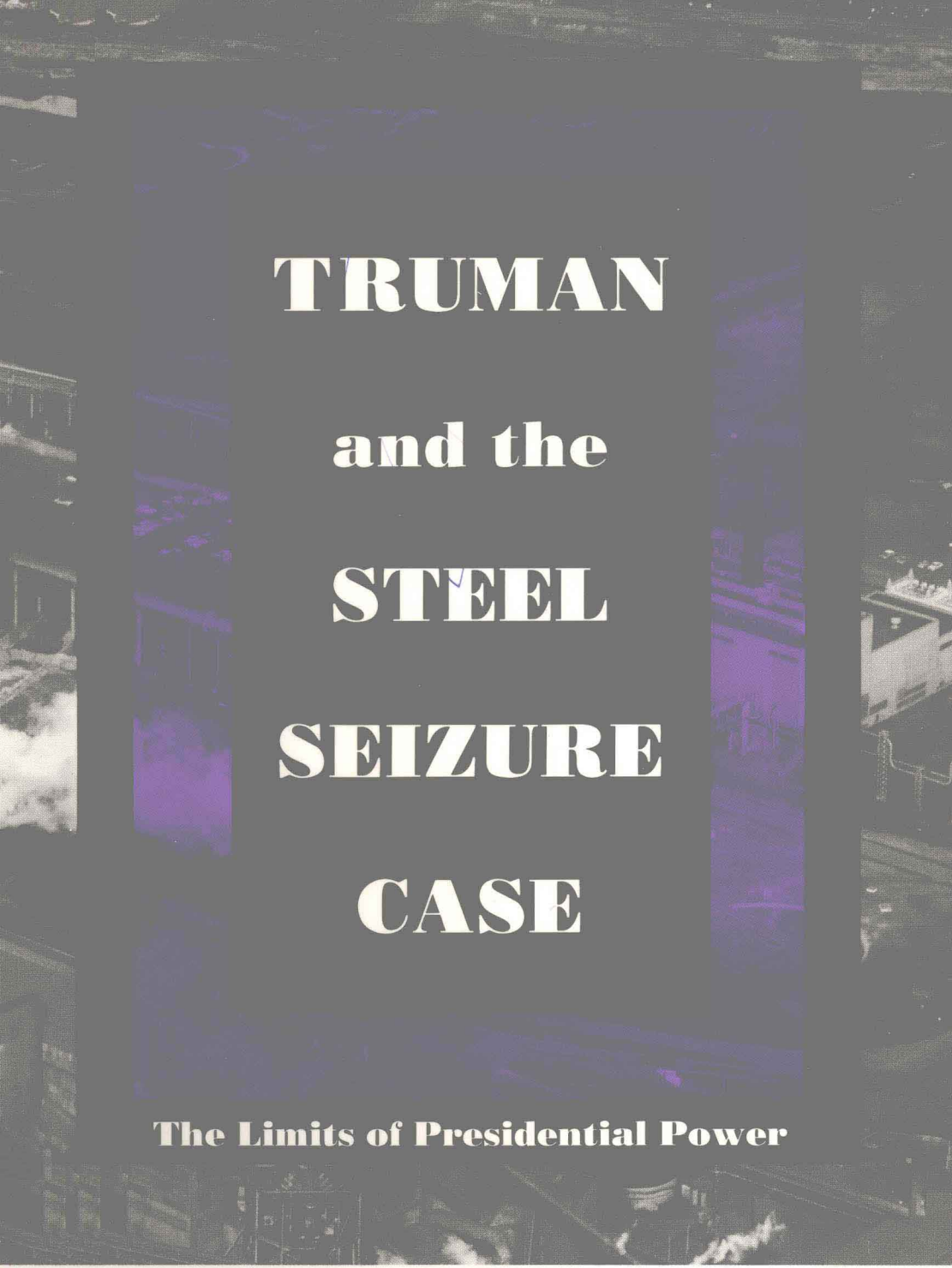

TRUMAN and the STEEL SEIZURE CASE

The Limits of Presidential Power

Maeva Marcus With a Foreword by Louis Fisher

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Truman and the Steel Seizure Case

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For Danny

Foreword *by Louis Fisher*

The Steel Seizure Case of 1952—*Youngstown Co.* v. *Sawyer*—continues to fascinate students of government. It marked one of those rare occasions when the Supreme Court, in a time of war, used judicial review to curb presidential power. To that extent it stands as a warning to occupants of the Oval Office that their actions are subject to judicial scrutiny and control. However, as Maeva Marcus explains in her detailed analysis of *Youngstown*, the circumstances of President Truman's seizure of the steel mills were so unique that it would be a misreading of history to expect the Court to play this role very often. In fact, the general lesson to be drawn from the confrontation in 1952 is that the most effective and enduring check on presidential power is an alert and assertive Congress. Otherwise, the unilateral exercise of executive power, whether soundly based or not, will prevail.

In a broader sense, *Youngstown* supplies a practical framework for explaining the scope of presidential power. The competing model, *United States* v. *Curtiss-Wright Export Corp.* (1936), described executive power in terms that are far more sweeping and generous. Because of the pressures of international affairs and diplomacy, the Supreme Court recognized (in dicta) that the President has access to inherent and extra-constitutional powers. *Curtiss-Wright* is frequently cited by the Court to justify presidential actions. For example, in 1993 the Court upheld an Executive Order that directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return them to Haiti with-

out first determining whether they qualify as refugees. Although the narrow legal question was whether the Executive Order violated a congressional statute and the United Nations Convention Relating to the Status of Refugees, the Court ended with a reference to the 1936 holding. The Court found reason to defer to presidential judgments in international affairs, arguing that such a "presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibilities," citing *Curtiss-Wright*.[1]

The account by Maeva Marcus explains that *Youngstown* stands as a reminder, not always applied with sufficient rigor, that the President operates within a constitutional structure and is subject to congressional and judicial restraints. It explicitly rejects the President's reliance on "inherent" powers. Two recent works, both published in 1990, demonstrate a continuing effort to compare the *Curtiss-Wright* and *Youngstown* models.

In *The National Security Constitution*, Yale law professor Harold Koh writes that the image in *Curtiss-Wright* of "*unchecked executive discretion* has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority."[2] He notes that federal courts "have too readily read *Curtiss-Wright* as standing for the proposition that the executive deserves an extra, and often dispositive, measure of deference in foreign affairs above and beyond that necessary to preserve the smooth functioning of the national government."[3]

By contrast, the Supreme Court in *Youngstown*, handed down in the midst of the Korean War, explicitly rejected the Truman administration's seizure of the steel mills as necessary to prosecute the war. Far from sanctioning foreign affairs as an executive preserve, the Court exercised its own powers in checking presidential action and recognized the power of Congress to authorize, or not authorize, what a President may do. As Koh explains, in the years since *Youngstown* "congressional framework statutes have confirmed Congress's constitutional right both to participate in the setting of foreign policy objectives and to receive the information and consultation necessary to make its participation meaningful."[4] The opinions in *Youngstown*

"rejected the *Curtiss-Wright* vision of unrestrained executive discretion in favor of a normative vision of the policy-making process in which the three branches of government all play integral roles."[5]

Part of Sutherland's dicta in *Curtiss-Wright* resulted in a distortion of presidential power. In claiming that the President is the "sole organ" of the United States in international affairs, Sutherland referred to a speech by Congressman John Marshall: "As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., col. 613."[6] This passage suggests that Marshall promoted an exclusive, independent power for the President in foreign affairs, but when his statement is read in full, and in context, it is evident that Marshall's position was much more narrow. Only *after* the two branches had jointly established national policy, either by statute or by treaty, did the President become the "sole organ" in *implementing* that policy.[7] The President possessed the sole power to announce, not make, policy.

Although Koh embraces *Youngstown* as the model most consistent with America's constitutional framework, he acknowledges that the Court's 1952 ruling has fared poorly over the years:

> Given the outcome in *Youngstown*, one might have expected subsequent presidents to have encountered less universal success in the courts. But an examination of the president's judicial victories since Vietnam reveals that he owes much of his success to a subtle judicial revival of the *Curtiss-Wright* theory of the National Security Constitution. . . . By resurrecting *Curtiss-Wright* after Vietnam, the courts have repeatedly upheld the president's authority to dominate foreign affairs. By applying a *Curtiss-Wright* orientation to tip particular decisions in favor of executive power, their actions have posed a potent, growing threat to *Youngstown*'s vision of the National Security Constitution.[8]

The second major work published in 1990, contrasting *Curtiss-Wright* and *Youngstown*, is *Constitutional Diplomacy* by Michael J. Glennon, who teaches law at the University of California, Davis. As to Justice Sutherland's grand theory in *Curtiss-Wright* regard-

ing presidential power, Glennon points out that the President was operating precisely on the basis of legislative power granted by Congress, and that it is untenable to suggest that the President could have meted out criminal penalties in the absence of an express congressional grant of power.[9] Thus, Justice Sutherland's supposition of presidential powers that are derived from somewhere outside the Constitution ("external sovereignty") has no basis in fact or theory.[10] Sutherland's sovereignty theory, Glennon says, "dangerously undermines freedoms safeguarded in the Bill of Rights."[11]

Turning to *Youngstown*, Glennon reviews the holding by Justice Black that President Truman had engaged in lawmaking, a task assigned to Congress by the Constitution. The seizure of the steel mills was unlawful, Black reasoned, because the President's power to issue the order must stem either from an act of Congress or from the Constitution itself. Remarks Glennon: "Notwithstanding the elegant simplicity of Black's opinion, it has not withstood the test of time; as Corwin noted, this seems not to have been the first instance of a president's doing something that Congress might also have done."[12] Yet the Court in *Youngstown* made no reference to powers that President Truman might have derived from "sovereignty," nor did the Court look at all to *Curtiss-Wright* for guidance on the constitutionality of Truman's action.[13]

The part of *Youngstown* that has had the greatest impact on contemporary constitutional analysis is Justice Jackson's concurring opinion. No other statement by a Justice has so concisely and insightfully defined the limits and scope of presidential power. He parted company from the purely textual approach used by Justice Black, concluding that the "actual act of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[14] To Jackson, the scope of presidential power depended on where it fell among three possible scenarios:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that

he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[15]

Jackson's second scenario (the "zone of twilight") helps explain the successful use of power by many Presidents. When President Jimmy Carter announced his intention in a year's time to terminate a defense treaty with Taiwan, he called into question the President's legal authority to terminate treaties. The Senate started to challenge his action but never reached a final vote. By the time the case reached the Supreme Court, it was a matter of weeks before the treaty would be terminated. Echoing Jackson's opinion, Justice Powell said that if Congress "chooses not to confront the President, it is not our task to do so."[16] Carter's actions against Iran, including his freezing of assets and the suspension of claims pending in American courts, was upheld by the Supreme Court partly because of congressional acquiescence. Presidents have a freer hand in foreign affairs "where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President."[17]

Similar judgments were handed down during the Reagan administration, when members of Congress went to the courts repeatedly to challenge his use of the war power in El Salvador, Nicaragua, Grenada, and the Persian Gulf. The message from the courts each time was the same: we will not use judicial remedies to compensate for legislative inaction.[18] If members of Congress want to protect legislative prerogatives, they must do more than file lawsuits. They must act by invoking the ample legislative weapons available to rein in an ambitious President. As a federal court said regarding the El Salvador suit:

> If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes. The Court need not decide here what type of congressional statement or action would constitute an official congressional stance that our involvement in El Salvador is subject to the WPR [War Powers Resolution], because Congress has taken absolutely no action that could be interpreted to have that effect.[19]

The outcome in the other war power cases followed the same logic. In the Nicaragua case, federal judges held the case to be nonjusticiable.[20] Judge Ruth Bader Ginsburg, now a member of the Supreme Court, noted that Congress "has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch. But no gauntlet has been thrown down here by a majority of the Members of Congress. On the contrary, Congress expressly allowed the President to spend federal funds to support paramilitary operations in Nicaragua."[21]

Jackson's third scenario—presidential actions incompatible with the expressed or implied will of Congress—is illustrated by President Reagan's role in the Iran-Contra affair. The theory of extraconstitutional powers was used by Reagan administration officials to justify their actions. Presidential aides took to heart the teachings of *Curtiss-Wright*, embroidering executive power to an extent that went beyond what Justice Sutherland counseled. At the Iran-Contra hearings, Oliver North claimed that the President could authorize

and conduct covert actions with nonappropriated funds (funds obtained from private parties from foreign governments).[22] He then tried to justify his actions by claiming that *Curtiss-Wright* held that "it was within the purview of the President of the United States to conduct secret activities and to conduct secret negotiations to further the foreign policy goals of the United States."[23] No such issue was before the Court in *Curtiss-Wright*, and whatever dicta was included to support the need for secrecy and confidentiality in foreign affairs offers no support for North's views.

For example, Justice Sutherland in *Curtiss-Wright* noted that secrecy "in respect of information gathered by [presidential agents] may be highly necessary, and the premature disclosure of it productive of harmful results."[24] The gathering of information and safeguards against disclosure do not justify the *operations* of the Reagan administration: offering assistance to the Contras in Nicaragua, in violation of the Boland Amendment, and giving weapons to Iran.

Justice Sutherland also noted that President Washington refused to provide the House of Representatives with documents concerning the Jay Treaty.[25] That precedent does not justify the exclusion of the entire Congress. The House was denied documents because it has no formal role in the treaty process. The Senate does, and it received all of the necessary instructions, correspondence, and documents.

North referred to *Curtiss-Wright* as authority for the proposition that the President "can do what he wants with his own staff," including the National Security Council, and therefore the Boland Amendment could not possibly constrain the activities of the NSC.[26] Nothing in *Curtiss-Wright* gives the President authority to use personal staff to violate statutory proscriptions. In fact, in the *Curtiss-Wright* case the President was acting on the basis of statutory authority, and the only issue was whether Congress had delegated *its* authority too broadly. Furthermore, President Reagan's Executive Order 12333 stated that covert actions may be conducted only by the Central Intelligence Agency unless the President specifically designated another agency for that purpose. President Reagan never authorized the NSC to conduct covert operations.[27]

Bush administration officials also toyed with the existence of extra-constitutional powers. They believed that the President may take offensive actions anywhere in the world without first seeking congressional authority. In the end, in part because of a key federal court decision, Bush sought statutory authority.

After Saddam Hussein invaded Kuwait on August 2, 1990, President Bush dispatched U.S. forces to Saudi Arabia as a defensive operation to deter further Iraqi aggression. However, on November 29, the UN Security Council authorized the use of force and Bush doubled the size of the U.S. presence, clearly giving him the capacity to take offensive action. Secretary of Defense Dick Cheney testified before the Senate Armed Services Committee on December 3 that President Bush did not require "any additional authorization from the Congress" before attacking Iraq.[28]

The Justice Department relied on the same argument in a case brought by fifty-four members of Congress, who maintained that Bush would have exceeded his constitutional authority if he used American troops offensively against Iraq without statutory authority. The Bush administration took the position that the issues "are political and not judicial," there was a "sheer lack of manageability by the judiciary of the foreign relations and national defense issues presented here," and therefore the case represented "a political question outside the Article III jurisdiction of a court."[29] For constitutional support the Justice Department cited these provisions: "the executive powers shall be vested in a President of the United States of America," the President "shall be Commander in Chief of the Army and Navy," the President has the power "to receive Ambassadors and other public Ministers" and must "take Care that the Laws be faithfully executed," and pursuant to these Article II authorities the President acts "as the sole organ of the federal government in the field of international relations" (citing *Curtiss-Wright*).[30]

Judge Harold H. Greene decided on December 13 that the case was not ripe for judicial determination, but in his decision he forcefully rejected many of the extravagant claims for presidential power made by the Justice Department. Judge Greene said that if the President "had the sole power to determine that any particular

offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an 'interpretation' would evade the plain language of the Constitution, and it cannot stand."[31] With regard to the Department's claim that the issue was political and not judicial, Judge Greene rejected that position as well:

> [T]he Department goes on to suggest that the issue in this case is still political rather than legal, because in order to resolve the dispute the Court would have to inject itself into foreign affairs, a subject which the Constitution commits to the political branches. That argument, too, must fail.
>
> While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs. . . . In fact, courts are routinely deciding cases that touch upon or even have a substantial impact on foreign and defense policy.[32] [Among the cases cited by Judge Greene are *Curtiss-Wright* and *Youngstown*.]

Concerned about his legal position, President Bush asked Congress on January 8, 1991, to pass legislation supporting his policy in the Persian Gulf. The following day he was asked by reporters whether he needed a resolution from Congress. He replied: "I don't think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions."[33] Congress passed legislation on January 12, specifically giving Bush legal authority to take offensive action against Iraq. Bush signed the legislation two days later.[34]

In his signing statement, Bush suggested that he could have acted without the statutory authority: "As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."[35] His signing statement does not alter the fact that he acted pursuant to congressional authorization. The UN Charter and Security Council resolutions do not take from Congress its consti-

tutional responsibilities and duties. On a military conflict of the magnitude facing President Bush in the Middle East, it was necessary for Congress to debate and authorize the military, political, and financial commitments.

On all these issues the book by Maeva Marcus supplies an important framework for understanding the political and social context for presidential power, the real constraints in expecting judicial review of executive actions, and the independent source of congressional power and responsibility. Her historical research reminds us once again that we operate under a system of three branches, with their mutual checks and balances, instead of the seemingly one-branch model of foreign affairs promoted by some advocates of presidential power.

One last observation about the Steel Seizure Case. It is generally understood that decisions by the Supreme Court are heavily influenced by political climate. Rarely, however, is that fact acknowledged by Justices. An exception to that record appears in a book by Chief Justice William Rehnquist in 1987. Rehnquist served as a law clerk for Justice Jackson when the Steel Seizure Case was being argued and decided. In terms of legal precedents, Rehnquist thought at the time that the administration was on fairly solid ground.[36] Yet Truman lost by a vote of 6–3. Clearly his definition of presidential power had seemed too sweeping to the nation, and the strong public sentiment against him had an effect on the Court. Rehnquist remarks: "I think that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that this tide of public opinion had a considerable influence on the Court."[37]

In her book, Maeva Marcus made a similar observation. The decision by District Judge David A. Pine, holding against the administration, "apparently influenced public opinion, for the Gallup Poll taken after the announcement of the ruling showed less support for the seizure than had been evidenced in previous polls. This popular reaction, which theoretically should not have had any effect on the outcome of the steel seizure as it traveled through the higher

courts, as a practical matter became an important element in the legal decision-making process" (p. 130). In that sense, an important check on presidential power depends on the general public to express its concern and communicate that sentiment to the courts and to Congress. Such a requirement puts a heavy premium on individual citizens to evaluate the use of executive power and to support independent legislative and judicial constraints.

Notes

1. Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549, 2567 (1993).

2. Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven: Yale University Press, 1990), p. 71 (emphasis in original).

3. *Ibid.*, p. 183.

4. *Ibid.*, p. 112.

5. *Ibid.*, pp. 112–13.

6. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

7. Louis Fisher, *The Politics of Shared Power: Congress and the Executive*, 3rd ed., (Washington, D.C.: Congressional Quarterly Press, 1993), pp. 146–147.

8. *Ibid.*, pp. 134–35.

9. Michael J. Glennon, *Constitutional Diplomacy* (Princeton: Princeton University Press, 1990), pp. 20–21.

10. *Ibid.*, pp. 19–20.

11. *Ibid.*, pp. 22–23.

12. *Ibid.*, p. 10.

13. *Ibid.*, p. 199.

14. Youngstown Co. v. Sawyer, 343 U.S. 579, 635 (1952).

15. *Ibid.*, pp. 635–38 (footnotes omitted).

16. Goldwater v. Carter, 444 U.S. 996, 998 (1979).

17. Dames & Moore v. Regan, 453 U.S. 654, 678–679 (1981).

18. Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), aff'd, Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (El Salvador); Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (Nicaragua); Conyers v. Reagan, 578 F.Supp. 324 (D.D.C. 1984), dismissed as moot, Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985) (Grenada); Lowry v. Reagan, 676 F.Supp. 333 (D.D.C. 1987) (Persian Gulf).

19. Crockett v. Reagan, 558 F.Supp. 893, 899 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984).