APPENDIX

The following pages consist of a portion of an interview with Howard Westwood conducted by his partner, Theodore Garrett, on May 31, 1979. The purpose of the interview was to prepare materials for use in a history of Covington & Burling which Howard later wrote in 1984.

This portion of the interview provides an active participant's recollection of the Steel Seizure case, one of the most important cases decided by the courts of the D.C. Circuit. Accordingly, it should be included in Westwood's contribution to the Oral History Project.

The Steel Seizure Case*/

During the Korean War (this was in 1952) there had been a significant amount of inflation which created wage demands by labor unions and there was a particularly dramatic situation in the steel industry. The steel industry's contracts with the labor unions came to an end at the end of 1951. Negotiations for new contracts had begun quite late in 1951, maybe not until around the 1st of December, they went on beyond the termination date, and ultimately there was a wage stabilization board recommendation as to how the dispute ought to be resolved. This wage stabilization board had been created as a part of the governmental activity in the field designed to help curb the inflationary trends. Its recommendation was made on the 20th of March of 1952 but the steel companies rejected it. Apparently, labor was willing to go along on it. Early in April, I think the date was April 3rd, after the rejection by the steel companies, the steel union announced that there would be a strike to begin at 12:01 a.m. on April 9. I have forgotten what day of the week April 9 was.

The Taft-Hartley Act, of course, had been adopted sometime before. It gave the President the power to declare an emergency if there were a threatened strike, and then for a so-called cooling off period there was to be no strike. The

government could enforce the no-strike provision during that period by bringing suit against the labor unions to enjoin a strike. During that cooling off period the idea was that the President would designate a fact-finding commission, etc. It would make a report before the end of the cooling off period. It was the theory that public opinion then would require the parties to the dispute to abide by the report or if it were a situation which involved a great national emergency, then presumably Congress would have an opportunity to step in and legislate.

The Taft-Hartley Act had created a great deal of opposition on the part of the unions. Anything that curbed their right to strike was, of course, regarded by the unions as very bad. President Truman was very much opposed to the Taft-Hartley Act. It was fairly evident from the beginning of the steel dispute that he was not going to resort to the procedures set up under the Taft-Hartley Act. So here was a threatened strike, one that was very critical to the economy and to the nation and theoretically, at least, or at least allegedly, would have an impact on our national military posture in connection with the Korean War. The steel companies, probably thinking that because of the impact on our military strength of a strike, felt that their bargaining position would be strengthened if there were a threatened strike, that that would result in public opinion being marshalled against the position of the labor unions. Obviously, from the

very beginning and then all through the litigation, the thing that was uppermost in the minds of the steel companies, and no doubt in the minds of the labor unions, was sheer tactics io their wage dispute -- what would most conduce to strengthening the position of one side or the other in the eyes of the general public.

When the strike was called, the steel companies decided that they would seek somehow or another to protect themselves by litigation. There had been a feeling all along, and some indication all along, that the President would actually seize the steel companies, take them over in the event there were a strike, and would not follow the Taft-Hartley Act. He would just resort to some kind of alleged inherent power on the part of the President as Commander-in-Chief of the Armed Forces to take over an industry and then forbid a strike if our national defense posture were seriously threatened. It was also reasonably clear that if the President seized the steel companies, the labor unions would not strike - not necessarily that they agreed that the President had the power to take over, but rather because they felt reasonably sure that, if the President did take over the steel companies, he or his agents then would make a wage deal with the steel unions that would be rather to their liking. That then would improve their bargaining position in the future because whatever the President had done would be a floor from which they could further bargain with the steel companies. The threat that

that sort of thing might occur was, of course, from the steel companies' standpoint, very serious because it meant that their bargaining position for the future would be correspondingly weakened if the President took over and raised wages. So the steel companies had their lawyers begin getting ready for litigation.

We were not in on the matter. We were not the lawyers for any of the steel companies and we had heard nothing about this whole controversy except that any member of the public reading the newspapers would know something about it.

Davis Polk represented U.S. Steel. U.S. Steel, of course, was the lead steel company. Our firm had had very happy relationships with Davis Polk for many, many years. This was the result to a considerable extent of Judge Covington. We would use Davis Polk in New York, and Davis Polk would use us in Washington. In those days New York firms didn't have branches down here by and large. For Davis Polk to conduct a litigation in the District of Columbia, they had *to* have local counsel They came to us without any real advance warning. Obviously it was their thought that we would be local counsel, and that they would be doing all the briefing and arguing and all the work. I am not sure whom they originally approached. I think maybe the top management in U.S. Steel may have called Tommy Austern. What they had in mind was getting Mr. O'Brian on the papers as local counsel. Mr. O'Brian's reputation was, of course, glittering. He was unquestionably the dean of the

American Bar, and to have him on the papers as local counsel would be very good. I think they called Austsrn to see if Mr. O'Brian might be available and Austern indicated that he probably would be.

The end of it was that a meeting was set up for, I think, the 8th of April, the day before the strike was actually to begin. That's my best recollection, although it is possible it was a little earlier than that. Mr. O'Brian, of course, would need some help, and I was asked to help him. Mr. O'Brian and I met with the Davis Polk lawyers on that first day. I am pretty sure that I had already decided that it would be necessary to have a lot of help and I had Paul Warnke and Stan Temko and another one of our then associates, a chap named Chuck Barber, sit in on the meeting.

We never did in our firm take to the idea of being local counsel in a matter and although it was reasonably apparent that the Davis Polk people thought we would just be putting our names on papers, we made it clear to them that, if we were going to be on the case, we were really going to be in it. That didn't mean that we would supersede Davis Polk but we were going to be actively involved in working out the strategy, the theory of the case, the papers, and so forth. I must say that the Davis Polk people were very good about it. There was no effort to put us on the shelf and keep us in a subordinate position at all.

What we did at that first meeting was to recognize that a hell of a lot of work had to be done in a very great hurry, because with the strike about to occur the President's seizure was imminent. So it was quite apparent that litigation would be essential. And of course there was a seizure by the President. As soon as he entered his executive order taking over the steel plants, the labor unions let it be known that they wouldn't strike.

In his order taking over the plants, the President designated his Secretary of Commerce, Mr. Sawyer, as the person who would be running the show. The take over was to all intents and purposes nominal. The management of the steel companies was not superseded. In fact, the take over merely amounted to an order saying that they were taken over by the United States but provided that all of the people in the steel companies' staff, management and labor, would stay on the job subject to such orders as Mr. Sawyer, on behalf of the President, might issue. At the beginning, there was no order at all affecting wages and hours. As a matter of fact, there were statements by Sawyer that indicated that he had no immediate intention of affecting wages and hours, and it was the idea that there would continue to be negotiations between management and union on the wage/hour issues with Sawyer sitting on the sidelines hoping that somehow everything would work out.

However, the taking over by the President made it unrealistic to expect that there would be any voluntary agreement.

On the one hand; the labor unions wanted to get the benefit of Sawyer's intervention and to force his hand so that he would have to take some wage and hour action which would be to their benefit. So the labor unions did cot want to enter into an agreement. On the other hand, the steel companies weren't about to enter into an agreement with the compulsion of the President of the United States. So the steel companies from the beginning figured that what they really faced was not only a take over -- which didn't do anyone any particular damage -- but in the very near future a very damaging action by Sawyer, that is increasing the wages and in effect acceding to various of the Union demands.

It was obvious that I would have to take the lead in the work that we did at Covington & Burling. Mr. O'Brian was well along in years and couldn't be expected to devote the time and energy to the basic work of research and drafting of the papers and so on. What I did was to divide the work that would have to be done among the three guys I mentioned. Warnke was to proceed with the necessary research and brainwork and legwork and muscle work on the procedural aspects of the problem; Temko was assigned the substantive aspects; and Chuck Barber was given quite a number of missions having to do with liaison with the Davis Polk lawyers and so forth.

We didn't start our work from a clean slate by any means because the Davis Polk people had done some very excellent research work and had some drafts of papers. But an awful lot of further work had to be done very, very promptly.

In the meantime, other of the steel companies had been busy and as soon as the seizure occurred a couple of them went into action - but not U.S. Steel. We didn't have our papers ready and we didn't want to be out in front. Moreover we wanted to try to be sure of how the case ought to be presented before we filed anything. But a couple of the companies very immediately went at night to Judge Bastian of the District Court to seek a restraining order against the seizure. One was Youngstown, represented by John Wilson of our Bar here. The other was Republic, represented by Bruce Bromley of the New York Bar. They went to Judge Bastian, but he refused to act that night. They were told to go to Judge Holtzoff the next day - Holtzoff was sitting in Motions Court.

They did go to Holtzoff and sought a temporary restraining order. After quite a lot of argument, Holtzoff denied the temporary restraining order. He didn't write a memorandum opinion or make any findings in his order of denial but there was significant colloquy in the argument before him. What he said was, "Look here, the mere seizure of the plants is not immediately injurious because nothing is happening. You are operating just the way you always have -- the same wages, hours and everything else -- and I don't see that there is any occasion for a temporary restraining order unless some kind of injury is threatened, so no temporary restraining order."

Nonetheless, of course, bills of complaint were filed seeking preliminary injunctions and we had our complaint ready to file fairly soon after Holtzoff's order. I have forgotten now how many complaints were filed, but every steel company was involved. It was an enormous bundle of papers that began to be filed in the District Court. The case got assigned to Judge Pine. You might remember that in my talking about the old PWA cases I referred both to Holtzoff, who was then in the Department of Justice, and to Pine, who was then in the Office of United States Attorney. That is not significant to the Steel Case; it is just interesting that I had had rather intimate contacts with both those gentlemen early on.

The case was assigned to Judge Pine. There was still real uncertainty about how to present the matter with any hope of getting immediate injunctive relief as long as Sawyer was not taking any action. As I have said, Sawyer was saying things that indicated that he didn't contemplate taking any action, that he was going to rely on a continuation of the bargaining between management and labor. And we here in the shop were very worried that in that posture there was not a prayer of getting a preliminary injunction.

I must say that at that point nobody among the steel companies' lawyers had any remote idea that anything would be faced up to by Pine except the matter of preliminary injunction. Nobody had any idea that there would be any final action in the District Court either at that stage or in the

near future. The whole question was -- are we going to get a preliminary injunction or not? We wanted a preliminary injunction pending a trial on the merits, in order to protect ourselves. We figured that a trial on the merits, while it would be expedited, certainly would not occur for a number of weeks.

But the government committed a tactical blunder. They could have waited for a substantial period under the rules before filing any responsive pleading. Instead they almost immediately filed a motion to dismiss. So whereas we and the other steel companies were assuming that the only real issue would be that of a preliminary injunction, the filing of this motion to dismiss at least set the stage -- although we couldn't believe that this would really happen -- for ruling on the motion to dismiss and in effect finally deciding the case. Well, I think it was on Sunday, which would be about April 20, Sawyer finally began making statements that indicated that he was going to make a change of some kind in wages. At that point, the matter of an injunction became of critical importance and we figured, as did the other lawyers, that the point made by Holtzoff could be got around because now there was threatened (on the basis of Sawyer's statement) an immediate injury, that is an increase in wages and otherwise taking action injurious to the management. well, argument was set for Thursday, April 24th. Actually the argument ran both on Thursday, April 24th, and Friday, April 25th.

I haven't double checked this, and my memory is fuzzy, but I think that technically the only thing before Pine, even though a Motion to Dismiss had been filed, the only thing technically before him was the Motion for Preliminary Injunction. The government, however, made a mistake; they filed a great long brief. They filed it several days before the argument. The Department of Justice lawyers - they were taking over the case; it wasn't left to *the* local U.S. attorney - had dug out papers that had been used during World War II in connection with the Montgomery Ward seizure, which was a very dramatic event and at that time there had been a lot of briefing of the power of the President to take over a plant. They had all that learning and all those papers in their files and I guess they couldn't resist the temptation to file a deathless document that would assert the unlimited inherent power of the Executive as the Commander-in-Chief to do whatever he wanted to do. So the paper they filed, although it was addressed to the preliminary injunction issue fairly thoroughly in one part, its burden was on the merits of the case, that is, is there or is there not inherent power in the Executive to take over?

Thus we had the benefit of the government having filed their brief and we got busy. Of course we had been working like hell on this thing all along. We got busy with their brief in hand and were able to put our brief on behalf of U.S. Steel in final shape with the benefit of the government's

document. All the steel companies filed briefs but ours was by all odds the most thorough, both on the preliminary injunction issue and on the merits responsive to the government's argument. It was a pretty doggone good job for having to be prepared in so short a time. The credit for it is due very largely to the extraordinary ability of Stan Temko and Paul Warnke. They aren't entitled to all of the credit because, as I said, Davis Polk had done some excellent work. We worked closely with the Davis Polk people in putting this brief together, but it was a Temko-Warnke job in the main that produced our document. The other lawyers in the case from Bruce Bromley on down -- Bruce Bromley was a very distinguished lawyer -- recognized the merit of our document and, in the argument that did occur before Pine, it was our document that was referred to not only by us but by other lawyers as the definitive statement of the position of the steel companies.

Before the argument we had a strategy session. We in Covington were not to participate in the argument for U.S. Steel. The person arguing would be Ted Kiendl, who was one of the important Davis Polk partners and very much involved in the work on the case. We had a strategy session with the lawyers for all the steel companies. Somebody has to assume the chairmanship of such a meeting, and gradually I sort of assumed that position. I had very good relationships with John Wilson, who represented Youngstown and who is a very able lawyer and was highly regarded and respected by the other

lawyers. The lawyers from New York, Pittsburgh and elsewhere would sort of defer to the local lawyer anyway. So, it was kind of a natural thing that in sessions among the lawyers to discuss how things would be worked out, a local lawyer would become a de facto chairman of *the* meeting and I was it. I don't want to exaggerate that. That doesn't mean that I was deciding things at all; it was simply to have things done in an orderly way.

It was decided that the lead-off argument would be by Ted Kiendl for U.S. Steel and then the other lawyers would follow along with Bruce Bromley, obviously, taking an important part, and John Wilson taking an important part. John Wilson's important position in the matter was recognized because Wilson and Pine knew each other well. Wilson at one time had been in the U.S. Attorney's Office and we all knew that there was a high mutual regard between those two people.

I think every single one of the steel companies that had filed suit appeared at the argument before Pine. Of course, there was a desire on the part of everybody to get into the act but Ted Kiendl it was agreed would lead-off.

Pine was a very diligent judge; and it was quite apparent, when the argument began, that he had read the papers that had been filed, despite their voluminous nature, and had read them rather carefully -- even including the U.S. Steel paper, which had been filed at the last minute.

One point in the strategy session ahead of time that had been agreed to by all the lawyers was that what we were really after was a preliminary injunction not enjoining the seizure but enjoining any alteration in labor conditions. Holtzoff's position had influenced us and in any event it seemed as a matter of solid legal analysis that, for the extraordinary remedy of a preliminary injunction, the best we could hope for would be a hold up on a change in labor conditions. We couldn't get a preliminary injunction against the seizure itself because that was the whole case. It never occurred to any of us at the strategy session that Judge Pine on such short notice would walk up to ruling on the Motion to Dismiss or in any event would entertain an argument in support of a preliminary injunction of the seizure itself. So Kiendl's argument, when he took off, was couched in terms of seeking only an injunction against a change in labor conditions. Although our papers had sought a preliminary injunction against the seizure, Kiendl went so far, on being questioned by Pine, as in effect to amend our papers so that our prayer would be limited to a preliminary injunction only against a change in labor conditions.

Almost immediately Judge Pine reacted very negatively to that position. He said, in effect, "Do I understand that you are not seeking a preliminary injunction against the seizure, that you are perfectly content to let the government hold on to the steel companies because you know that there

will be no strike? The labor unions won't strike against the government. You want to get the benefit of the government's holding the steel companies because then you know that there will be no strike. All you want to do is to prevent the government from giving any benefits to the labor unions by making a change in labor conditions. Is that what you are saying?" And Kiendl, of course, said, "Yes." Well, it was very apparent that Pine didn't like that one bit.

It was also apparent that Pine was not very happy about the argument of the government that there was some kind of inherent power in the Executive to seize property -- particularly in view of the fact that in the Taft-Hartley Act Congress had sought to make provision for dealing with a labor dispute that involved a national emergency.

Even though early on, the judge during Kiendl's own argument had telegraphed the fact that he was disposed to walk right up to the basic merits of the case, he, Kiendl, didn't retreat from his position. He was very firm. However, when Kiendl finished and the other lawyers began arguing -- and particularly this was true in the case of John Wilson -- they got the point. They really began leaping to the merits of the case and working hard on what they sensed to be Judge Pine's disposition not only to go to the merits but to go to the merits in a way favorable to the position of the steel companies. That doesn't mean that they repudiated Kiendl's position but none of them would take the position that they, were amending

their papers so as to pray only for the kind of injunction that Kiendl prayed for in his oral amendment.

It was particulariy clear during John Wilson's argument what the bent. of Pine's mind was. Wilson knew Pine like his own brother. I don't mean that Pine favored Wilson in any sense, but when Wilson was before him, there obviously was a rapprochement and an understanding on both sides of the bar as to what it was all about. So by the time the government's turn arrived it was pretty clear to everybody in the courtroom that Pine was disposed to go to the basic merits of the case and to rule on the motion to dismiss. The government then came along and walked right up to the merits. They were obviously very confident. I don't know why because everything that had happened up to that point did not such suggest that the government was going to win before Pine.

The argument was concluded on Friday and Pine took the matter under advisement. He indicated that he was going to decide very promptly but he didn't decide it from the bench. In the meantime, we were nervous as could be, of course, as to what Sawyer might do. We thought any minute that Sawyer would be hauling off with some kind of order changing the labor conditions. But he didn't. I don't know exactly why he didn't. The book written a year or so ago about *the* Steel Case -- a superb book -- really does not explain why Sawyer didn't immediately take action. I can only guess, that Sawyer was never really happy about this seizure.

I think he felt that it was not particularly good government for the President to be seizing plants without regard to any statutory authority and in defiance of the procedure set up in the Taft-Hartley Act. I think he was dragging his feet and the White House was reluctant to give him peremptory orders. In any event, there was no change in the labor conditions over that weekend.

On Tuesday, Pine issued his decision. A memorandum opinion was passed out. We read it quickly. It overruled the government's motion to dismiss and issued a preliminary injunction as I recall it. I'd have to go back and check the papers for just exactly what it was, but I think he overruled the motion to dismiss and issued a preliminary injunction against the seizure. He said that since U.S. Steel had amended its papers orally, they weren't going to get any injunction because it would be stultifying to let U.S. Steel have the benefit of a government seizure which meant no strike, practically speaking, and at the same time, keep the government from taking any action benefiting the employees. But Pine said, "If you want to amend your papers, I'll issue an injunction for you, also." By that time, of course, I was the guy representing U.S. Steel, because Kiendl and company were in New York and all of this had happened on very short notice. So with one of our sweet secretaries, Ann Steel, with the typewriter in the Courthouse corridor down there, I did an amendment of our papers, withdrawing the oral amendment which Kiendl had made during his argument. So we got an injunction, also.

Then the government made its next blunder. They decided that they would go directly to the Supreme Court and skip the Court of Appeals. That was a blunder of the first order. As you know, once the record is filed in the Court of Appeals, you can petition directly to the Supreme Court, if you want. They don't have to grant it, but they have the power to grant it. So on Wednesday morning, the government first asked Pine for a stay of the injunction pending their appeal to the Court of Appeals, and indicated that, as soon as they filed their appeal, they would petition for certiorari. Pine, of course, denied the stay. By that afternoon, we were in the Court of Appeals. Argument occurred that afternoon in the Court of Appeals on the government's motion for a stay pending a petition for certiorari. Of course, we had worked all night and had papers filed, as did the other steel companies, opposing a stay. In the argument that afternoon on the matter of a stay, the government was still overconfident. I have forgotten now whether the Solicitor General, Mr. Perlman, was present at that argument. I think he was. Yes, I think the argument that afternoon, the principal argument, was made by Mr. Baldridge of the Department of Justice, and I think Perlman made a reply argument after the argument by the steel company lawyers.

Things were happening so fast Mr. O'Brian couldn't possibly have kept up with it. So I was the guy. But we had had another strategy session of the lawyers on Tuesday night,

knowing that this is what the government was going to do. First I should say that before Pine the only local lawyer who had been really involved significantly in the actual argument was John Wilson. There were all of these New York lawyers, and I think some lawyers from other cities. At the strategy session that Tuesday night when we were deciding how things were to be handled on Wednesday in the Court of Appeals, which we knew would be coming, I moved in very firmly and I just laid down the law to such New York lawyers as then were there, and Bruce Bromley was there, and, God bless him, he was great. I laid down the law and said, the guy who is to take the lead and make the principal argument in our Court of Appeals should be John Wilson. John Wilson is highly regarded; he is a local lawyer, and we don't want you foreigners in here screwing things up.

Everybody took that in good spirit and it was agreed that John Wilson would lead-off. I didn't mean that Bruce Bromley would not be involved. He was importantly involved in the argument in the Court of Appeals, and some of the other lawyers were, too. But John Wilson took the lead and the argument went pretty well. I participated in the argument only in some of the colloquy. I just got in the act a little bit on some of the questions and answers back and forth between the bench and the lawyers.

The argument went pretty well and it really looked good. Chief Judge Stevens, it seemed, was with us. Judge

Edgerton, everyone knew, would be against us. But it looked as though we were going to get a majority. What we were doing, of course, was to argue against a stay; and the burden of the argument was if there were a stay, then immediately Sawyer would change labor conditions, the fat would be in the fire, and we would be irreparably injured and we couldn't possibly ever cure that injury.

The Court took the matter under advisement and was out for some little time. I think the argument went on until about 6:00 and then, I think, the court came back around 7:00, or something of the sort. I have forgotten the exact times of day. In the course of the argument, the point had been made that if there were a stay issued, it should be on condition that there be no change in the labor conditions. John Wilson made that point all the way through, but the burden of argument was against issuing any stay as had been agreed among all the lawyers. I may say, one of the lawyers then prominently involved in the argument was another highly respected local lawyer; that was Nubbie Jones, of Hogan & Hartson. We were getting a local flavor in the Court of Appeals, except for Bruce Bromley. There was very little in the way of alien lawyers being involved. It was John Wilson and Nubbie Jones, both of whom were very highly regarded; their prestige much greater than mine. But while the Court was out, we had another strategy session, and it was agreed that, if the unthinkable happened and a stay were issued with no condition, I was to

speak up immediately and press hard the question of having a condition attached to the stay.

The Court let it be known that they were ready to announce their decision, and so the Court came in, all nine of them. The lawyers were sitting at the desks in front of the Court. I think it was 7:00 or 7:30 by this time. Very preemptorily Stevens said that Judge Edgerton would announce the decision of the Court since he, Stevens, was in the minority. And Judge Edgerton simply announced that a stay would issue, and right away Stevens adjourned the session. Of course, on adjournment, the lawyers stand. I will never forget. I was standing next to Nubbie Jones, and Nubbie Jones, out of the corner of his mouth, growled, "Why don't you speak up?" I was paralyzed. All I could do was sort of gurgle. It was stage-fright; it was something; it was paralysis; and I didn't do what I was supposed to do. However, fortunately Stevens, the Chief Judge, didn't leave the bench immediately, as all the other judges did. The other judges literally ran out. It was as though someone had a *gun* at their heads. The decision had been 5 to 4 against us. We had lost Prettyman. Prettyman was the swing *guy.* Stevens didn't go quite so fast and in a moment I was able to recover from the paralysis. So then I began to say to Stevens, now, wait a minute, there is another point here which apparently the Court has not addressed, and that is the matter of attaching a condition to the stay. What about that? Stevens then sent for Judge Edgerton and Judge

Edgerton came back, and here were Stevens and Edgerton on the bench and all the lawyers.

Then we had quite a little discussion. I was saying, then in effect, damn it, we had asked that, if there were a stay, there be a condition, and the Court hadn't addressed that. It was apparent that the Court had not addressed that question. They said nothing about it in Edgerton's announcement from the bench. It was quite obvious they had forgotten all about it in their in camera discussions. They just ignored it. There was considerable discussion. Perlman, of course, was eager to get away, he was all ready to run right out of the courtroom, because if you win, you don't hang around. But he couldn't quite get away.

The net of it was that Stevens finally said, with Edgerton agreeing, that, if we wanted to, we could, at 9:00 in the morning or 9:30, I have forgotten, file an application for a condition to be attached to the stay. So off we went and worked all night on the papers for a condition to the stay. By that time we at C&B were really in the saddle; you couldn't fool around with other lawyers. There wasn't time. So it was Temko, Warnke, and Westwood working right through the night on an application for a condition to be attached to the stay. We filed the papers then by 9:30 in the morning.

The Court, however, did not convene at 9:30. I don't think they came in until about 10:30. Obviously they had been studying the papers that were filed. I have forgotten

whether the government filed papers in opposition. They may have, because they were working hard, too. The court came in and the session began at 10:30. We had a full scala argument on the condition for a stay. By this time I was taking the lead in the argument, because I was the only one, obviously, thoroughly prepared on this thing. In the course of that argument Prettyman pressed Perlman for an agreement that there would be no change in the labor conditions until the Supreme Court had an opportunity to really pass on the question. Perlman resisted. That led us to think that, by golly, on this point we will get Prettyman and it will be 5 to 4 in our favor.

Of course, in the beginning all that we had wanted was to prevent a change in labor conditions, the position that Kiendl initially had taken. So if we could get that, hell, we would have won the case. And we were pretty confident; the argument on this matter of a condition went pretty well. Finally, right at the tail end, Perlman grudgingly agreed that there would be no change in labor conditions until his petition for certiorari was filed. The court's stay had been-issued on condition that a petition for certiorari be filed by Friday, which by then was the next day. But Perlman's agreement meant that he could file a petition for cert. the next morning at 9:00 and change labor conditions at 9:30, so we were still mighty scared. We didn't feel that met Prettyman's point, and it didn't. So we still felt pretty confident when the Court,

at the end of that argument, took the matter under advisement. We figured we would get Prettyman. However, the Court came back in due course, 5 to 4 against us on the matter of attaching the condition we requested.

So we had another night's work. We had decided the steel companies would get on file immediately their petitions for certiorari, and we figured we would beat the government to it even though we were the prevailing party in the District Court. We could, of course, petition the Supreme Court for certiorari. So we worked like the devil. I don't remember whether there was just a single set of papers filed on the petition for cert. just for U.S. Steel, and other companies filed their own, or whether several companies joined in the single paper. I would have to go back and look at the files on that.

Anyway first thing Friday morning our petition for certiorari was filed. The government was surprised. They never dreamed we would do that. The reason we did that was to dramatize our interest, and we wanted to get this matter of a condition before the Supreme Court in a hurry so that the Justices would begin thinking about this point, which was the key point as far as we were concerned. Very strongly emphasized in our papers was the need for the attachment of some kind of a condition that would prevent a change in labor conditions until the Supreme Court had time to review Pine's decision.

The rules of the Supreme Court at that time, incidentally, provided that if both parties petitioned for cert. the plaintiff in the lower court would have the opening argument. I mention that as kind of amusing, because Perlman was very much upset about that. Ultimately, when cert. was granted he wrote to the Chief Justice urging that the real moving party was the government. We were defending the action below, he said, and the government ought to have the opening and closing. But the Court's rules were clear. Actually, there had been another case in the fairly recent past where the situation had been reversed, where the government had won below, had been a petitioner, and it had had the lead-off argument. That case was referred to by the Chief Justice in refusing Perlman's request. The rule in the Supreme Court, by the way, since then has been changed.

In any event, our petition for cert. was filed. The government's petition for cert. was filed quite a bit later. On Friday we again worked all night on a reply to the government's petition and had our reply on file first thing Saturday morning. In those days, the Court heard argument on Friday and had conference on Saturday.

When Pine issued the injunction, the labor union called a strike. The injunction, of course, was an injunction against the seizure itself. When the Court of Appeals issued its stay, the labor union called off the strike. Someone approached them; I don't know who; the White House, somebody;

they called off the strike. Then on Saturday the White House called together the steel companies management and the labor union and really put the heat on them to try to come to an agreement on labor conditions. It looked as though an agreement was just about to be made. Truman was really putting the heat on them. But that afternoon, the Supreme Court announced its decision to grant cert. and issued an order that there should be no change in labor conditions pending its review. Immediately, negotiations at the white House came to an end, because all of a sudden the steel companies proved not to be willing to resolve the matter by agreement.

The Supreme Court specified that the case would be argued a week from the following Monday. This was Saturday. That meant that the case had to be briefed, the record had to be filed, everything, in real short order. It had been agreed that in the Supreme Court John W. Davis would argue on behalf of all the steel companies, except that Charles Tuttle (who was the father of my first wife) insisted on participating in the argument, also. I have forgotten now which steel company he represented. And Tuttle separately briefed the case. I don't now remember whether the brief on behalf of U.S. Steel was joined in by the other companies or not. I'm sorry my memory is so vague. But certainly U.S. Steel's brief was to be the most important one, particularly since Mr. Davis was to have the principal argument. The question was how to get all this done. The record had to be printed, and briefs had to be prepared and printed, all this in a week.

Obviously, we had to be involved, although the Davis Polk people had done a lot of work. We had been very close to this thing. The net of it was that I, with Stan Temko and Paul Warnke, went to New York right away to work with Mr. Davis and with one of the other partners in Davis Polk, Porter Chandler, a very, very able guy. We just moved up to the Davis Polk shop in New York to work with Mr. Davis and to prepare the brief with Porter Chandler. Chuck Barber, in the meantime, would stay down here. He was an enormous help in all the mechanics, because all kinds of mechanics had to be worked out during that week.

That was, for me, a very interesting experience. I regarded Mr. Davis as the minion of the capitalist class. He had been the presidential nominee of the Democratic Party in 1924 after the famous Madison Square Convention, which was the longest convention in all history. The great struggle that had occurred between McAdoo and Al Smith at that Convention was finally terminated with the nomination of John W. Davis as a dark horse. Davis had been a lawyer at that time in West Virginia. His nomination had meant the triumph of the conservative forces in the Democratic Party and, in my view in later years, the nomination of Mr. Davis had represented the ascendency in our society of the forces of reaction. Here the Democrats had nominated Davis, Republicans had nominated Coolidge, and it had been left to insurgents to form the Progressive Party, the nominees of which were, for President, Bob LaFollette and

for Vice President, Burt Wheeler. Up to that week in New York I had thought of Mr. Davis as kind of a stuffed animal, simply the puppet of the capitalist class.

I came to have a very different feeling about Mr. Davis during that week. He was absolutely magnificent. He was quite old by that time. We, Stan Temko and Paul Warnke and I, would work like the devil there in the Davis Polk library. Their library wasn't as good as ours, but we worked like the devil in their library. And each day, and maybe more than once each day, we would meet with Mr. Davis to talk out how best to frame the arguments, and so on. Davis couldn't have been more magnificent. Here were the three of us from Covington who were relatively kids, but he treated us as equals. His entire manner and approach were absolutely magnificent. It was, for me, a very stimulating experience, and I may say, a very enlightening experience, to find that the person I had regarded as the minion of the capitalist class was really quite a guy. This was a great experience for me, and I came to have enormous admiration for the man, which was confirmed later when I heard him argue this case in the Supreme Court.

Somehow or another, we got it all done, and the brief was filed, and the case was argued on the following Monday. As you know, the case was decided on the second of June, which was exactly one month after the petitions for cert. had been filed, and was less than eight weeks after the litigation began. The case was decided by the Supreme Court

in favor of the steel companies, holding that - well, it is not quite clear what the holding was. Every Justice wrote an opinion. There was not a real agreement in the reasoning; I don't know what the case stands for as a precedent today. Although even scholars tend to cite the case in support of the' broad proposition that the Commander-in-Chief has no inherent power of the sort asserted, I am not sure that that was what was decided by the majority of the Justices. It may be that most of them decided simply that, in view of the Taft-Hartley Act, such inherent power as the Chief Executive had had been superseded.

A couple of years ago there was a superb book on the Steel Case that was written by a gal named Marcus, I think the name was. I did a review of that'book, which is in the University of Chicago Law Review, in which I brought out quite a number of things which I have just touched on here today, and also corrected two or three omissions or mistakes in that book. But a couple of things were brought out in that book that I did not know about, because Mrs. Marcus had access to a lot of papers such as diaries of Justices and judges, and so on. As I remember that book it indicated that when certiorari was granted Mr. Justice Burton, in his diary, said that he thought that what should have been done by Pine was not to decide the matter on the merits but to do exactly what Kiendl had asked, and that is, simply issue a preliminary injunction against change in labor conditions. A very interesting obser-

vation, I don't think that there is any question but that, as a legal matter, our instincts at the beginning had been right. But, as a matter of human psychology with Pine, we were wrong. In any event Burton's reaction when this whole matter came before the Supreme Court is a confirmation of our original decision, and in a way of Kiendl's stubbornly adhering to that position.

The government made a fatal mistake in seeking cert. immediately, rather than going to the Court of Appeals. Look at what happened. The Court of Appeals refused the condition. I have very little doubt but that our Court of Appeals at that time would have decided that the President had inherent power to do what he did, and in any event, they would not have decided that for some time. They wouldn't have done what the Supreme Court did. It would have been expedited, no doubt, but I'll bet they would have sat on that case. Two, three, four months would have gone by before they finally disposed of it. In the meantime, with the government having changed the labor conditions, it is my judgment that the steel companies would have had to give way; they weren't going to sit around forever and let the government run the plants. They would have had to come to terms, and I don't think the case would have ever reached the Supreme Court. The case would have become mooted, I think, in the end.

Mr. Baldridge, who was the lawyer for the Department of Justice and running the show for the government until they

got into the Court of Appeals with Perlman, was severely criticized by a lot of people for his tactics before Pine and for having a motion to dismiss and emphasizing the merits, and so on; but I think the criticism of Baldridge himself is unwarranted. I think that there was a naive overconfidence in the White House. I think they were calling the shots, and that's rather confirmed in Mrs. Marcus' book. I think that, without really comprehending the matter as a legal problem, the White House was just overconfident and took the view, "Damn it, we are going to assert the moon," and gave Baldridge to understand from the beginning that that's the way it was to be.

So much for the steel case.