

Inherent Executive Power and the Steel Seizure Case: A Landmark in American Constitutional Law

BERNARD SCHWARTZ*

New York

“At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry’s men before Harfleur, they stand like greyhounds in the slips straining from the start.”¹

On April 8th, 1952, “the old bugle-note rang out, clear and thrilling, calling Americans to a fresh debate on the Constitution”.² For, on that day, the Secretary of Commerce was directed by President Truman to take possession of and operate the plants and facilities of the nation’s steel industry. The President had acted in order to head off a steel strike, which was to have begun on April 9th. The indispensability of steel as a component of substantially all war materials led the President to believe that the proposed work stoppage would jeopardize the national defence of the United States and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.

But, though the President’s action in ordering seizure of the steel industry was motivated by his conception of what was necessitated by the public interest, he had acted without any statutory authorization to do what he did. The steel companies brought proceedings against the Secretary of Commerce to re-

* Bernard Schwartz, B.S.S. (College of the City of New York), LL.B. (New York University), LL.M. (Harvard), Ph.D. (Cantab.), Associate Professor of Law, New York University, Visiting Professor, Faculté de Droit et des Sciences Politiques, Ecole Libre des Hautes Etudes. Professor Schwartz is the author of a number of books on public law questions and has contributed to this and other legal periodicals.

¹ The Economist, May 10th, 1952, p. 370.

² *Ibid.*

strain him from enforcing the President's seizure order, on the ground that the order was illegal. The government, in opposing the action, asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the nation that the President had "inherent power" to do what he had done — power "supported by the Constitution, by historical precedent, and by court decisions".³

The issue was thus squarely joined upon a question as important as any ever decided by the American courts under their authority as arbiters of constitutional disputes. The question is one that had never before been authoritatively determined by the American judiciary, although it is one that is fundamental in modern government. It is the question of the extent of inherent executive power — one that is as important in other countries as it is under the American constitutional system.

To the comparative observer, the judicial resolution of an issue such as that presented in the steel seizure case illustrates, in a striking manner, the key position of the judiciary in the American scheme of things. The American Constitution is not a self-executing document. The *ought* laid down by the Constituent Assembly of 1789 must run the gauntlet of judicial interpretation before it attains the practical status of an *is*. This is, in a sense, true of all legislation; but it is especially true of a constitution, whose terms must, of necessity, be less specific and detailed than those of an ordinary law. A constitution is, in practice, what the courts say it is. The American Constitution, like other organic instruments, would lose much of its practical efficacy if its terms were to be read by the courts in a decimating spirit.

It is from this point of view that one must approach the decision of the American courts in the steel seizure case. A constitution is a mere paper instrument unless the guaranties contained in it are adequately safeguarded by the courts. It is judicial enforcement that makes a constitutional right a thing of meaning, for rights without remedies to enforce them are denuded of practical content.

It is true, as one of the great opinions of John Marshall pointed out, that we must never forget that "it is a *constitution* we are expounding"⁴ — a living instrument that must be construed so as to meet the practical necessities of present-day government. The courts would be derelict in their duty if they allowed their

³ *Youngstown Sheet & Tube Co. v. Sawyer* (1952), 72 Sup. Ct. 863, at p. 865.

⁴ *McCulloch v. Maryland* (1819), 4 Wheat. 316, at p. 407 (U.S.).

individual political, economic and social theories to lead them to invalidate exercises by the executive branch of powers needed to cope with contemporary conditions. One familiar with the background of judicial supremacy in the United States during the last century cannot help but feel sympathetic toward assertions of judicial self-restraint, in so far as the invalidation of governmental action is concerned. But even self-restraint must have its limits if the provisions of a constitution are to be more than mere maxims of political morality.⁵ Judicial abnegation and judicial abdication are two entirely different things.

Inherent Executive Power

In 1950, a study of French administrative law was published in England entitled *Government by Decree*.⁶ This title was intended to emphasize the fact that, in a continental country like France, government is carried on as much by exercises of inherent executive power as it is by administrative exercises of authority delegated by the legislature. This is particularly apparent in so far as the administrative rule-making power is concerned. The common lawyer who examines the rule-making power in France is immediately struck by the fact that, in the French system, the administration is vested with the inherent authority to promulgate rules that have the force of law. This is something that is foreign to Anglo-American conceptions of executive power, for, in our theory, the administration possesses only the rule-making authority that has been delegated to it by the legislature.

It is true that, even in the common-law world, the extent of administrative rule-making power has been drastically altered in the last fifty years. If, as the Report of the United States Attorney General's Committee on Administrative Procedure pointed out, "the promulgation of general regulations by the Executive, acting under statutory authority, has been a normal feature of federal administration ever since the Government was established",⁷ the area of administrative authority has certainly increased by leaps and bounds since the founding of the American Republic. In mere volume, indeed, the amount of administrative rule-making completely dwarfs the number of statutes enacted by the federal Congress. And what is true of volume is true also of degree of authority. Anglo-American legislatures are tending more and more to enact legislation of the "skeleton" type, which lays down

⁵ The term used in Dicey, *Law of the Constitution* (9th ed., 1939) p. 135.

⁶ Sieghart, *Government by Decree* (1950).

⁷ Final Report (1941) p. 97.

only the broadest standards to limit the administrative rule-making power. In such cases, the flesh and the blood — not to mention the soul — of the scheme of legislative regulation have to be provided by the rules promulgated by the administration.⁸

Yet, even though the administrative rule-making power is an enormous one today in the common-law world, it is still one that has its source in delegations by the legislature. In Anglo-American theory, it is only the elected representatives of the people who have been vested with the inherent power to legislate. Other governmental organs may exercise legislature authority only by virtue of an express grant of such authority from the legislature. It is in this sense that the common lawyer has become accustomed to the term "delegated legislation", as indicating the exercise by the administration of rule-making authority that has been delegated to it.

The French Constitution contains a general direction to the head of the executive branch to ensure the execution of the laws. Under the Constitution of 1946, it is the French Prime Minister who is vested with this constitutional charge.⁹ So far as his rule-making authority is concerned, he has no need of an express legislative delegation. A general rule-making authority is to be found in his "inherent powers". This is the term used in a famous French case, where the executive power was expressly stated to be based upon the constitutional charge to ensure the execution of the laws.¹⁰ Under the French theory, the inherent rule-making authority of the executive is a very broad one. It includes the power to promulgate any rule that is considered necessary to promote public order, safety, health and tranquility — which, in effect, means any rule the executive deems to be in the public interest.

American constitutional theorists have not been slow to claim for the executive in the United States an inherent power similar to that possessed by the executive in continental countries like France. Such theories, which involve in effect a readaptation of the English notion of prerogative to contemporary American conditions, appear inconsistent with the basic Anglo-American theory of administrative authority as delegated, rather than inherent. It has, however, been difficult to assert categorically that they are wholly incorrect, because of the lack of clarity in the provisions relating to executive power in the American Constitution.

⁸ Compare Allen, *Law and Orders* (1945) p. 122.

⁹ Article 47, Constitution of October 27th, 1946.

¹⁰ Labonne, *Conseil d'Etat*, August 8th, 1919.

Constitutional Provisions

The domain of the executive power, as one observer has expressed it, constitutes a sort of "dark continent" in American jurisprudence, the boundaries of which are still undetermined.¹¹ The constitutional provisions are among the most unclear in the American organic instrument. "The most defective part of the Constitution beyond all question", asserted an acute American student over a century ago, "is that which relates to the Executive Department. It is impossible to read that instrument without being struck with the loose and unguarded terms in which the powers and duties of the President are pointed out."¹² The language of article II of the American Constitution, which contains the sections dealing with the executive and its powers, is vague and indefinite by comparison with the articles defining the authority of the other branches of the government. Its important provisions are contained in the following sentences: "The executive power shall be vested in a President of the United States of America. . . . The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States. . . . he shall take Care that the Laws be faithfully executed."

One American school of constitutional construction — of which the outstanding adherent was President Theodore Roosevelt — has derived a theory of inherent executive power from the differences between the language used in article II and in article I of the American Constitution. The latter, which deals with the Congress and its powers, reads: "All legislative powers herein granted shall be vested in a Congress". The absence of such express limitation in the general grant of "*the* executive power" to the President has led to the assertion that the authority vested in the President includes all powers executive in nature, though not specifically enumerated in article II. Advocates of this view have maintained, in the words of its leading exponent, that "the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers". They have denied "that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization for it".¹³

¹¹ Garner, *The Executive in the United States in War Time* (1918) *Revue du Droit Public* 5, 13.

¹² Upshur, *A Brief Inquiry into the Nature and Character of Our Federal Government* (1840) p. 116.

¹³ T. Roosevelt, *Autobiography* (1927) p. 57.

Rejection of Inherent-Power Theory

If the decision of the American courts in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁴ the steel seizure case, means anything, it means that they have rejected this theory of inherent power in the executive. In that case, it will be recalled, the steel companies had brought proceedings in the District Court, the court of general jurisdiction in the federal judicial system, to enjoin the Secretary of Commerce from taking any action under the President's steel seizure order. The case was heard before David A. Pine, a jurist on the bench of the District Court in the nation's capital. "Up to that moment only a minute part of the population had ever heard of Judge Pine, though there were many lawyers and others in Washington who knew him, or knew of him, and held him in respect. But overnight his place in the history books became secure."¹⁵

On April 29th, 1952, Judge Pine, in a now-famous decision, seized the constitutional issue by the bit and ruled that the President's steel seizure order was illegal.¹⁶ Referring to the provisions of article II of the American Constitution, which have already been quoted, the learned jurist asserted: "Neither singly nor in the aggregate do they grant the President, expressly or impliedly, . . . the 'residuum of power' or 'inherent' power which authorizes him, as defendant claims, to take such action as he may deem to be necessary, including seizure of plaintiffs' properties, whenever in his opinion an emergency exists requiring him to do so in the public interest.¹⁷ . . . the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise."¹⁸ And, alluding to the Theodore Roosevelt theory of inherent executive power, which I have already discussed, Judge Pine felt compelled to declare, "with all due deference and respect for that great President of the United States, I am obliged to say that his statements do not comport with our recognized theory of government, but with a theory with which our government of laws and not of men is constantly at war"¹⁹.

The normal procedure in the federal judicial system is for

¹⁴ (1952), 72 Sup. Ct. 863.

¹⁵ *Loc. cit. supra*, footnote 1.

¹⁶ *Youngstown Sheet & Tube Co. v. Sawyer* (1952), 103 F. Supp. 569 (D.C.).

¹⁷ *Idem* at p. 573.

¹⁸ *Idem* at p. 574, quoting Taft, *Our Chief Magistrate and His Powers* (1916) p. 139.

¹⁹ 103 F. Supp. at p. 575.

decisions of the District Courts to be appealed to the appropriate Court of Appeals, the tribunal of intermediate appellate jurisdiction, before they are reviewed by the Supreme Court, the tribunal of last resort in the hierarchy of federal courts. In important cases, where expedition in ultimate decision is desirable, however, the Supreme Court may decide to hear appeals directly from the District Court. This was the procedure that was followed in the steel seizure case, and it enabled that controversy to be resolved by the nation's highest court less than two months after the proceedings were originally instituted.

It was on June 2nd, 1952, that the American court announced its decision in *Youngstown Sheet & Tube Co. v. Sawyer*.²⁰ "The nine Justices of the U.S. Supreme Court", reads a journalist's account, "filed out from behind their velour curtain on 'decision Monday' this week and took their seats with routine solemnity. Chief Justice Fred Vinson looked out across the crowded chamber and announced that routine business would be postponed until after the reading of opinions in 'the steel case'. At his words, the chamber buzzed with electric anticipation. On Vinson's right, Justice Hugo Lafayette Black put on his thick-rimmed glasses and picked up a sheaf of papers. In his Alabama half-drawl, he began reading the majority decision."²¹

The Supreme Court, in a decision concurred in by six of its nine members, affirmed the judgment of the District Court. "It is clear", stated Mr. Justice Black, in delivering the court's opinion, "that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution. And it is not claimed that express constitutional language grants this power to the President."²² It was, however, contended that presidential power should be implied from the aggregate of his powers under article II of the American Constitution. This contention was unequivocally rejected by the majority of the court. As it was expressed by Mr. Justice Burton, in his concurring opinion, "Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances."²³

Advocates of the doctrine of inherent power in the American executive have, as has been pointed out, urged that the delegation to the President of "the executive power" in article II of the

²⁰ (1952), 72 Sup. Ct. 863.

²¹ Time, June 9th, 1952, p. 17.

²² 72 Sup. Ct. at p. 866.

²³ *Idem* at p. 882.

Constitution constitutes a "grant of all of the executive powers of which the Government is capable".²⁴ This view was repudiated by the majority of the Supreme Court, as it had been by Judge Pine in the District Court. "The example of such unlimited executive power that must have most impressed the forefathers", eloquently asserts the concurring opinion of Mr. Justice Jackson, "was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."²⁵

Commander in Chief

Two of the generic powers specifically accorded in article II of the American Constitution have been particularly relied upon by those who have affirmed the existence of inherent authority in the President to act as he did in the steel seizure case, even in the absence of statutory authorization. These have been the grant to the President of the rôle of commander in chief of the armed forces and of the authority to take care that the laws be faithfully executed. The Supreme Court in the steel seizure case held, however, that these are not sufficiently substantial supports for so significant a power in the executive.

The court was careful to state that its decision was not intended to circumscribe the legitimate military rôle of the President as head of the armed forces. The widest latitude of interpretation should be indulged in to sustain his function to command the instruments of national force, at least when turned against the outside world for security reasons. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labour, it should have no such indulgence.²⁶ "The Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants."²⁷

²⁴ *Idem* at p. 873.

²⁵ *Ibid.*

²⁶ *Idem* at p. 875.

²⁷ *Idem* at p. 874.

The military powers of the American executive as head of the nation's armed forces do not thus extend to such an interference with the civilian life of the country as that involved in the President's steel seizure order. "His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress."²⁸ It is not a military prerogative to seize persons or property because they are essential for the military establishment. "The order cannot properly be sustained as an exercise of the President's military powers as Commander in Chief of the Armed Forces", declared Mr. Justice Black. "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."²⁹

Execution of the Laws

The Supreme Court gave a similar answer to the contention based upon the provision in article II of the Federal Constitution directing the President to "take Care that the Laws be faithfully executed". American advocates of the doctrine of inherent executive power have urged that this "faithful execution" clause implies a vast residue of authority in the President. As it has been put by one student, "It would seem to include the power to take all steps 'which shall be necessary and proper for carrying into Execution' the laws of the United States, except those which conflict with Constitution or statute. The Executive power is thus not limited to specific constitutional or statutory grants, but includes the power to take measures and exercise authority not specifically conferred."³⁰

This, it should be noted, is precisely the view that has prevailed in continental countries, like France, with regard to the question of inherent executive power. In the French system, as we have seen, the grant to the executive of the power to ensure the execution of the laws has been construed to imply a delegation of autonomous rule-making authority. This includes the power to promulgate any rule that is considered necessary to promote

²⁸ *Idem* at p. 875.

²⁹ *Idem* at p. 867.

³⁰ Schwartz, *The War Power in Britain and America* (1945), 20 N.Y.U.L.Q. Rev. 465, at p. 486.

public order, safety, health and tranquility, even though specific powers of delegated legislation may not have been accorded by the legislature in the particular case.

In addition to its inherent rule-making power derived from the constitutional charge to ensure the execution of the laws, the executive in a continental country like France is deemed to be vested with the authority directly to execute its own decisions, by force if need be. And this power, too, is considered to flow from the "execution of the laws" clause in the French Constitution.

It is true that the executive in the common-law world may also proceed to forced execution of its decisions in certain cases. "Where immediate action is absolutely necessary in order to avoid disastrous results, as in the case of a nuisance prejudicial to the public health and in the case of the payment of taxes, the administration may proceed directly to enforce its orders, and in case of resistance to the execution of the law may, without application to the courts, apply force to overcome such resistance".³¹ But, in the Anglo-American world, this type of case has remained the striking exception to the normal procedure for the enforcement of executive decisions. In France, on the other hand, the normal rule is that "the administration, in principle, has the privilege of having its decisions directly executed by its agents, without having to resort to the courts for enforcement".³²

French students themselves have not been slow to recognize the dangers involved in this principle. "That the recognition in the administration of such a power of direct execution *manu militari* is dangerous for public liberties seems obvious: the abuse by the administration of so great a power is to be feared."³³ The principle itself has, however, normally been approved, because of the fear of the consequences of not providing any enforcement for governmental orders, for whose violation the legislator has failed to provide a penalty.

The situation in a country like France illustrates the consequences of deriving inherent executive power from a constitutional provision authorizing the executive to ensure the execution of the laws. In the French system, such a provision is deemed to confer upon the executive both an autonomous rule-making power, which is not dependent upon any legislative delegation, and the authority to execute its own decisions, by force if need

³¹ 2 Goodnow, *Comparative Administrative Law* (1893) p. 126.

³² Waline, *Traité Élémentaire de Droit Administratif* (6th ed., 1951) p. 424. The leading authority is the *Saint-Just* case, decided by the Tribunal des Conflits, Dec. 2nd., 1902.

³³ Waline, *op. cit. supra*, footnote 32, at p. 426.

be. The result, in effect, is to make of the executive in France a primary source of law, just as is the French Parliament and, in many cases, an effective enforcer of the law, just as are the French courts.

It may well be that the worst abuses inherent in such a system are avoided by the existence in France of a parliamentary system of government. The executive in France, as in Britain, is wholly responsible to the parliament and can be dismissed by the legislature if its exercise of inherent authority is disapproved of. In the United States, on the other hand, as is well known, there is nothing like the direct accountability of the executive to the legislature which prevails in countries that, like France, are governed by a parliamentary system. The American executive is elected directly by the people for a fixed term of four years, during which he holds office, regardless of whether he is supported by a majority of the legislature. In a system like the American one, where the executive is almost entirely independent of legislative control, the recognition of inherent executive power like that acknowledged to exist in the executive in France, in virtue of its constitutional charge to ensure the execution of the laws, could be much more dangerous than it is in a parliamentary system.

It must, however, be admitted that the argument advanced by the government in the American steel seizure case, based upon the constitutional direction to the President to "take Care that the Laws be faithfully executed", has great force in its application to executive action taken in connection with the prosecution of a formally declared war. A declaration of war is as much a part of the statute-book as those other laws whose faithful execution the President is exhorted to attend to. As Mr. Justice Story pointed out almost a century and a half ago, the power to see that this law is faithfully executed carries with it the authority to take all steps necessary for such execution.³⁴

The exercise of inherent executive power in execution of a declaration of war does not, however, present the case of the greatest difficulty. That case occurs when the executive relies upon inherent power to deal with an emergency when the nation is not formally at war. If assertions of unrestricted executive power are valid in such cases, then the American constitutional system is not as different from continental systems, like the French, as one would have hoped. Exercises of inherent power, which are not in execution of a declaration of war, run counter to the basic principle that executive power is, in the common-law world, delegated

³⁴ *Brown v. United States* (1814), 8 Cranch 110, at pp. 145, 149 (U.S.).

rather than autonomous. It is in such cases that the constitutional shoe really "pinches".

As it was expressed by Mr. Justice Jackson, concurring in an important case, "No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. . . . Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed." ³⁵

One nurtured upon common-law constitutional traditions must reject the view that the American executive possesses authority as vast as that of its counterpart in a continental country like France. Reliance upon the constitutional grant of the power to take care that the laws be faithfully executed can be of little avail if, in the particular case, the executive action that is at issue does not find its source in a law, which the action concerned is seeking to execute. In war-time, as has been pointed out, executive acts related to the war effort are taken in execution of the declaration of war enacted by the legislature. But, absent such a formal declaration, the executive action must find its source in some other law passed by the Congress. For, if it is not taken in execution of a law, it cannot be justified by reliance upon the "faithful execution clause".

This was clearly the view of the majority of the American court in the steel seizure case. "In the framework of our Constitution", reads Mr. Justice Black's opinion, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . . This is a job for the nation's lawmakers, not for its military authorities." ³⁶

Review of Presidential Action

Many American students have become disturbed by a tendency that has become apparent in the jurisprudence of the American courts to refuse to review directly action of the President. While American courts have never hesitated to review the action of

³⁵ *Woods v. Cloyd W. Miller Co.*, (1948), 333 U.S. 138, at p. 146.

³⁶ 72 Sup. Ct. at p. 867.

officers in the executive branch, they have been most reluctant to control the legality of acts of the head of the executive branch himself. "The President", stated a majority of the Supreme Court in 1948, "both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."³⁷

The leading case is *Mississippi v. Johnson*, decided in 1866.³⁸ That case involved an action to enjoin the President from carrying into effect an Act of Congress alleged to be unconstitutional. The Supreme Court held that such an action could not be maintained. "We are fully satisfied", reads the opinion, "that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be entertained by us."³⁹ Since this case, it has generally been assumed, as a basic principle of American law, that a federal court may not issue an injunction against the President. This principle tends to place presidential action in an unreviewable position, for the action for an injunction is the basic remedy, the absence of statutory provisions for review, for review of executive action by the federal courts in the United States.⁴⁰ As it has been expressed by Mr. Justice Jackson, the presidential office is "relatively immune from judicial review".⁴¹

The reluctance of American courts to review the legality of acts of the President stems from a perverted construction of the doctrine of the separation of powers. "The Congress", the Supreme Court has stated, "is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."⁴² For the courts to attempt to control the legality of presidential action would, in this view, amount to undue interference by the judiciary with the workings of a coordinate, independent branch of the government.

The separation of powers interpreted in this way is, in effect,

³⁷ *Chicago & Southern Airlines v. Waterman S. S. Co.* (1948), 333 U.S. 103, at p. 111.

³⁸ (1866), 4 Wall. 475 (U.S.).

³⁹ *Idem* at p. 501.

⁴⁰ Certiorari and prohibition, which are the basic common-law remedies in this field, are not available in the federal courts for the review of executive action under *Degge v. Hitchcock* (1913), 229 U.S. 162.

⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 72 Sup. Ct. at p. 879.

⁴² *Mississippi v. Johnson* (1866), 4 Wall. 475, at p. 500 (U.S.).

the opening wedge to a system of government foreign to Anglo-American conceptions. It places the head of the executive beyond judicial control, which, in practice, means that his acts are not subject to law. Such a construction of the separation-of-powers doctrine is neither desirable nor justified. It is erroneous to assert that the American courts are interfering unduly in the operation of another department when they review the legality of presidential action. The essence of judicial power is the application of the law in cases presented to the courts for decision. The fact that the head of the executive happens to be a party in a given case does not mean that a court, in deciding that case, is exercising other than purely judicial power.

The decision of the Supreme Court in the steel seizure case indicates that it is becoming aware of the need for avoiding the dangers inherent in the doctrine that acts of the head of the executive cannot be reviewed. It is true that the court did not expressly repudiate the principle that the federal courts cannot enjoin the President. But, even though the court continued to pay lip-service to that principle, it did nonetheless assert an effective review power over the chief executive by a liberal application of the doctrine of an earlier case, *Williams v. Fanning*.⁴³ In that case, the court held that the Postmaster General was not an indispensable party in an action to enjoin a local postmaster from carrying out the provisions of an order not to deliver mail to plaintiff, although all that the postmaster was doing was to carry out the orders of his departmental superior. The President, like the Postmaster General, acts in practice through subordinate officials. Under *Williams v. Fanning*, the subordinates through whom the President acts can be enjoined from executing illegal presidential orders. This enables the American courts to review the legality of acts of the President, without the need for formally ordering the head of the executive to do, or to refrain from doing, anything.

This is, in fact, the approach that was followed by the American courts in the steel seizure case. The action in that case, it will be recalled, was brought against the Secretary of Commerce to restrain him from carrying out the President's order. The defendant claimed that the federal courts were without power to negate action of the President, relying upon the principle that the judiciary would not attempt directly to control the President. "But", said Judge Pine, in his now-famous opinion in the District Court, "in this case the President has not been sued.

⁴³ (1948), 332 U.S. 490.

Charles Sawyer is the defendant, and the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute. . . . There is no doubt, therefore, that the defendant is subject to an injunction, and the President not only is not a party but he is not an indispensable party to this action, as held in *Williams v. Fanning*.”⁴⁴ In upholding Judge Pine’s decision, the majority of the Supreme Court clearly appears to have agreed with his opinion on this point. Indeed, even the dissenting justices did not question the propriety of the injunction action against the Secretary of Commerce.

Need for Judicial Control

To constitutional and administrative lawyers, the steel seizure case will remain of primary importance as an illustration of the basic principle that, in the American system, assertions of executive power are subject to judicial control. Though American courts may accept the existence of some inherent authority in the executive to deal with emergencies, that does not eliminate the need for judicial control. When executive action “directs interferences with liberty or property — measures normally beyond the scope of governmental power, which are lawful if at all only because an abnormal situation has made them necessary and appropriate — it is of the very essence of the rule of law that the executive’s *ipse dixit* is not of itself conclusive of the necessity”.⁴⁵

The American approach in this respect should be compared with that of the House of Lords in the celebrated case of *Liversidge v. Anderson*.⁴⁶ That case involved an action by a person detained under the notorious Regulation 18B against the Home Secretary for damages for false imprisonment. Appellant applied for particulars of the grounds on which the Secretary had reasonable cause to believe him a person of hostile associations, over whom it was necessary to exercise control under the regulation. The question for the House of Lords was whether disclosure could be compelled or whether the order of the Home Secretary was conclusive proof of the legality of his action.

As is well known, the House of Lords in the *Liversidge* case adopted the latter view, despite the vigorous dissent of Lord Atkin. What is especially significant from our point of view is the

⁴⁴ (1952), 103 F. Supp. 569, at p. 576. (D.C.).

⁴⁵ Fairman, *The Law of Martial Rule and the National Emergency* (1942), 55 Harv. L. Rev. 1266, at p. 1272.

⁴⁶ [1942] A.C. 206.

complete preclusion of any judicial control over the legality of executive action, which results from their Lordship's opinions. Such exclusion of all judicial control is not merely implicit in those opinions but is candidly expressed as their underlying purpose. "To my mind", asserted Viscount Maugham, "this is so clearly a matter for executive discretion that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary being subject to the discussion, criticism and control of a judge in a court of law".⁴⁷

It is the *Liversidge v. Anderson* approach, which renders executive emergency action immune from judicial control, that has been rejected by the American courts. Thus, even the dissenting justices in the steel seizure case recognized the propriety of review on the question of whether the President's action was, in fact, justified by the necessities of emergency.⁴⁸

To assert that executive emergency power should not be subject to judicial control is, in the words of one American jurist, to advance an argument as untenable today as when it was cast in the language of the Plantagenets, the Tudors and the Stuarts.⁴⁹ "If this position could be deemed well taken", the United States Supreme Court has declared, "it is manifest that the fiat of [the Executive], and not the Constitution of the United States, would be the supreme law of the land. . . . There is no such avenue of escape from the paramount authority of the Federal Constitution."⁵⁰

It thus seems clear that, even if we were to accept the assertions of those who assert authority in the executive to cope with emergencies, we would, at the same time, constantly have to reiterate the need for judicial control. Executive action must not be proof of its own necessity, nor must executive judgment be conclusive that its action was justified by exigency. In the American system, as Mr. Chief Justice Hughes stated in a landmark case, "What are the allowable limits of [executive] discretion, and whether or not they have been over-stepped in a particular case, are judicial questions".⁵¹

⁴⁷ *Idem* at p. 220. For a more complete discussion of the *Liversidge* case, see Schwartz, Law and the Executive in Britain (1949), pp. 329 *et seq.* An interesting case involving a similar problem is *Gopalan v. State of Madras* (1950), 13 Indian Supreme Court Journal 174. See Schwartz, A Comparative View of the *Gopalan* Case (1950), 4 Ind. L. Rev. 276.

⁴⁸ 72 Sup. Ct. at p. 949.

⁴⁹ Murphy J. in *Duncan v. Kahanamoku* (1946), 327 U.S. 304, at p. 329.

⁵⁰ *Sterling v. Constantin* (1932), 287 U.S. 378, at p. 397.

⁵¹ *Idem* at p. 400.

It is the existence of judicial control over exercises of executive authority that minimizes the danger of "government by decree" in the United States, such as that which has occurred so often in countries where the judicial safeguard has been absent. It should not be forgotten that it was the recognition in the Weimar Constitution of unrestrained power in the executive to deal with emergencies that helped pave the way for the downfall of the German Republic. And, it was the existence of similar authority in the French executive that eased the transition to the regime of Vichy in 1940. It is not enough to say that executive freedom of action is essential to deal with exigencies, as the executive is the only branch of government that can act efficaciously to protect the public in emergency. "From time immemorial", as Mr. Justice Murphy has eloquently pointed out, "despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised."⁵²

Laski on Jurisprudence

And what is true of the world of letters, as between the two periods [following the Civil War and the First World War], is true also, in perhaps a lesser degree, of the world of science. It is still true that American science tends to specialize on the applied rather than on the pure side; and American philosophy, where it is not some species of instrumentalism, tends still to do little more than adapt, with minor variations, the main categories of European philosophy. But the development of American jurisprudence has far outstripped in realistic understanding that of most European countries, and very certainly that of England, which still does little more than ring the changes on the ideas of Jeremy Bentham and Sir Henry Maine. Perhaps no American lawyer has had a genius for historical insight as brilliant as that of Maitland, though the *Common Law* of Mr. Justice Holmes hardly yields in quality to that insight; but in relating law to the totality of social relationships it is difficult to feel that America has now any rivals, and though it has had few economists of first-rate standing in analytic power, in the application of economics to industry and agriculture, I think it could be claimed that the United States has, in the last generation, outstripped all rivals; an achievement the more remarkable when it is remembered that little American work in this field had any significant importance before the Civil War. (Harold J. Laski, *The American Democracy: A Commentary and an Interpretation*. 1948)

⁵² *Duncan v. Kahanamoku* (1946), 327 U.S. 304, at p. 330.