parte Rowland*, 104 U.S. 604. But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. . . . Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time.¹⁵¹

In oral argument before the District Court, Assistant Attorney General Sonnett said of the *Shipp* case: ". . . it cannot be distinguished."¹⁵² This, it would appear, is a slight exaggeration. In the first place, there was not involved in the *Shipp* case any Act of Congress directly forbidding the courts to issue orders in a particular class of cases. It is true that there was a problem of statutory construction, since the jurisdiction of the court under statute depended on finding a constitutional question. But there was no clear command that the court should not issue orders in that class of cases not involving a constitutional question. Whereas here there was an unequivocal withdrawal of authority to issue orders in that class of cases involving or growing out of labor disputes. And it is to be noted that the Norris-LaGuardia Act makes no exception for interlocutory orders issued in cases where there is serious doubt as to the Court's jurisdiction. Consequently, even though the court in the *Shipp* case might be without jurisdiction because of the absence of a constitutional question, and without jurisdiction in this case because of the presence of a labor dispute, the two cases are not comparable since in the *Shipp* case there was no statute forbidding the issuance of an order pending determination of the jurisdictional problem. But here such an order runs afoul of the express prohibition of Congress, because clearly an order issued to preserve the court's jurisdiction in a case which involves a labor dispute is no less an order in a case "involving or growing out of" a labor dispute merely because the first question on the agenda is whether or not it does involve or grow out of a labor dispute.

It may plausibly be urged, nonetheless, that the position taken by the Chief Justice and Mr. Justice Frankfurter rests on the distinction between

¹⁵¹ *Ibid.*, at 573.

¹⁵² Record, at 183.

an order issued in a case involving or growing out of a labor dispute and an order issued to protect the court's jurisdiction and preserve the subject matter, which order happens to be issued in a case ultimately found to involve or grow out of a labor dispute. This latter type of order, presumably, would be exempt from the prohibitions of the Norris-LaGuardia Act. But the Chief Justice, in stating that if the order were found void on appeal the petitioner would not be entitled to civil relief, makes this distinction hard to maintain. "The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court. Nor does the reason underlying *United States v. Shipp* . . . compel a different result. If the Norris-LaGuardia Act were applicable in this case the conviction for civil contempt would be reversed in its entirety."¹⁵³ The civil contempt conviction would fall because the order was void as beyond the jurisdiction of the court. And there was only one order issued, not two. It is hard to see how this one order can be both void and not-void, even though you distinguish between its civil-relief and its jurisdiction-preserving aspects. If it is void at all, it must be because it is an order issued in a case involving or growing out of a labor dispute. It cannot at the same time be a valid, disembodied, interlocutory, jurisdiction-preserving order having no relation to the labor dispute.

It is also to be noted that Mr. Justice Holmes, in citing the *Sawyer*,¹⁵⁴ *Fisk*,¹⁵⁵ and *Rowland*¹⁵⁶ cases, gave no indication that he intended to overrule them. Those cases are good authority—at least they were until the decision in the *Lewis* case served to confuse their status—for the proposition that where an order of a court is void, as being without jurisdiction, "the order punishing for contempt is equally void."¹⁵⁷ All that Holmes could have intended was to distinguish these cases. This may be done very simply since none of them involved an order of a court having for its purpose the preservation of the status quo pending a determination of its jurisdiction to proceed in the case. Not one was a case in which a court had found it necessary to preserve the subject-matter of the litigation. Nor did the contempt charged in any of them effectively destroy the subject-matter. That is why Mr. Justice Holmes brushed them aside.

¹⁵³ Vinson, C. J., at 696-97. This statement of the Chief Justice is also evidence for the view that as used in the Norris-La Guardia Act "jurisdiction" means "power."

¹⁵⁴ *In re Sawyer*, 124 U.S. 200 (1888).

¹⁵⁵ *Ex parte Fisk*, 113 U.S. 713 (1885).

¹⁵⁶ *Ex parte Rowland*, 104 U.S. 604 (1881).

¹⁵⁷ *Ex parte Fisk*, 113 U.S. 713, 718 (1885); *Beauchamp v. United States*, 76 F. 2d 663 (C.C.A. 9th, 1935).

For in the *Shipp* case it was imperative that the subject-matter be preserved. The court had authority "from the necessity of the case" to issue orders preserving the "existing conditions" and the "subject of the petition." And what did Mr. Justice Holmes mean by these phrases? Clearly he meant that while the court was deciding whether or not it had jurisdiction to grant habeas corpus it was essential that the petitioner be kept alive. "From the necessity of the case" he had to be kept alive—otherwise there could be no case. Mr. Justice Holmes removes all doubt as to his meaning by saying—in a passage ignored by the Court here: "We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. The murder of the petitioner has made it impossible to decide that case. . . ."¹⁵⁸

But there is no comparable "necessity of the case" here. The actions of Lewis and the United Mine Workers did not oust the jurisdiction of the court, they did not make it impossible to decide the case presented by the government—the question of whether or not Lewis had the authority unilaterally to terminate the Krug-Lewis Agreement. Instead of listening to disjointed discussions on sovereignty and the subtleties of civil and criminal contempt, Judge Goldsborough might have been applying his knowledge of contract law to the problem at hand. Whether John L. Lewis ignored the preliminary order and whether the miners stayed away from the mines or not—the contract problem remained properly before the court, ready, willing, and able to be decided. A declaratory judgment issued while the miners were on strike would have been just as valid and effective a judgment as one issued at any other time. The ability of the court to proceed in the cause was in no wise defeated by what Lewis and the United Mine Workers did. Mr. Shipp's violation of the Court order had a totally different effect. It should be obvious even to an Assistant Attorney General that there can be no habeas corpus if the corpus has become a corpse.

As Mr. Justice Murphy observes of the Court's reasoning, "these arguments have a seductive attractiveness here."¹⁵⁹ Judges are very frequently seduced by attractive argument in labor cases. Witness Lord Chancellor Halsbury's would-be contribution to labor law in the famous English case

¹⁵⁸ *United States v. Shipp*, 203 U.S. 563, 573-74 (1906). There is a further distinction which the Court does not appear to recognize. In the *Shipp* case an order was issued pending determination of the Court's jurisdiction over the controversy. Here the doubt relates to the district court's jurisdiction or authority to grant injunctive relief. By issuing a temporary order pending a determination of that jurisdictional question, the district court necessarily asserts its authority and so resolves the doubt in its favor. See *Jurisdictional Considerations in United States v. United Mine Workers*, 47 Col. L. Rev. 505, 506-7 (1947).

¹⁵⁹ Murphy, J., at 718.

of *Allen v. Flood*¹⁶⁰ in 1898, which involved a union representative's inducing an employer to discharge two workers who belonged to another union. The Lord Chancellor said that this was like the case in which it was long ago held that a man behaved unlawfully when he deliberately scared away wild fowl from his neighbor's decoys by firing a gun into the air over his own land.

The *Shipp* case has an equal relevance here. It ignores the whole background of the Norris-LaGuardia Act and the hard inescapable facts of labor relations. The labor injunction was a strike-breaker pure and simple. It did its dirtiest work in the form of the ex parte restraining order, in the name of the status quo. But there is and can be no status quo in a labor dispute. Relations are too fluid and fast-moving. As soon as you require unions and workers to obey a court order, you have in all likelihood effectively broken the strike, and without there having been an opportunity for the merits of the controversy to be heard. To say that the order can be tested on appeal is simply to acknowledge the fact that the order has served its purpose by forcing the appeal. The history of the labor injunction shows that most such cases were never carried beyond the restraining order or preliminary injunction stage. "The preliminary proceedings, in other words, make the issue of final relief a practical nullity."¹⁶¹ The strike being broken, the litigation terminates.

Congress knew all this and intended the Norris-LaGuardia Act to put a stop to it. In the words of Mr. Justice Murphy:

If we are to hold these defendants in contempt for having violated a void restraining order, we must close our eyes to the expressed will of Congress and to the whole history of equitable restraints in the field of labor disputes. We must disregard the fact that to compel one to obey a void restraining order in a case involving a labor dispute and to require that it be tested on appeal is to sanction the use of the restraining order to break strikes—which was precisely what Congress wanted to avoid. Every reason supporting the salutary principle of the *Shipp* case breaks down when that principle is applied in this setting.¹⁶²

Mr. Justice Frankfurter assured us that in ordinary private labor disputes the Norris-LaGuardia Act could not be defeated by the technique of securing an injunction under the guise of preserving the court's jurisdiction to decide whether or not it has jurisdiction. Yet in a case cited approvingly by the Chief Justice, *Carter v. United States*,¹⁶³ the origi-

¹⁶⁰ [1898], A.C. 1, 77.

¹⁶¹ Frankfurter and Greene, *The Labor Injunction* 200 (1930).

¹⁶² Murphy, J., at 719.

¹⁶³ 135 F. 2d 858 (C.C.A. 5th, 1943).

nal petition for an injunction in a labor dispute was brought by a private party. Thus, although the Court rejected the government's contention that asking for a declaratory judgment with regard to a contract was enough to by-pass the act, a technique any private employer might use, it appears that the *Shipp* doctrine again brings the private employer into his own.

In the *Carter* case a restaurant owner obtained a temporary restraining order, without notice but after entry of findings as required by the act, to restrain picketing, boycotting, and similar activities on the part of defendants. An injunction was later issued over the defendant's objections that the court had no jurisdiction because of lack of diversity of citizenship and the absence of a federal question. On appeal these objections were sustained and the injunction vacated.¹⁶⁴ Meanwhile, however, the defendant had violated the order, and for this he was held to be properly punishable for criminal contempt. The Circuit Court of Appeals applied the *Shipp* case, saying that the trial court could lawfully "by a temporary injunction preserve the business which was the subject of the litigation . . . pending a hearing of a doubtful question of jurisdiction."¹⁶⁵ The court stated that the question of jurisdiction was not frivolous. But clearly this is a misuse of the *Shipp* doctrine. Between preserving petitioner's life in the *Shipp* case and petitioner's restaurant business in the *Carter* case there is a world of difference.

Now in the *Carter* case the petitioner complied with the Norris-La-guardia Act. In fact, with a labor dispute on his hands, he attempted to argue that the act impliedly gave federal courts power to grant injunctive relief in all cases provided certain procedural requirements were met and findings made. His only trouble was that he had no business in a federal court at all. Consequently, the order of the court was not an order issued in face of the express prohibitions of the act. So far as the act was concerned the court complied with it. What was lacking was federal jurisdiction. Thus the order preserving the status quo pending determination of that question at least had this element of respectability—it was not in defiance of the express commands of Congress. So the *Carter* case is not strictly applicable to the *Lewis* case. It is like the *Shipp* case in that no statutory prohibition was involved, but it represents a misapplication of the *Shipp* doctrine in that there was no "necessity of the case" to preserve

¹⁶⁴ *Brown v. Coumanis*, 135 F. 2d 163 (C.C.A. 5th, 1943).

¹⁶⁵ *Carter v. United States*, 135 F. 2d 858, 862 (C.C.A. 5th, 1943). The court distinguished the *Sawyer*, *Fisk*, and *Rowland* cases, *supra* notes 154, 155, and 156, on the ground that they involved civil and not criminal contempts. But *Ex parte Fisk* is plainly a criminal contempt case.

the petitioner's restaurant business. It was not a case where without the order there could have been no further proceedings.

The *Carter* case is clearly wrong, because it involves punishing a defendant for violating an order that turns out to be void on appeal. This, as dissenting Judge Hutcheson objects,¹⁶⁶ is directly contrary to the provisions of the United States Code which authorize proceeding against a person for criminal contempt only if he has willfully disobeyed "any *lawful* writ, process, order, rule, decree, or command of any district court of the United States. . . ."¹⁶⁷ Since the court had no authority to issue the order, that order was not lawful. Therefore the defendant should not have been punished.

The same statutory provision governs in the *Lewis* case, although it is not to be found in any of the majority opinions, not even in the footnotes. Yet the majority must implicitly interpret "lawful" to include "interlocutory orders issued without jurisdiction as determined finally upon review."¹⁶⁸ It should be noted that the *Shipp* case, on the other hand, is not affected by any difficulty as to the meaning of "lawful," for there the Court never determined that the order Shipp had violated was invalid, since it never passed on the question of its jurisdiction to grant habeas corpus.

Mr. Justice Rutledge makes the further point that misuse of the *Shipp* doctrine in this way would serve to defeat the jurisdiction of courts in habeas corpus proceedings.¹⁶⁹ Supposing Lewis had been punished by imprisonment instead of by fine. The position taken by the majority would require denying his writ for habeas corpus, even though the court might find void the order under which he was imprisoned. Until fairly recently, habeas corpus has been the only method of securing review of a criminal contempt conviction.¹⁷⁰ A party who chooses to ignore an order is taking his chances that it will turn out to be void on appeal, or when he brings habeas corpus, and traditionally a person imprisoned for violating a void order has been held entitled to release.¹⁷¹

In any event, when can one say that the question of jurisdiction before the court is only frivolous? When is the court "merely usurping judicial forms and facilities"? Mr. Justice Holmes, as is well known, said of the doctrine of *Swift v. Tyson*: "I say that this is a pure usurpation founded on a subtle fallacy. They say the question is a question of the common law

¹⁶⁶ *Ibid.*

¹⁶⁷ 38 Stat. 783 (1914), 28 U.S.C.A. § 386 (1928) (italics added).

¹⁶⁸ Rutledge, J., at 729.

¹⁶⁹ Rutledge, J., at 726.

¹⁷⁰ See *Bessette v. Conkey Co.*, 194 U.S. 324, 330-38 (1904).

¹⁷¹ See *Ex parte Young*, 209 U.S. 123, 143 (1908).

and that they must decide what the common law is."¹⁷² But the jurisdiction of a court, no more than the common law, is not "a brooding omnipresence in the sky."¹⁷³ And particularly not when Congress, in the exercise of its constitutional authority, has placed definite and clear limits on that jurisdiction.

In *Thomas v. Collins*¹⁷⁴ a denial of habeas corpus was reversed on the ground that the statute under which the restraining order was issued was invalid. The defendant Thomas had deliberately refused to comply with the court order enjoining him from soliciting memberships in any union affiliated with the CIO without first obtaining an organizer's card as required by the statute. The Court said: "We think he was within his rights in doing so."¹⁷⁵ Why was not Thomas required to obey the court's order and contest it on appeal? Was the order of the court a plain usurpation? It could be, and at least Judge Goldsborough thought so.¹⁷⁶

But if one takes the Chief Justice literally, one cannot be sure that he will escape punishment if the statute under which the order is issued turns out to be unconstitutional, despite the *Thomas* case. ". . . We find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued."¹⁷⁷ And the Chief Justice cites the case of *Howat v. Kansas*.¹⁷⁸ Now it is true that Mr. Chief Justice Taft used language in that case which seems to support this startling proposition, but the opinion explicitly states that the order did not depend for its validity on the constitutionality of the statute under attack.

Nonetheless, the sweeping language used here by the Chief Justice is disturbing. It is well settled that a man cannot be punished for violating a statute which turns out to be unconstitutional. Now just exactly why should an order of a court have any different standing? Why should a man be punishable for violating an order of a court that turns out, not to be merely erroneous, but void—as much a nullity as an unconstitutional statute is usually thought to be?¹⁷⁹ When we place these two propositions

¹⁷² 2 Holmes-Pollock Letters 215 (1941).

¹⁷³ Holmes, J., dissenting in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917).

¹⁷⁴ 323 U.S. 516 (1945).

¹⁷⁵ *Ibid.*, at 536.

¹⁷⁷ Vinson, C. J., at 696.

¹⁷⁶ Record, at 145.

¹⁷⁸ 258 U.S. 181 (1922).

¹⁷⁹ Res judicata principles have been applied to prevent collateral attack on determinations of jurisdiction which were not contested on review. *Stoll v. Gottlieb*, 305 U.S. 165 (1938). They

side by side, however, it is clear that the language used by the Chief Justice, and apparently in direct contradiction to the doctrine of *Thomas v. Collins*, is full of sinister suggestion. Assume a statute is passed giving courts authority to restrain certain types of political meetings and providing as well for the criminal prosecution of persons who conduct or participate in such meetings. According to our present notions, a person who violates that statute cannot be punished when on appeal the statute is declared unconstitutional. But what if a court has issued an order restraining him from participating in a meeting, pending a determination as to whether the contemplated meeting is of the type banned by the statute? Can he be punished for criminal contempt when he violates that order? I would like to think that the answer is clear. But as the doctrine of the *Thomas* case seems to have been modified, it is now apparently necessary to show that the court was usurping its authority, that the whole question of its jurisdiction was frivolous.

Nor should it be overlooked that where a court is asked to issue a restraining order it is being asked to exercise power. Is it likely that the judge in most instances is going to treat this as a frivolous request? We may be sure that some private employer will attempt to use the declaratory judgment technique and the *Shipp-Carter-Lewis* doctrine to obtain injunctive relief in a labor dispute. If the length of the briefs and the eloquence of counsel are criteria of the substantiality of the question, nothing is surer than that the briefs and arguments will be imposing. The question will be novel, never before decided, and the decision in the *Lewis* case will offer pages and pages of brand-new authority requiring close study. Let us suppose the first attempt fails, what of a second where the facts are somewhat different? As any lawyer knows, no two cases are exactly alike, and the ability of a lawyer depends in large part on his skill in distinguishing them. Are these questions of possible jurisdiction frivolous? Can unions and workers take the risk of violating the order some anti-labor judge is bound to issue as though it were nothing but "a letter

have also been used to qualify the notion that an unconstitutional statute is simply a nullity. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). It is far from obvious that these principles should govern where the jurisdictional question concerns the power of a court to issue a valid, binding order. If he is to review the order, the defendant must comply with it. In the field of labor relations this will frequently terminate the proceedings, since the defendant stands to gain from a ruling that the order was not valid only if he has not been required to obey it pending that ruling. Unions have a chance against invalid injunctions only if they can attack them collaterally. Moreover, it requires some stretching of the concept of collateral attack to apply it to a contempt trial growing directly out of the injunction proceedings. This is particularly true here where the line between the two was never very clearly drawn in the District Court. For an excellent early discussion, see *Collateral Attack upon Labor Injunctions Issued in Disregard of Anti-injunction Statutes*, 47 Yale L.J. 1136 (1938).

to a newspaper"? Dare they take the plain words of the Norris-LaGuardia Act "so simply"?

With this incredible doctrine of the void but non-frivolous order the Court has finally kicked over all the traces. The most skillfully drafted statute purporting to limit the jurisdiction of courts is nothing but a printed invitation to those courts to determine whether or not and to what extent limits have been imposed. The fate of the Clayton Act¹⁸⁰ and now of the much more carefully-drawn Norris-LaGuardia Act is all the evidence that is needed. Once a court has been invited to decide, and while it is deciding, the difficult problems of jurisdiction, it can issue such orders as it pleases provided only they have some connection with the litigation, the subject-matter of which the court feels its duty to preserve. To such a power there is "hardly any limit but the sky."¹⁸¹ Its use need not be confined to any set of circumstances or subjects. The field of civil liberties is no more immune than the field of labor relations. The *Shipp-Carter-Lewis* doctrine can very well mean that "the liberties of our people would be placed largely at the mercy of invalid orders issued without power given by the Constitution and in contravention of power constitutionally withheld by Congress."¹⁸²

The history of the assumption and usurpation of power by the judiciary in America is a familiar story. But this doctrine, I submit, is as flagrant an instance as our constitutional history provides. Contempt of court had its origin in the notion that disobedience of the King's courts constituted contempt of the King.¹⁸³ The flavor of long-discarded divine right which has lingered around the concept of contempt has finally emerged as a doctrine—the doctrine that the Court can do no wrong. The *Lewis* case is the ultimate in judicial power. It clearly says—"Courts are courts, and only courts can say what courts shall be and do."

III

A large and liberal construction in ascertaining offences, and a discretionary power in punishing them, is the idea of *criminal equity*; which is in truth a monster in jurisprudence.—EDMUND BURKE.¹⁸⁴

¹⁸⁰ 38 Stat. 730 (1914), 29 U.S.C.A. § 52 (1942). See Gregory, Labor and the Law 159-74 (1946).

¹⁸¹ Holmes, J., dissenting in *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930).

¹⁸² Rutledge, J., at 726.

¹⁸³ Fox, *The History of Contempt of Court* 44-45 (1927).

¹⁸⁴ *Thoughts on the Causes of the Present Discontents*, 2 Works 57 (World's Classics ed., 1930). Compare the language of Frankfurter, J., dissenting in *Penfield Co. of California v. SEC*, 67 S. Ct. 918, 930 (1947): "The true significance of our opinion in *United States v. United Mine Workers* . . . as we understand it, is that contempt proceedings are *sui generis* and should be treated as such in their practical incidence. They are not to be circumscribed by

The District Court was nothing if not candid. Judge Goldsborough even remarked to defendants' counsel: "But if you know the exact difference between civil contempt and criminal contempt, you are the only person in the United States who does."¹⁸⁵

In theory there is a difference, a difference surrounded by a "long existing confusion"¹⁸⁶ which this case has only served to compound. A civil contempt proceeding is for the purpose of requiring the defendant to do something for the benefit or advantage of the petitioner or to prevent his doing something which harms the petitioner. For civil contempt "the punishment is remedial and for the benefit of complainant. . . ."¹⁸⁷ It may be either compensatory, to repay the complainant for the damage he has suffered, or coercive, to require the defendant to do something desired by the complainant. A criminal contempt proceeding is for the purpose of punishing the defendant for his actions or his failure to act in accordance with the requirements imposed upon him by the court. The punishment, therefore, "is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions."¹⁸⁸

John L. Lewis and the United Mine Workers were held to have committed both civil and criminal contempt, a judgment which was entered in one proceeding. No serious effort was made during the trial to distinguish between the two charges, nor did the sentence imposed by the District Court in any way indicate which portions of the fine were for criminal contempt, and which for civil contempt. No part of the fine was coercive. The entire amount was punitive and, so far as any civil relief was involved, compensatory.

Mr. Justice Rutledge eloquently argues that to mingle these two different procedures with different purposes into "a single criminal-civil hodgepodge"¹⁸⁹ is nothing less than shocking. It ignores completely what he calls "one of the great constitutional divides,"¹⁹⁰ the difference between civil procedure and criminal procedure. It puts the defendant in the impossible position of not knowing which of two sets of rules and safeguards are to apply to his trial, of not knowing "whether relief or punishment was the object in view."¹⁹¹ The Assistant Attorney General felt compelled to say to the District Court only this: ". . . I think the simple answer is, since the complainant is the United States, or the people of the

procedural formalities or by traditional limitations of what are ordinarily called crimes, except insofar as due process of law and the other standards of decency and fairness in the administration of federal justice may require."

¹⁸⁵ Record, at 191.

¹⁸⁶ Rutledge, J., at 733.

¹⁸⁷ Ex parte Grossman, 267 U.S. 87, 111 (1925).

¹⁸⁸ Ibid.

¹⁸⁹ Rutledge, J., at 730.

¹⁹⁰ Ibid.

¹⁹¹ Rutledge, J., at 735.

United States, that this contempt is both civil and criminal."¹⁹² As an answer this is patently insufficient. The government could not seriously contend that all cases in which the United States appears as the civil complainant become by that simple fact alone both civil and criminal contempts.¹⁹³ Nor should this dual role of the government "as 'employer' seeking remedial relief and in sovereign capacity seeking to vindicate the court's authority by criminal penalty"¹⁹⁴ serve to nullify the distinctions between two different proceedings. Such a mingling was held by the Supreme Court in the *Gompers*¹⁹⁵ case to require reversal of the judgment for criminal contempt. Here the Chief Justice observed only that "substantial prejudice" was not shown.¹⁹⁶

Nowhere was the charge described as criminal contempt in accordance with the Rules of Criminal Procedure.¹⁹⁷ This fact was conceded. Yet the Chief Justice concluded that since the defendants in their motion to discharge the rule to show cause and in oral argument showed they were "quite aware that a criminal contempt was charged," they did not suffer "substantial prejudice."¹⁹⁸ This amounts to saying that since, being required to guess, the defendants guessed correctly, they were not harmed. The whole purpose of the rule, of course, is to save defendants from the necessity of guessing.

The Supreme Court tacitly recognized the error of the District Court with respect to the fines imposed, since it reduced the amount of the unconditional fine from \$3,500,000 to \$700,000, describing this as a punitive penalty for criminal contempt. The balance was set up as a conditional fine to coerce the defendants into obedience, nothing being provided for compensation to the government as a complainant entitled to civil relief. Neither the District Court nor the Supreme Court employed any standards to justify the size of the fines. The War Labor Disputes Act authorizes as maximum penalties a fine of \$5,000 or a year's imprisonment or both. The net result in this case was to impose upon Lewis twice the maximum statutory fine and on the United Mine Workers one hundred forty times that maximum. If a statute imposing criminal sanctions can thus be enforced by the simple device of bringing a civil suit for injunctive

¹⁹² Record, at 196.

¹⁹³ Cf. *Penfield Co. of California v. SEC*, 67 S. Ct. 918 (1947), and particularly the concurring opinion of Rutledge, J., at 923.

¹⁹⁴ Rutledge, J., at 739.

¹⁹⁵ *Gompers v. Buck Stove and Range Co.*, 221 U.S. 418 (1911).

¹⁹⁶ *Vinson, C. J.*, at 699.

¹⁹⁷ Note 65 *supra*.

¹⁹⁸ *Vinson, C. J.*, at 698. But cf. *Western Fruit Growers v. Gottfried*, 136 F. 2d 98 (C.C.A. 9th, 1943).

relief and of "then convicting the person who violates it of criminal contempt, regardless of the order's validity and of any of the usual restraints of criminal procedure, the way will have been found to dispense with substantially all the protections relating not only to the course of the proceedings but to the penalty itself."¹⁹⁹ This is unlimited power with a vengeance.

Space does not permit an exhaustive discussion of the procedural aspects of the case. Mr. Justice Rutledge properly observed that "at times in our system the way in which courts perform their function becomes as important as what they do in the result."²⁰⁰ The procedure here seems utterly to disregard statutory requirements and constitutional safeguards. The same must be said of the penalties imposed. In the vocabulary of Mr. Justice Murphy, they are "vindictive."²⁰¹ One can only hope that the righteous concern and sense of alarm expressed so ably by Justices Murphy and Rutledge will yet be heeded.

One further point remains. The District Court ruled that since the Norris-LaGuardia Act did not apply the defendants were not entitled to a jury trial. The Supreme Court affirmed this ruling, conceding, as did the government, that defendants would have been entitled to a jury trial had the Norris-LaGuardia Act been applicable.²⁰² Now on the view I have taken of the actual mechanics involved in the Court's sustaining the judgment convicting the defendants of criminal contempt and imposing punitive fines for that contempt, the Court was required to assume that the act did apply. For if my argument is correct, that portion of the Court's decision affirming the judgment on the grounds that the defendants had violated a non-frivolous order which was void as contrary to the Norris-LaGuardia Act is not dictum.

There is no point in repeating that argument here. But if the "alternative grounds" are essential to the judgment, and those grounds assume "that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief,"²⁰³ then I cannot escape the conclusion that to be punished as they were the defendants ought properly to have been tried before a jury in accordance with the Norris-LaGuardia Act. I recognize, however, that one sentence of Mr. Justice Frankfurter's opinion may serve to pull the props out from under this argument. His final sentence reads: "I concur in the Court's opinion insofar as it is not inconsistent with these views, and, under the compulsion of the ruling of the majority that the court

¹⁹⁹ Rutledge, J., at 740.

²⁰⁰ Rutledge, J., at 730.

²⁰¹ Murphy, J., at 719.

²⁰² Vinson, C. J., at 698 n. 69; Frankfurter, J., at 705 n. 2.

²⁰³ Vinson, C. J., at 697.

below had the jurisdiction to issue its orders, I join in the Court's judgment."²⁰⁴ This seems to say that although the Justice disagrees violently with the Court's ruling on the Norris-LaGuardia Act he joins in the judgment based on that ruling, taking care, however, to dissociate himself from that part of the opinion justifying that ruling. I concede that this strange action may invalidate my analysis, although it in no way helps in trying to figure out what position Mr. Justice Jackson occupied in this confusion.²⁰⁵ Mr. Justice Frankfurter appears to have been so concerned with maintaining the dignity of the judiciary that he was willing to swallow a result based on reasoning he could not swallow.

IV

Though written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people. . . .—THOMAS JEFFERSON²⁰⁶

"We have examined the other contentions advanced by the defendants but have found them to be without merit."²⁰⁷ This is all the Court has to say concerning the plea that the restraining order deprived the defendants of their constitutional rights. The Court has repeatedly held that publicizing the facts of a labor dispute is an exercise of the right of free speech protected by the Constitution.²⁰⁸ Yet here the sweeping character of Judge Goldsborough's order effectively prevented the defendants from saying or writing anything about their dispute with the government. They could not say that in the opinion of their counsel they had a right to terminate the Krug-Lewis Agreement, even though the legal merits of their contention had not been decided by any competent tribunal. They could not speak to members of the union, telling them the full facts of the controversy and urging them to back up the union or to remain away from work. And apparently, since the theory of the government's case must have been that the miners were acting in concert with the defendants, the miners were restrained from exercising their right to strike. It is no answer for Judge Goldsborough to say that "the miners are not in this case" or to describe the greater portion of his order as "ancillary." Nor is it an answer for the Assistant Attorney General to justify the breadth of the

²⁰⁴ Frankfurter, J., at 712-13.

²⁰⁵ "Mr. Justice Jackson joins in this opinion except as to the Norris-LaGuardia Act which he thinks relieved the courts of jurisdiction to issue injunctions in this class of case" (at 703).

²⁰⁶ Thomas Jefferson on Democracy 153 (Pelican Books ed., 1946).

²⁰⁷ Vinson C. J., at 703.

²⁰⁸ *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Senn v. Tile Layers' Protective Union*, 301 U.S. 468 (1937).

order by referring vaguely to cases holding that words having the effect of force may be restrained.²⁰⁹ The inescapable fact of the matter is that Judge Goldsborough's order is infected with all the vices which characterized the pre-1932 labor injunction, including the vice of unconstitutionality.

The conclusion must be that government employees, even government employees of the hybrid variety found here, have no constitutional rights. Their loyalty must be to their employer, the government, right or wrong. If they become involved in a labor dispute with that employer, their rights in that dispute are too insignificant to bother about. This is dangerous doctrine.

As Max Lerner has phrased it, this is the Labor Dred Scott case. At a time when government enterprise and government intervention in business and industry inevitably are bound to increase, the Court has refused to recognize that government employees have any constitutional rights which the Court need protect. The long fight of labor to secure recognition of its rights to carry on the struggle with capital "in a fair and equal way"²¹⁰ comes to naught in the shadow of the sovereign. A more undemocratic result in a world desperately in need of democracy could hardly be imagined.

The means employed to achieve this result are unlikely to alter the defendants' "total lack of respect for the judicial process."²¹¹ Or to cause many others to respect it. For the judicial process here became "a weapon for misapplying statutes according to the grave exigencies of the moment."²¹² With exasperating selectivity the Court chose what it liked and ignored what it could not plausibly pervert. The words of Congress and the words of the Court itself were twisted and distorted to suit the needs of a conclusion. Virtually every point of law touched by the Court has suffered. The clear is now unclear. And the not so clear before is almost beyond recognition.

The doctrine of the void but non-frivolous order may well prove a technique for government by decree. Fifteen years ago Senator Norris wrote:

It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law,

²⁰⁹ Record, at 185.

²¹⁰ Holmes, J., dissenting in *Vegelahn v. Guntner*, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896).

²¹¹ Vinson, C. J., at 703.

²¹² Murphy, J., at 717.

has undertaken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge. It cannot be successfully claimed that the courts have not written into these injunction cases a new law of labor disputes, fitting the law to each particular case, and then enforcing this new law made by the court.²¹³

The *Lewis* case reopens a vast area and suggests new areas for the making of such special laws in whatever crises may arise to require them. A government desirous of imposing "unity" on an "un-united" citizenry could ask for no better weapon. The *Lewis* case does not authorize government by these special laws or decrees—it only suggests that their use might be easy.

United States v. United Mine Workers of America is at one with that imposing array of cases in which the rights and liberties of the people have suffered at the hands of the judiciary—*Dred Scott v. Sandford*,²¹⁴ *The Civil Rights Cases*,²¹⁵ *In re Debs*,²¹⁶ *Lochner v. New York*,²¹⁷ and a host of others. Great cases all, but bad law—incredibly bad law.

²¹³ S. Rep. 163, 72d Cong. 1st Sess. (1932).

²¹⁴ 19 How. (U.S.) 1 (1857).

²¹⁶ 158 U.S. 564 (1895).

²¹⁵ 109 U.S. 3 (1883).

²¹⁷ 198 U.S. 45 (1905).