The Presidium Crisis - A Study of Power Allocation in United States Government

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The New York Ballet's command performance at the White House came to a brilliant end. The President, Harrison Freeman, invited Theodore Drummond and Richard Butterfield for a late coffee. As they went upstairs, Drummond, a well-known Constitutional jurist, and Butterfield, Senate Majority Leader, sensed the cause of the President's concern.

For weeks, official Washington had been debating the plan to establish an American Presidium, an all-powerful arbiter of power allocation conflicts among the three governmental branches and superior to them. Dismay with the Supreme Court's inability or failure to decide certain power allocation problems motivated many Presidium supporters.

Freeman vigorously opposed the radical institutional change represented by the suggested Presidium; he feared the consequences of such concentrated power. He saw no viable alternative to the presently effective balance of power system, which over the long term, caused the federal branches of government to reflect current political needs in terms of power allocated to a particular branch. The President believed that the federal judiciary should properly hear controversies con-
cerning power allocation among the coordinate federal government branches.

On this particular evening, the President wanted Drummond's and Butterfield's help with a national address he intended to make concerning the suggested Presidium. Now the President confronted them in his second floor study:

"Ted, Dick, I need your help. This suggested Presidium frightens me. It is a dangerous and concerted attack on the judiciary and our whole democratic way of life. Will you both look over this speech I'm going to give? I think I'm right, but am I blinding myself to a more effective way of resolving conflict between Congress and the Executive? Perhaps I could state my case better. Would you consider my speech in this light and write a personal memo to me—suggestions, corrections, additions, cautions, other ideas—don't spare me."

"Sure," said Theodore Dummond. "When this Presidium idea started gathering strength, I became curious about the governmental processes of power allocation. I'll gather the research together and get a memo to you in two or three days."

"I'd like to draw your attention to certain self-help procedures for Congress in this regard," Richard Butterfield volunteered. "You know, I think internal Congressional reorganization would allow us to keep better tabs on the executive branch, and would go far to meet certain pro-Presidium arguments. This Presidium business—I can't see changing the present system of testing allocation of power. Give me three days. I'll be back with a memo, too."

"Thanks Ted, Thanks Dick. Here's a draft of the speech. Send over your comments when you get a chance."

The three men parted.

When Drummond and Butterfield returned to their homes that evening, they each read the draft given to them by the President.

THE PRESIDENT'S SPEECH

Fellow Citizens. I come before you this evening to discuss a matter of grave importance that affects the very continued existence of our beloved country and its governing institutions as we know them. As you are aware, discussion regarding a proposed Presidium to oversee power conflicts among the three present branches of government has captured wide attention. It is argued that such an institution, composed of elected officials, will more closely reflect the views of the people than the non-elected and present final arbiter of such disputes,
the Supreme Court. Fellow Americans, the proponents of the Presidium plan present a very shallow argument of “more democracy” for Americans but really make a thinly disguised effort to discredit the Supreme Court. The proposed Presidium dangerously concentrates power in one group of men, whether elected or not, in a manner that fundamentally violates the purpose of separating government into coordinate branches which check and balance each other.

When the federal courts adjudicate regarding allocation of power among coordinate branches, this adjudication does not unduly concentrate power in the federal courts. The executive, legislative and judicial branches are independent at the same time they are interdependent, and the judiciary, in deciding a case or controversy, doesn’t award the right to exercise certain power to one or the other of the coordinate branches. Its decision is not a naked political decision prompted solely by political reasons as would be the Presidium’s decision. The judiciary merely interprets the constitutional restrictions upon a particular branch and begins with the initial premise that each branch has independence, subject only to clear and express constitutional limitations on that independence.

The Presidium would concentrate all meaningful power in a body with all-encompassing power, under which would come three subservient, not independent, branches.

My Fellow Citizens, it is my heartfelt belief that the present system by which we resolve controversy over power-assertion by a governmental branch brilliantly and responsively tunes our governmental machinery to current needs. Our present system, separation of powers with judicial scrutiny and interpretation of constitutional restrictions, shuns grandiose political announcements to be expected from a Presidium. It prevents concentration of several types of governing power in one set of hands. One all-powerful allocator of governmental powers, a Presidium, would destroy this inherent protection within our system and would eliminate the more subtle give and take which grants our government extreme “suppleness of adaptation to changing social needs.”

Many intemperately argue for the Presidium because they misunderstand that the delays, internal tensions and conflicts engendered by our system facilitate debate and consideration of alternatives. You have

been told that our government is cumbersome, unwieldy and unnecessarily complex. Yet, time and time again, our present system has effected power allocation shifts among the branches in accordance with political needs. These changing power contours have reflected the evolution of American attitudes towards the nature, basis and scope of governmental power. They have highlighted the overlapping nature of our “independent” branches of government. This harmony between independence and interdependence, the crux of our American system of government, has been emphasized from the earliest days of our government’s founding.2

The judiciary, for example, although allocated no specific executive or legislative authority, exercises a limiting power by weighing executive and legislative actions against constitutional parameters and checks arbitrary unconstitutional action. On the other hand, certain court-developed limitations such as the political question and deference to State Department declarations restrict possible judicial usurpation of executive and legislative powers.3

Judicial scrutiny of power allocation does work. Let me remind you of the classic case regarding allocation of power between Congress and the President that arose in April, 1952, when Truman seized American steel plants. He based the order on authority vested in him by the Constitution as Commander-in-Chief. Truman deeply believed in the President’s inherent unstated4 powers to meet a crisis, and saw many historical precedents for his action.5

In 1952, the unspecified powers that a President might wield in a situation of national emergency short of war were virtually undefined. The judicial decision resulting from this seizure is therefore an extremely important definition of power allocation between the Congress and the President. Truman, in his memoirs, insisted that the President

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4. Unstated in U.S. CONST. art. II or in a Congressional Statute.

must always act in a national emergency and he saw the Court’s limited viewpoint of inherent powers available to the President as unrealistic.\(^6\) Said Truman: “. . . The President who is Commander-in-Chief and who represents the interest of all the people, must be able to act at all times to any sudden threat to the nation’s security. A wise President will always work with Congress, but when Congress fails to act or is unable to act in a crisis, the President, under the Constitution, must use his powers to safeguard the nation.”

But note—Truman’s retrospective observations should not cloud the fact that the President accepted the Supreme Court’s decision; power, as between Congress and the Executive, was allocated by the judicial interpretation of constitutional guidelines. Truman, as I do, realized the relativity of Presidential power. The availability of inherent Presidential power really depends on the seriousness of the emergency and explicit or implicit Congressional consent of the President’s use of executive resources to meet the crisis. I firmly believe that the Supreme Court had the capability to make this adjudication and should resolve this type of power allocation conflict. The decision will cause me to consider carefully a similar action. Yet, if the need is grave, and Congress is behind me, I can still use what Truman called “inherent powers” without any taint of illegality. I read the decision as authorizing Presidential use of non-specifically granted inherent powers as long as there is Congressional acquiescence. The primary responsibility for control of “inherent Presidential power” rests, this case teaches, with the legislature when the President seeks to exercise inherent powers essentially legislative in nature.

You can see the complex beauty of our present power allocation system. It does respond to political currents. It does allow implicit give and take among the branches. Compare the political decisions and rules, sweeping across the powers of all three branches, which will emanate from the Presidium to the type of governmental decision expected from the present trio of independent, but interdependent, branches with no one branch able to exercise the uncontained breadth of decision suggested by an all-powerful Presidium. Implicit understandings and consent to a course of action among independent but interdependent branches of government do successfully allocate power among the branches. Judicial controversy need not always be involved.

Fellow citizens, the operative principles of our democratic form of government cannot survive a Presidium experiment. I fear the stran-

\(^6\) II TRUMAN MEMOIRS: YEARS OF TRIAL AND HOPE, 475-78 (1956).
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glehold that this institution would soon have upon the once independent-interdependent relationship of our governmental branches. It will quickly paralyze the subtle abilities of our government to respond to power allocation crises. The Presidium does not represent popular control; it represents centralizing and stultifying political control without any check or safeguard upon its exercise of power. Further, my Fellow Americans, I know that when you consider the present system by which our government meets power crisis problems, as I have tried to outline for you this evening, you will see the present efficiency and safety in the way we do things now. I, therefore, urge you to oppose this measure.

Our present structure of government, with its system of judicially balanced power allocation, is a delicately balanced governmental mechanism. No other structure can safely accomplish these allocations of power. Our present system must not be changed.

Good-night my Fellow Americans.

A MEMORANDUM FROM BUTTERFIELD,
SENATE MAJORITY LEADER
TO: HF
FROM: RB

Good speech! Must be given and soon! The pro-Presidium people insist that the Presidium extends democratic decision and possesses the capability to cope with the extensive proliferation of bureaucracy and present-day complicated interaction among the branches of government which our forefathers could not imagine. They insist that our present system is deficient by reason of its inability to cope with this proliferation of bureaucracy. They do not see the subtle qualities of ebb and flow as to power allocation described in your speech. They say that interpretation of constitutional restrictions by the judiciary just does not work because the courts have refused to entertain certain fundamental questions of power allocation. Further, given the present imbalance between the executive and legislative bureaucracies, they see a need for a powerful, central control group in American government.

I need not remind you that these sentiments surface, for example, in the strong desire to curb the President's broad foreign affairs powers. Many of my fellow members of Congress feel strongly that the

7. The outlines of this broad discretion, along with areas of “judicial competence” can be traced in LaAbra Silver Mining Co. v. United States, 175 U.S. 423 (1899)
President’s exercise of such power allows him to exert a legislative power within the United States contrary to the Constitution because of the internal effects of various treaties and international agreements. The same sentiments surfaced in 1957 when Congress considered the revised Bricker Amendment. Indeed, collective opinion, including judicial decision and other observations, sees no express limitation on the treaty making power. Yet, treaties can reallocate power as between Congress and the President, as between the states and the federal system, as between the United States and foreign governments, and most importantly, can limit the people’s constitutional rights. Certain Congressmen, then, might support the Presidium for this reason alone.

In this connection, perhaps you read the influential article which asserted that the President could not negotiate a peace treaty with North and South Vietnam without formal advice and consent of the Senate as a body, and further, that a careful study of previous treaty making precedent indicated that the President must also seek the advice and consent of the Senate when entering into substantive treaty negotiations. Your predecessor took this route and his actions as to the Vietnam Peace Treaty in fact properly re-allocated the legislative and executive power aspects of treaty making, for he recognized that as to treaty making, the Senate is his only constitutional and responsible counsellor. This represents a prime example of power re-allocation by internalized re-examination of respective constitutional roles without judicial intervention.

You mention some of the more subtle means of power allocation, such as Congress’ ability to control appropriations by placing a time limit on their effectiveness. (Executive impoundment, though, which I discuss below, may very well nullify this control.) However,

(fraudulent aspect to international claim within province of Court); National City Bank v. Republic of China, 348 U.S. 356 (1955) (see especially dissent of Justices Reed, Burton and Clark at 348 U.S. 370-71); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (This decision broadens the permissible breadth of delegated power to the Executive depending on whether internal or foreign affairs are involved); and Garcia v. Lee, 37 U.S. (12 Pet.) 511, 522 (1838) (executive expertise as to boundary line determination).

8. See Bricker Amendment and related materials, ODEGARD, supra note 1, at 174-75.


I think it most important that you emphasize the most crucial allocation problem: the historically recent development of "Presidential Government." Executive power accretion stems from such diverse factors as the rise of political parties, the advent of mass communications and the complex, highly interdependent character of modern life. Congress, more structurally conservative, has not similarly increased its power. Development of "Presidential Government" further, by virtue of Congressional default underlines the need for structural reorganization of Congress to accomplish non-judicial reallocation of power as between the executive and the legislative branches.

Let us look at the problem. The practice of executive impoundment of appropriated funds presents a prime example of executive aggrandizement with subsequent accretion of power. The power of the purse has been constitutionally allocated to the legislature. It seems to me that continued control of public spending, along with open debate and committee investigation, comprises vital Congressional checks and controls over executive power without violating executive branch integrity. Yet world wars, economic crises and protracted cold war feed executive aggrandizement and in turn impair the separation of powers prescribed by the Constitution. These factors have distorted the historical basis for executive impoundment. Such impoundment has now become an executive branch rejection or deferral of projects approved and mandated by Congress, an absolute veto over public spending.

Executive impoundment provides fuel for the Presidium supporters. Congressional members fear diminished public reliance on Congress caused by this significant executive assumption of policy making power. Your speech must acknowledge this problem and suggest a solution. Neither judicial review nor impeachment presents a means of resolution. You must emphasize that resolution can and must come from within our present structure. Congress can limit executive impoundment by using the Government Accounting Office to follow and maintain control over appropriations already made. It should fur-

13. Executive failure to expend funds in accordance with Congressional intent.
ther investigate the amounts of reserved funds by demanding this information from the Budget Bureau.

Another area of concern is highlighted by a recent conference of Congressional leaders which pinpointed certain developments handicapping Congress from coping with the problems before it: executive initiative in proposing and drafting legislation which is often discretionary (making supervision more difficult), the volume and complexity of legislation which discourages substantial review, the growing use of executive privilege to restrict information outflow, and outdated and undermanned Congressional facilities which are no match for the ever-expanding executive bureaucracy. Failure to cope with problems caused by these factors contributes to a further shift of power to the executive branch, furthers "Presidential Government," and encourages even more support for the Presidium.

Solution to these problems does not lie with a Presidium. Rather a re-allocation of power to restore a more even balance between the legislative and executive branches can be accomplished by Congressional reorganization permitting comprehensive analysis and decisive solution of a problem without destroying committee autonomy. Reorganization should ensure timely, complete information supply. It should eliminate procedural barriers wasting valuable time better spent in deliberating and crystallizing substantial recommendations. Committees must interact and share information. Greater inter-committee activity, augmentation of central informational facilities staffed with adequate numbers of properly qualified experts, and an up-to-date computerized ability on a par with the executive would be further reorganizational aims. Such reorganization would meet the growing concern of my colleagues and diminish the appeal of the Presidium idea.

I agree with the basic premise of your speech. My review of the Congressional-Executive relationship and its problems convinces me that the present power allocation system does work—judicial decision, subtle branch interaction and Congressional reorganization serve as the on-going mechanisms of its operation. A Presidium is unnecessary and most dangerous.

A Memorandum From Drummond,
Constitutional Jurist

TO: HF
FROM: RD

Your stand against the Presidium is sound. In essence you are say-
ing that there are two mechanisms in our government handling power allocation problems: the federal judiciary and more subtle arrangements, including both understandings among branches and internal reorganization efforts (more could be made of this in your speech), seeking to readjust certain present power misallocations.

It seems to me, however, that you should emphasize the destructive impact of a Presidium's centralized political control upon the present means of power allocation within our federal government. Judicial decision, limited within closely circumscribed boundaries, contrasts sharply to the sweeping and unlimited type of ruling that can be expected from a political institution such as the Presidium. Court developed self-restraints would not bind a Presidium. Practical limits on judicial authority are further absent as concerns a Presidium. The present independence—interdependence of coordinate branches, enforced by the judiciary, prevents absolute control by any one branch. I can easily see this absolute control exercised by a Presidium combining judicial, legislative and executive powers.

My memo gives additional data for your use and expands on a theme of your speech: constitutional controversy concerning the separation of powers and allocation of power among coordinate branches should be and can be resolved by the federal judiciary without need of any new institutional structure. Implicit here is the obvious exception for allocation problems solvable by self-imposed reorganization, readjustment of self-limiting devices (especially applicable to the judiciary), or some form of inter-branch accommodation.

Presidium supporters point to the Supreme Court's past ineffectiveness with certain problems of national concern. These problems are represented, for example, by the attempts to check Presidential action in Vietnam through a test case concerning the Vietnam War's constitutionality. I commend to you, as an answer to these arguments, an excellent study of the non-institutional real power limitations upon the Court.\textsuperscript{17} As an issue becomes more volatile, the more in jeopardy becomes the Supreme Court's ability to function effectively. This study brilliantly contrasts the Supreme Court's "authority" with legislative and executive "power to enforce." Limited judicial "authority" has political consequences because decrease in the Court's effectiveness de-

\textsuperscript{17} Maclver and Wolff, Part I—\textit{The Political Question Doctrine: Would Congressional Action Ensure Justiciability}, and Part II—Locke, \textit{The Noninstitutional Limitations on the Supreme Court: The Legitimacy of a Decision on Vietnam, The Supreme Court as Arbitrator in The Conflict Between Presidential and Congressional War-Making Powers} (hereinafter cited as \textit{Arbitrator}) in Special Issue.
creases ability to function judicially and in turn upsets the constitutional balance of government.

The Court loses effectiveness when it decides counter to deeply felt popular needs or convictions. Judicial decisions will not be accepted as the rational and reasonable choice when emotions are so heavily invested in a question that the decision cannot be considered rationally.\textsuperscript{18}

The article I have commended to you presents a set of reference terms for analyzing interaction among courts and the nation: "influence," "authority," "power" and "force."\textsuperscript{19} "Influence," a function of the Court's prestige, legitimizes the majority of its decisions and arises from consistently "rational decisions." The Court exercises "authority" when citizens choose the Court's course because they understand the decision's reasonableness, especially when a decision represents a profound change of values. Such authority arises from a determination that the Court has stayed within its institutional power boundaries, though such boundaries be self-imposed and perhaps too conservative. Unfortunately, such a determination may, therefore, inhibit Court action.

When "influence" and "authority" fail, the court depends upon "power": tacit or overt threats of executive sanctions. This Court behavior seeks an immediate change in the status quo\textsuperscript{20} with the hope that an individual, temporarily acting in a prescribed way, may be convinced of the acceptability of the new course of action implicit in the Court decision. But exercise of "power" by the Court can be effective only if the threat is credible and only if the judicial opinion can eventually be accepted. The Court must obviously depend on the executive to provide sanctions and, therefore, cannot direct its power without executive cooperation, nor upon the Executive himself. Also, if the values at issue outweigh the sanction threat, the Court's power will be nullified.

The court uses "force" when it invokes executive sanctions on those refusing to heed the Court's command.\textsuperscript{21} Note, however, that use of force does not legitimize the Court's opinion but only brings temporary acquiescence. The ultimate legitimization of the Court's mandate depends upon acceptance of the Court's holding, the expression of the Court's authority.

\textsuperscript{18} See discussion of Bickel's \textit{The Least Dangerous Branch} in Locke, \textit{id.} at 95.
\textsuperscript{20} For example, the school desegregation cases.
\textsuperscript{21} For example, the use of troops at Little Rock, Arkansas.
My point is this: to criticize the Court as ineffective, when it refuses to adjudicate an issue with extremely intense political, emotional and moral implications, ignores the Court’s inability to legitimize the decision with resultant diminution of its authority. If judicial review becomes jeopardized, the constitutional balance of our government can be seriously disrupted, for the Supreme Court serves as the fulcrum of constitutional balance in our rapidly changing society.22 The efficient working principle of power separation is judicial review and the Supreme Court is the final arbiter of any conflict in this area.23

Judicial power has been self-limited and is exercised only when the Court is confronted with a case or controversy within certain parameters.24 The Court’s self-imposed restraint by virtue of these parameters, as well as by the political question doctrine, dispels fear of judicial oligarchy and yet suggests ineffectiveness. The political question doctrine, especially, must therefore be re-evaluated by the courts. Is the substantive matter one which should as a matter of principle be left to the autonomous determination of the executive or legislative branches?25 Even if the issue does not have this character, is it a question from which the Court should still stay its hand because of practical political or “power” considerations? Such self-limiting queries must not, however, blind the Court from its watchfulness for unconstitutional invasion or impairment of Congressional powers by the President, for invasion or usurpation of Presidential powers or prerogatives by Congress, and for impairment of the states’ or citizens’ constitutional rights by either branch.

Judicial deference represented by the political question doctrine needs readjustment to allocate power more properly in this time of “Presi-

22. ODEGARD, supra note 1, at 51 quoting from Justice Robert H. Jackson’s views in Lecture: The Supreme Court in the American System of Government.
25. For example, the doctrine of “executive preference” represents the Court’s acceptance of the State Department’s expert opinion in a pending case as a matter of law. See Note—The Relationship Between Executive and Judiciary—The State Department as the Supreme Court of International Law, 53 MINN. L. REV. 389 (1968). There is broad deference regarding national foreign policy. See arguments pro and con at 395. But even though the Court defers to competent exercise of authority, (Korematsu v. United States, 323 U.S. 214 (1944)) and Hirabayashi v. United States, 320 U.S. 81 (1943)), it first must find reasonable factual premises for the action taken. Limits upon executive military discretion do emerge to protect individual rights from unreasonable action. In Korematsu v. United States, 323 U.S. 214, 234 (Murphy, J., dissenting) the Court warns of limits beyond which the executive could not go for the Court stood ready to protect the system; see Mora v. McNamara, 389 U.S. 934 (1967). Contra, Schwartz and McCormack, Justiciability of Legal Objections To the American Military Effort in Vietnam, 46 TEX. L. REV. 1033 (1968), and Velvel, War in Viet Nam: Unconstitutional, justiciable and jurisdictionally attackable, 16 KAN. L. REV. 449 (1968); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970).
dential Government." Mechanical categorization as a "political question" must cease for no coherent single principle permits or requires non-decision of an identifiable class of cases on this basis. Informed abstention rather than artful avoidance demands close constitutional determination that the particular subject matter presents a constitutional political question to be determined by another branch.26

The Court has in fact decided the most basic power allocation questions as it did when it found that President Truman's seizure of the steel mills exceeded his power.27 Truman seized the mills during a labor dispute though his advisors doubted the legal soundness of this action.28 Truman depended on historical precedent29 and his view of the President's "inherent powers" to cope with emergency. Many thought the Court would never hear the case. However, the federal judiciary met its constitutional responsibility and did so. The confrontation raised vital questions concerning the limits of executive and legislative power at a time when many believed that Presidential power had dangerously expanded; the decision supplied an important interpretation of Article II of the United States Constitution. At each level of hearing in the case, the government argued inherent power to meet crises and the necessity of executive action in the absence of a controlling statutory provision; the steel companies insisted that without specific constitutional or Congressional authority, the President's action was unconstitutional.30 Eventually the government backed off this position and claimed no residuum of power outside of the constitutional powers inherent in the Chief of State.31

In the Supreme Court phase of the case, the companies argued strenuously against the idea of a broad residuum of powers in the President, and contended that without specific constitutional or Congressional authority, the President's action was unconstitutional.32 The government, continuing its argument of inherent power, cited historical examples of executive seizure, but could cite no judicial precedent for seizure. The government contended that the Executive could, without

27. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) more commonly known as the Steel Seizure Case.
29. The President had intervened in major industrial disputes on twenty-four occasions before 1952 without specific legal authorization: See Westin, supra, n.5 at 23: Wilson 8, Harding 2, FDR 4, HST 2, though in each instance the Congress had ratified the action taken by statute, and no test case had reached the Supreme Court or been decided on constitutional grounds.
31. Id. at 67.
32. Id. at 99-101.
statutory authority, employ seizure as a means of averting impending crises, and by negative inference suggested the lack of judicial or legislative correction of previous seizures meant acquiescence in the action taken.

The Supreme Court rendered an opinion made remarkable by its willingness to confront this basic power allocation problem and by its diversity of written opinion. Even so, only Justices Black and Douglas denied the existence of the inherent powers claimed by Truman. The other justices either reserved judgment on the issue or expressly recognized inherent power to act in an emergency if it did not contravene Congressional mandates. Whether or not Truman had contravened existing federal statutes in fact became the basic issue.

The Court's majority opinion, written by Justice Black, did not hesitate to assess whether or not the President acted within the scope of his constitutional power. This opinion interpreted Truman's actions as an attempt to execute Presidential policy rather than Congressional policy. Because the Constitution entrusted this power of lawmaking to Congress and not the President, the President's seizure order could not stand.

Justice Frankfurter, concurring, would have avoided any attempt to define Presidential power comprehensively under all circumstances. Though the Court should be wary in this area, he had no doubt that it could intervene to determine "... where authority lies as between the democratic forces in our scheme of government," not as overseer of the government, but as the ultimate authority in constitutional interpretation. He emphasized that absence of Presidential authority to deal with a crisis does not imply want of governmental power, but the existence of governmental power does not necessarily vest it in the President.

Justice Douglas concurred and identified the judicial role as determinative of where the Constitution allocated power and not determinative of the branch which could act most expeditiously.

Justice Jackson, also concurring, feared Congressional disability from the Presidential acts. He reasoned that the Court must limit further executive aggrandizement which he noted as relatively immune from judicial review. The Executive must be under the law and the law

34. Id. at 588.
35. Id. at 597.
36. Id. at 594-95.
37. Id. at 654.
must be made by parliamentary deliberation.\(^{38}\)

Justice Burton, concurring, measured validity of executive action by determining whether it properly fell within the constitutional area of governmental power of this branch.\(^{39}\)

Justice Clark, concurring, recognized independent Presidential power to meet crises, but never used the term, “inherent power.”

Justices Vinson, Reed and Minton dissented. Implicit in their measurement of the context within which Truman acted lay belief in the President's power to meet crisis not covered by a pre-existing statutory scheme. Depending on historical precedent, statutory interpretation, and the argument of approval by abstention (already discussed), they argued: the President acted because Congress had not reacted to prevent crises. To them, faithful Presidential execution of the laws required prompt *interim* action (even the dissent placed this strict limit on such “inherent power”) to execute legislative programs essential to the country's survival.\(^{40}\) The dissenters, then, saw Truman's initiative to meet a crisis as comparable to a judicial injunction meant to maintain the *status quo* until Congress could act.\(^{41}\)

You must tell the American people in detail about this remarkable judicial analysis of power balance. Regardless of the approach of each individual justice, the case clearly demonstrates the Court's institutional ability to meet quickly and effectively a power allocation crisis.

The “Pentagon Papers” case presents another example of the Court's institutional ability to meet power allocation problems—especially with regard to “executive power.”\(^{42}\) Though there were diverse opinions, the Court noted that it, too, could not unconstitutionally legislate by injunction when the legislature had not outlawed such action. The Court saw itself confronted with executive overreaching.

The Court's short *per curiam* decision holds that the government had not justified a prior restraint of expression. The nine more detailed concurring and dissenting opinions discussed below, should be noted in your speech. Conscious of its own power limitations, the Court measures the effect of a favorable decision that might be seen as legislating for the Executive and thus tainted with the same vice as the executive action being reviewed.

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38. *Id.* at 655.
39. *Id.*
40. *Id.* at 709.
41. *Id.* at 703.
Justices Black and Douglas identified the government's "inherent power to enjoin" argument as executive overreaching to cause the Court to legislate by injunction when the legislature had not acted. Further, an executive claim based on emergency and inherent power must be subject to an independent assessment by the Court to verify the existence of the emergency.

Justice Stewart, joined by Justice White, recognizing the Executive's enormous defense and foreign policy powers, identified an enlightened citizenry as the only effective restraint on executive policy and power in these areas.43 With this principle before them, they determined that leeway afforded the Executive must not eliminate judicial and legislative scrutiny in these areas. As a prerequisite to injunctive relief, the Court must weigh the propriety of the executive action giving rise to the controversy. Here, the absence of a clear Congressional mandate identifying these circumstances appropriate for injunctive relief convinced Justices White and Stewart that the Executive's argument based on an "inherent power" was overreaching constitutionally allocated power. In terms reminiscent of the steel seizure case already discussed, these justices unhesitatingly set the boundary limits of Presidential power allocation.

Justice Marshall queried: which branch had the power to make a law giving the basis for injunctive relief? Can the Court, he asked, consistent with proper power allocation among the branches, use injunction to prevent behavior that Congress specially declined to prohibit?44 He concluded that the Court must not "enact law" in any guise, especially where Congress has purposively not enacted legislative limitation on behavior.

Chief Justice Burger and Justices Harlan and Blackmun dissented. In contrast to the other justices, they limited the scope of judicial inquiry in such a case. The judiciary, they held, could evaluate the Executive's determination of power to act by verifying that the Executive has correctly determined the dispute's subject matter to be within allocated Presidential power. Further, the Court can insist that such a decision be made by the executive department head concerned. The judiciary, in their view, could inquire no further.

This latter view is unwarranted, and it contributes to feelings of unease concerning the Court which eventually culminate in a proposal such as the Presidium. To come to the conclusion of the dissenters

43. Id. at 727.
44. Id. at 741.
radically limits the Court's effectiveness as a constitutional interpreter. If the Court followed the view it could be validly argued that the Executive in an era of "Presidential Government," using care to place the right label on his action, would be unlimited in power. The Court must assess the propriety of power allocation, often self-assumed by the branch involved and must not rest content with a mere threshold determination as suggested by this dissent.

Executive action in time of emergency has been considered in a number of important cases. Even in time of crisis, a government under law must act within and be guided by constitutional limitations.

You should also call the nation's attention to the fact that the Court has assessed many times whether or not the legislature has gone too far in delegating power. To do this, it has asked: Has Congress itself established the standards of legal obligation and thus performed the essential legislative function? In this area, too, extraordinary conditions do not enlarge constitutional power or justify actions outside the sphere of constitutional authority.

The courts have also established that the President in his person cannot be restrained by injunction from carrying into effect an Act of Congress, though the executive branch can be reached by a suit against an official of the executive department. An injunction will lie against such an official acting in excess of his authority or under an authority not validly conferred.

You should also point out the Court's competence regarding executive power as expressed in an executive order concerning a government employee. There may also be questions of too broad delegation here, or doubt as to legality of judicial review in this area.

All these cases contain a theme which argues eloquently against the creation of a Presidium. Maintaining each of the three branches free from the control and influence of the others can only be accomplished by allowing each branch to be master in its own house. The Presidium would be one master over all three branches and would in ef-

46. Id. at 385; see also id. at 307-9, 312, 336, 343 re: a government in emergency.
48. Id. at 528-29.
50. Peters v. Hobby, 349 U.S. 331 (1955), as involved with loyalty board proceedings the Court has reviewed the propriety of such an executive order as it relates to the Congressional mandate.
51. Id. at 350, 354.
fect destroy the basic principle supporting the separation of powers and balance inherent in our democratic process.

I hope this memorandum gives you needed legal references to demonstrate the judiciary's institutional ability to confront power allocation problems. This demonstration disproves the pro-Presidium arguments stating the inability of the courts to handle such problems. A Presidium suggests to me a real and vital danger to our democracy. Its unlimited powers cutting across all branches and dependent on none would bring eventual totalitarian control over our political institutions and a complete end to the doctrine of separation of powers.

MAY, 1979
AN AFTERWORD BY AN IMPARTIAL OBSERVER

The Presidium crisis has passed. Freeman's memorable speech in July, 1978, united the country against this proposed institutional change and sparked serious self-examination by Congress and the federal judiciary. Many of the re-organizational suggestions discussed in Butterfield's memorandum have already been accomplished.

The Presidium crisis highlighted the absolute need for definitive power allocation rulings in a democracy premised on a balanced mechanism of independent, yet interdependent, branches operating in an increasingly complex society. Many individuals studied the judiciary's record and were pleasantly surprised by its success in confronting such problems. The judiciary had resolved many power crises representing fundamental power clashes between Congress and the Executive, they noted. Further, much criticism leveled at the Court, it became apparent, failed to recognize the Court's limited authority to legitimize its decisions and its concern that over-extension would destroy our government's constitutional fulcrum. All these considerations cast decisive doubt on the pro-Presidium charge of institutional inability to cope with power allocation crisis.

The Presidium crisis made one thing clear. There is no need for institutional restructuring of the American Government to provide a new institution for resolving power allocation questions. The courts presently do and must continue to interpret the parameters of our Constitution. Power allocation conflicts must remain constitutional questions measured and resolved by constitutional norms and must never become a political issue to be resolved by political decision exercised by a non-judicial body such as a Presidium. With full realization that many such power allocation conflicts are solved by internalized branch
readjustment or subtle give and take, the remaining power allocation questions must be resolved by the accumulated and measured wisdom of our judiciary. Herein lies our best hope that the American system of independent yet interdependent branches will continue to remain a viable form of government.