MR. JUSTICE FRANKFURTER, concurring.

Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded - too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. [343 U.S. 579, 594] The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

The Framers, however, did not make the judiciary the overseer of our government. They were familiar with the revisory functions entrusted to judges in a few of the States and refused to lodge such powers in this Court. Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute "Cases" or "Controversies." Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in a conventional litigation - and then, only to the extent that they are so involved. Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle - preferably forever - a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: "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 upon the start." The Economist, May 10, 1952, p. 370. [343 U.S. 579, 595]

The path of duty for this Court, it bears repetition, lies in the opposite direction. Due regard for the implications of the distribution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution, has not only confined the Court within the narrow domain of appropriate adjudication. It has also led to "a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Brandeis, J., in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 , 346. A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.

So here our first inquiry must be not into the powers of the President, but into the powers of a District Judge to issue a temporary injunction in the circumstances of this case. Familiar as that remedy is, it remains an extraordinary remedy. To start with a consideration of the relation between the President's powers and those of Congress - a most delicate matter that has occupied the thoughts of statesmen and judges since the Nation was founded and will continue to occupy their thoughts as long as our democracy lasts - is to start at the wrong end. A plaintiff is not entitled to an injunction if money damages would fairly compensate him for any wrong he may have suffered. The same considerations by which the Steelworkers, in their brief amicus, demonstrate, from the seizure here in controversy, consequences [343 U.S. 579, 596] that cannot be translated into dollars and cents, preclude a holding that only compensable damage for the plaintiffs is involved. Again, a court of equity ought not to issue an injunction, even though a plaintiff otherwise makes out a case for it, if the plaintiff's right to an injunction is overborne by a commanding public interest against it. One need not resort to a large epigrammatic generalization that the evils of industrial dislocation are to be preferred to allowing illegality to go unchecked. To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action. And so, with the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of Executive Order No. 10340.

The pole-star for constitutional adjudications is John Marshall's greatest judicial utterance that "it is a constitution we are expounding." McCulloch v. Maryland, 4 Wheat. 316, 407. That requires both a spacious view in applying an instrument of government "made for an undefined and expanding future," Hurtado v. California, 110 U.S. 516, 530 , and as narrow a delimitation of the constitutional issues as the circumstances permit. Not the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future. It is no less incumbent upon this Court to avoid putting fetters upon the future by needless pronouncements today.

Marshall's admonition that "it is a constitution we are expounding" is especially relevant when the Court is required to give legal sanctions to an underlying principle of the Constitution - that of separation of powers. [343 U.S. 579, 597] "The great ordinances of the Constitution do not establish and divide fields of black and white." Holmes, J., dissenting in Springer v. Philippine Islands, 277 U.S. 189, 209 .

The issue before us can be met, and therefore should be, without attempting to define the President's powers comprehensively. I shall not attempt to delineate what belongs to him by virtue of his office beyond the power even of Congress to contract; what authority belongs to him until Congress acts; what kind of problems may be dealt with either by the Congress or by the President or by both, cf. La Abra Silver Mng. Co. v. United States, 175 U.S. 423 ; what power must be exercised by the Congress and cannot be delegated to the President. It is as unprofitable to lump together in an undiscriminating hotch-potch past presidential actions claimed to be derived from occupancy of the office, as it is to conjure up hypothetical future cases. The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble. Such is the teaching of this Court's role in the history of the country.

It is in this mood and with this perspective that the issue before the Court must be approached. We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given. These and other questions, like or unlike, are not now here. I would exceed my authority were I to say anything about them.

The question before the Court comes in this setting. Congress has frequently - at least 16 times since 1916 - [343 U.S. 579, 598] specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards. This body of enactments - summarized in tabular form in Appendix I, post, p. 615 - demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority. The power to seize has uniformly been given only for a limited period or for a defined emergency, or has been repealed after a short period. Its exercise has been restricted to particular circumstances such as "time of war or when was is imminent," the needs of "public safety" or of "national security or defense," or "urgent and impending need." The period of governmental operation has been limited, as, for instance, to "sixty days after the restoration of productive efficiency." Seizure statutes usually make executive action dependent on detailed conditions: for example, (a) failure or refusal of the owner of a plant to meet governmental supply needs or (b) failure of voluntary negotiations with the owner for the use of a plant necessary for great public ends. Congress often has specified the particular executive agency which should seize or operate the plants or whose judgment would appropriately test the need for seizure. Congress also has not left to implication that just compensation be paid; it has usually legislated in detail regarding enforcement of this litigation-breeding general requirement. (See Appendix I, post, p. 615.)

Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power

generally and in advance, without special Congressional enactment to meet each particular need. Under the urgency of telephone and coal strikes in [343 U.S. 579, 599] the winter of 1946, Congress addressed itself to the problems raised by "national emergency" strikes and lockouts. 1 The termination of wartime seizure powers on December 31, 1946, brought these matters to the attention of Congress with vivid impact. A proposal that the President be given powers to seize plants to avert a shutdown where the "health or safety" of the Nation was endangered, was thoroughly canvassed by Congress and rejected. No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress. 2 Authorization for seizure as [343 U.S. 579, 600] an available remedy for potential dangers was unequivocally put aside. The Senate Labor Committee, through its Chairman, explicitly reported to the Senate that a general grant of seizure powers had been considered and rejected in favor of reliance on ad hoc legislation, as a particular emergency might call for it. 3 An amendment presented in the House providing that, where necessary "to preserve and protect the public health and security," the President might seize any industry in which there is [343 U.S. 579, 601] an impending curtailment of production, was voted down after debate, by a vote of more than three to one. 4

In adopting the provisions which it did, by the Labor Management Relations Act of 1947, for dealing with a "national emergency" arising out of a breakdown in peaceful industrial relations, Congress was very familiar with Governmental seizure as a protective measure. On a balance of considerations, Congress chose not to lodge this power in the President. It chose not to make available in advance a remedy to which both industry and labor were fiercely hostile. 5 In deciding that authority to seize should be given to the President only after full consideration of the particular situation should show such legislation to be necessary, Congress presumably acted on experience with similar industrial conflicts in the past. It evidently assumed that industrial shutdowns in basic industries are not instances of spontaneous generation, [343 U.S. 579, 602] and that danger warnings are sufficiently plain before the event to give ample opportunity to start the legislative process into action.

In any event, nothing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947. Perhaps as much so as is true of any piece of modern legislation, Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency. Instead of giving him even limited powers, Congress in 1947 deemed it wise to require the President, upon failure of attempts to reach a voluntary settlement, to report to Congress if he deemed the power of seizure a needed shot for his locker. The President could not ignore the specific limitations of prior seizure statutes. No more could he act in disregard of the limitation put upon seizure by the 1947 Act.

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words. The authoritatively expressed purpose of Congress to disallow such power to the President and to

require him, when in his mind the occasion arose for such a seizure, to put the matter to Congress and ask for specific authority from it, could not be more decisive if it had been written into 206-210 of the Labor Management Relations Act of 1947. Only the other day, we treated the Congressional gloss upon those sections as part of the Act. Bus Employees v. Wisconsin Board, 340 U.S. 383, 395 -396. [343 U.S. 579, 603] Grafting upon the words a purpose of Congress thus unequivocally expressed is the regular legislative mode for defining the scope of an Act of Congress. It would be not merely infelicitous draftsmanship but almost offensive gaucherie to write such a restriction upon the President's power in terms into a statute rather than to have it authoritatively expounded, as it was, by controlling legislative history.

By the Labor Management Relations Act of 1947, Congress said to the President, "You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation." This of course calls for a report on the unsuccessful efforts to reach a voluntary settlement, as a basis for discharge by Congress of its responsibility - which it has unequivocally reserved - to fashion further remedies than it provided. 6 But it is now claimed that the President has seizure power by virtue of the Defense Production Act of 1950 and its Amendments. 7 And the claim is based on the occurrence of new events - Korea and the need for stabilization, etc. - although it was well known that seizure power was withheld by the Act of 1947, and although the President, whose specific requests for other authority were in the main granted by Congress, never suggested that in view of the new events he needed the power of seizure which Congress in its judgment had decided to withhold from him. The utmost that the Korean conflict may imply is that it may have been desirable to have given the President further authority, a freer hand in these matters. Absence of authority in the President to deal with a crisis does not [343 U.S. 579, 604] imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.

No authority that has since been given to the President can by any fair process of statutory construction be deemed to withdraw the restriction or change the will of Congress as expressed by a body of enactments, culminating in the Labor Management Relations Act of 1947. Title V of the Defense Production Act, entitled "Settlement of Labor Disputes," pronounced the will of Congress "that there be effective procedures for the settlement of labor disputes affecting national defense," and that "primary reliance" be placed "upon the parties to any labor dispute to make every effort through negotiation and collective bargaining and the full use of mediation and conciliation facilities to effect a settlement in the national interest." 8 Section 502 authorized the President to hold voluntary conferences of labor, industry, and public and government representatives and to "take such action as may be agreed upon in any such conference and appropriate to carry out the provisions of this title," provided that no action was taken inconsistent with the Labor Management Relations Act of 1947. 9 This provision 10 was said by the Senate Committee [343 U.S. 579, 605] on Banking and Currency to contemplate a board similar to the War Labor Board of World War II and "a national labor-management conference such as was held during World War II, when a no-strike, no-lockout pledge was obtained." 11 Section 502 was believed necessary [343 U.S. 579, 606] in addition to existing means for settling disputes voluntarily because the Federal Mediation and Conciliation Service could not enter a labor dispute unless requested by one party. 12 Similar explanations of Title V were given in the Conference Report and by Senator Ives, a member of the Senate Committee to

whom Chairman Maybank during the debates on the Senate floor referred questions relating to Title V. 13 Senator Ives said:

"It should be remembered in this connection that during the period of the present emergency it is expected that the Congress will not adjourn, but, at most, will recess only for very limited periods of time. If, therefore, any serious work stoppage should arise or even be theatened, in spite of the terms of the Labor-Management Relations Act of 1947, the Congress would be readily available to pass such legislation as might be needed to meet the difficulty." 14 [343 U.S. 579, 607]

The Defense Production Act affords no ground for the suggestion that the 1947 denial to the President of seizure powers has been impliedly repealed, and its legislative history contradicts such a suggestion. Although the proponents of that Act recognized that the President would have a choice of alternative methods of seeking a mediated settlement, they also recognized that Congress alone retained the ultimate coercive power to meet the threat of "any serious work stoppage."

That conclusion is not changed by what occurred after the passage of the 1950 Act. Seven and a half months later, on April 21, 1951, the President by Executive Order 10233 gave the reconstituted Wage Stabilization Board authority to investigate labor disputes either (1) submitted voluntarily by the parties, or (2) referred to it by the President. 15 The Board can only make "recommendations to the parties as to fair and equitable terms of settlement," unless the parties agree to be bound by the Board's recommendations. About a month thereafter Subcommittees of both the House and Senate Labor Committees began hearings on the newly assigned disputes functions of the Board. 16 Amendments to deny the [343 U.S. 579, 608] Board these functions were voted down in the House, 17 and Congress extended the Defense Production Act without changing Title V in relevant part. 18 The legislative history of the Defense Production Act and its Amendments in 1951 cannot possibly be vouched for more than Congressional awareness and tacit approval that the President had charged the Wage Stabilization Board with authority to seek voluntary settlement of labor disputes. The most favorable interpretation of the statements in the committee reports can make them mean no more than "We are glad to have all the machinery possible for the voluntary settlement of labor disputes." In considering the Defense Production Act Amendments, Congress was never asked to approve - and there is not the slightest indication that the responsible committees ever had in mind - seizure of plants to coerce settlement of disputes. [343 U.S. 579, 609] We are not even confronted by an inconsistency between the authority conferred on the Wage Board, as formulated by the Executive Order, and the denial of Presidential seizure powers under the 1947 legislation. The Board has been given merely mediatory powers similar to those of agencies created by the Taft-Hartley Act and elsewhere, with no other sanctions for acceptance of its recommendations than are offered by its own moral authority and the pressure of public opinion. The Defense Production Act and the disputes-mediating agencies created subsequent to it still leave for solution elsewhere the question what action can be taken when attempts at voluntary settlement fail. To draw implied approval of seizure power from this history is to make something out of nothing.

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a

specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

The legislative history here canvassed is relevant to yet another of the issues before us, namely, the Government's argument that overriding public interest prevents the issuance of the injunction despite the illegality of the seizure. I cannot accept that contention. "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck [343 U.S. 579, 610] the balance, has defined the weight to be given the competing interest, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Apart from his vast share of responsibility for the conduct of our foreign relations, the embracing function of the President is that "he shall take Care that the Laws be faithfully executed . . . ." Art. II, 3. The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." Myers v. United States, 272 U.S. 52, 177 . The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government.

To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part [343 U.S. 579, 611] of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by 1 of Art. II.

Such was the case of United States v. Midwest Oil Co., 236 U.S. 459 . The contrast between the circumstances of that case and this one helps to draw a clear line between authority not explicitly conferred yet authorized to be exercised by the President and the denial of such authority. In both instances it was the concern of Congress under express constitutional grant to make rules and regulations for the problems with which the President dealt. In the one case he was dealing with the protection of property belonging to the United States; in the other with the enforcement of the Commerce Clause and with raising and supporting armies and maintaining the Navy. In the Midwest Oil case, lands which Congress had opened for entry were, over a period of 80 years and in 252 instances, and by Presidents learned and unlearned in the law, temporarily withdrawn

from entry so as to enable Congress to deal with such withdrawals. No remotely comparable practice can be vouched for executive seizure of property at a time when this country was not at war, in the only constitutional way in which it can be at war. It would pursue the irrelevant to reopen the controversy over the constitutionality of some acts of Lincoln during the Civil War. See J. G. Randall, Constitutional Problems under Lincoln (Revised ed. 1951). Suffice it to say that he seized railroads in territory where armed hostilities had already interrupted the movement of troops to the beleaguered Capital, and his order was ratified by the Congress.

The only other instances of seizures are those during the periods of the first and second World Wars. 19 In his eleven seizures of industrial facilities, President Wilson [343 U.S. 579, 612] acted, or at least purported to act, 20 under authority granted by Congress. Thus his seizures cannot be adduced as interpretations by a President of his own powers in the absence of statute.

Down to the World War II period, then, the record is barren of instances comparable to the one before us. Of twelve seizures by President Roosevelt prior to the enactment of the War Labor Disputes Act in June, 1943, three were sanctioned by existing law, and six others [343 U.S. 579, 613] were effected after Congress, on December 8, 1941, had declared the existence of a state of war. In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General. Thus the list of executive assertions of the power of seizure in circumstances comparable to the present reduces to three in the six-month period from June to December of 1941. We need not split hairs in comparing those actions to the one before us, though much might be said by way of differentiation. Without passing on their validity, as we are not called upon to do, it suffices to say that these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution revealed in the Midwest Oil case. Nor do they come to us sanctioned by long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice Brandeis:

"The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, [343 U.S. 579, 614] by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 240 , 293.

It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the

Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world. When at a moment of utmost anxiety President Washington turned to this Court for advice, and he had to be denied it as beyond the Court's competence to give, Chief Justice Jay, on behalf of the Court, wrote thus to the Father of his Country:

"We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States." Letter of August 8, 1793, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 489.

In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.