THE CONSTITUTIONAL IMPLICATIONS OF THE MAYAGUEZ INCIDENT

*By Michael F. Kelley**

Introduction

On May 12, 1975, gunboats from the communist regime which had assumed power the month before in Cambodia seized the United States merchant ship *Mayaguez*. Within the next few days President Ford reacted to this provocation by ordering the United States Navy and Marine Corps to attack Cambodian targets in the Gulf of Thailand as well as on the Cambodian mainland. This note discusses the constitutionality of the presidential response to the seizure. The author takes the position that the military retaliation ordered by President Ford transcended his constitutional and statutory war-making authority because Congress at no time authorized his course of action.

Part I of this note presents the views of the framers of the Constitution as to the allocation of war powers between Congress and the president by analyzing the debates at the Constitutional Convention and those at the subsequent state ratifying conventions. Part II contrasts the modern argument for adaption by usage, an argument used to support the assumption of virtually unlimited war-making power by latter-day presidents, with the relevant judicial interpretation of the war powers language of the Constitution. Part III analyzes the War Powers Resolution of 1973 in an effort to determine the limitations of this statute and its probable effect on the future use of American military force around the world. The final section, Part IV, considers the *Mayaguez* affair as the most recent example of presidential usurpation of congressional war power and the corresponding, though lamentable, tendency of recent Congresses to acquiesce in this process. The note concludes with a call for Congress to reassume its constitutionally mandated responsibility to decide between war and peace, and emphasizes that the potential of a nuclear holocaust demands that Congress reassert itself in this area.

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I. The Framers' Understanding of the Constitutional Delineation of the Power to Commit the Nation to War

Unlike the express limitation placed on state war-making by the federal Constitution,[1] language dividing the war-making powers between the president[2] and Congress[3] does not explicitly deny these powers to one branch or the other. Nor is this ambiguity completely resolved by the record of the debates at the Constitutional Convention, because the question of the division of the war powers between the three branches of the federal government was apparently not deemed worthy of extended debate.[4] The documentation available—James Madison's notes on the debate of August 17, 1787, where the clause of the draft constitution giving Congress the power "to make war"[5] was weighed against an amendment offered by Madison and Elbridge Gerry[6]—indicates a general objection to a national war power that could be exercised without serious reflection:

> Mr. Pinkney opposed the vesting of this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs of Reps would be too numerous for such deliberations. The Senate would be the best depository . . . .
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> Mr. Butler . . . was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.
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> Mr. M[adison] and Mr. Gerry moved to insert "*declare*" striking out "*make*" war; leaving to the Executive the power to repel sudden attacks.
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> Mr. Sherman thought "to make war" stood very well. The Executive shd. be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.
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> Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.
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> . . . .

1. U.S. CONST. art. I, § 10, cl. 3: "No state shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

2. U.S. CONST. art. II, § 2, cl. 1: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States. . . ."

3. U.S. CONST. art. I, § 8, cl. 11: "[The Congress shall have power] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

4. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (M. Farrand ed., rev. ed. 1937) [hereinafter cited as FARRAND]. The principal report on the one debate, that of August 17, 1787, explicitly discussing the allocation of the war-making powers is little more than a page long.

5. *Id.* at 182.

6. *Id.* at 318-19. This amendment substituted the wording "to declare" for "to make" war.

> Mr. Mason was agst. giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "*declare*" to "*make.*"[7]

Madison's journal shows that the question on the amendment was called again after it failed to pass on a four to five vote.[8] The second tally was originally seven in favor of the amendment with two opposed, but Robert Elseworth of Connecticut changed his vote to aye when he was told that the word "make" would be understood as giving Congress the power to "conduct" a war already instituted, which power the Constituion had already vested in the executive.[9] Since no other explanation can be found to account for the shift from rejection to acceptance, it is likely that the amendment was intended merely to express the consensus that Congress would be denied the power to decide strategy and tactics in a war it had previuosly declared.

The constitutional scholar Raoul Berger concludes from the quoted passage that:

> Viewed against repudiation of royal prerogative, no more can be distilled from the Madison-Gerry remark than a limited *grant* to the President of power to repel attack when, as the very terms "sudden attack" imply, there could be no time to consult with Congress. Despite the fact, therefore, that the replaced "make" is a verbal component of "war-making," the shift to "declare" did not remove the great bulk of the war-making powers from Congress; it merely removed the power to *conduct* a war once declared . . . .[10]

Another scholar, the historian Charles Lofgren, reaches essentially the same conclusion on the strength of other evidence. Noting that the draft constitution reported by the Committee on Detail on August 6[11] agreed in all essentials with earlier draft constitutions submitted by Edmund Randolph,[12] he states:

> Clearly, as the committee sensed the will of the Convention on these points—points which, it must be remembered, had scarcely been debated—war-making fell almost automatically to Congress. At the same time, the committee made the executive, now denominated the President, the Commander in Chief of the armed forces. In view of the concurrent grant to Congress of the broad power "to make war," the Presidency did not carry with it any authority

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7. *Id.*
8. *Id.* at 314.
9. *Id.* at 319 n.10.
10. Berger, *War-Making By the President*, 121 U. PA. L. REV. 29, 41 (1972) [hereinafter cited as Berger].
11. 2 FARRAND, *supra* note 4, at 181-82.
12. *Id.* at 142-44.

> to initiate war, except perhaps the restricted power of repelling sudden attacks . . . .[13]

In contrast to the August 17th debate settling Congress' power as one "to declare war,"[14] the commander in chief clause[15] was passed without recorded debate or amendment on August 27, 1787.[16] Coupled with the convention's understanding of Congress' war powers, "[t]his expeditious, unremarked assent," Lofgren asserts, "again suggests a narrow, non-controversial conception of the clause."[17]

The preponderance of evidence from the state ratification debates further suggests that the delegates to the Constitutional Convention in defending their product before their constituencies thought of presidential war-making in exceptionally narrow terms. At least one commentator[18] is inclined toward the view that the power "to declare war" given to Congress by the Constitution was practically identical to the "sole and exclusive right and power of determining on peace and war" given to Congress by the former Articles of Confederation.[19] The clause "declare war" generated so little controversy that the only attempted amendment was to require a two-thirds vote in each House for a declaration of war.[20]

Countering any possible charge that the new Constitution diminished the war-making powers of Congress, Robert R. Livingston of New York argued that its powers were the "very same" as those of Congress under the old Confederation: "Congress have the power of making war and peace, of levying money and raising men; they may involve us in a war at their pleasure . . . ."[21] James Wilson of Pennsylvania,[22] although recognizing that the young nation was an inviting target for European military adventures, and that the new nation required a coordinated national defense, abhorred the prospect of a concentration of war-making powers in the Executive:

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13. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679 (1972) [hereinafter cited as Lofgren].

14. See text accompanying notes 6-7 *supra*.

15. U.S. CONST. art. II, § 2, cl. 1.

16. 2 FARRAND, *supra* note 4, at 426-28.

17. Lofgren, *supra* note 13, at 679.

18. *Id.* at 684-85.

19. ARTICLES OF CONFEDERATION, art. IX in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 81 (J. Elliot ed., 1836) [hereinafter cited as ELLIOT, DEBATES].

20. 2 ELLIOT, DEBATES, *supra* note 19, at 407. The amendment was offered by Thomas Tredwell at the New York Ratifying Convention. The record does not indicate whether this question ever came to a vote.

21. *Id.* at 278.

22. Wilson was appointed as one of the first justices of the Supreme Court of the United States in 1789.

> I do not mean that, with an efficient government, we should mix with the commotions of Europe. . . . This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large . . . from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.[23]

James Iredell,[24] speaking before the North Carolina Ratifying Convention, was even more explicit as to the necessity of separating executive from legislative power in this area. He observed the material distinction between the war powers of the king of Great Britain and those of the president under our Constitution. The king was not only the commander in chief of his army and navy, but he also had the authority to commit Great Britain to war. In the United States, on the other hand, the power of declaring war was exclusively vested in the Senate and House of Representatives.[25]

Finally, Alexander Hamilton, often regarded as the great exponent of an expansive presidential prerogative, echoed Iredell's understanding of the war-making powers of the national executive when he defended the new Constitution against objections of its New York critics that the president could assume quasi-regal power:

> [T]he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.[26]

Admittedly hostilities without declaration of war were common during the eighteenth century,[27] as they have been in the twentieth. All the same, does the Constitution leave the waging of an undeclared war unaccounted for, or does it impliedly vest this power in the president? In view of the rejection of the British model,[28] and the comparison of the war powers of Congress under the Constitution with those of the Congress under the Articles of Confederation[29] both alter-

23. 2 ELLIOT, DEBATES, *supra* note 19, at 528.

24. Iredell was appointed associate justice of the United States Supreme Court in 1790.

25. 4 ELLIOT, DEBATES, *supra* note 19, at 107-08.

26. THE FEDERALIST No. 69, at 465 (J. Cooke ed. 1961) (A. Hamilton).

27. *See* J. MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR 1700-1870, at 12-26 (1883).

28. See text accompanying notes 24-26 *supra.*

29. See text accompanying notes 18-23 *supra.*

natives seem unlikely. However, we need not rely on inference alone. Analysis of the delegation to Congress of the power "To . . . grant Letters of Marque and Reprisal,"[30] leads to the conclusion that the new Congress' power "to declare war" was to be understood not in the narrow, technical sense of ratification of military action previously initiated by the president, but was to encompass the authority to initiate all hostilities.

Letters of marque and reprisal were the means by which European states authorized a private individual to pursue an enemy and seize his person or property, wherever he might be found.[31] While the practice of granting letters for the satisfaction of purely personal claims had all but disappeared by the time of the Convention of 1787, nations continued to press their own claims by means of both public naval forces and private ships authorized to act under privateer commissions or letters of marque and reprisal.[32] Noting that European state reprisals commonly resulted in outright war, Lofgren argues that:

> The clause thus could easily have been interpreted as serving as a kind of shorthand for vesting in Congress the power of *general* [i.e., "state"] reprisal outside the context of declared war. For someone in the late 1780's, this interpretation . . . in turn would have given increased plausibility to the view that Congress possessed whatever war-commencing power was not covered by the phrase "to declare war."[33]

Lofgren's analysis of the "Letters of Marque and Reprisal" clause effectively refutes the argument that the congressional power to declare war merely gives Congress an opportunity to ratify an already accomplished condition of war—to grace a state of de facto belligerency with its official blessing. The grant to Congress of the powers "To declare War" and "grant Letters of Marque and Reprisal" was almost certainly understood by the members of the adopting and ratifying conventions to vest in the legislative branch complete authority to start our nation on the road to war, however broadly or narrowly this term was to be defined. With the exception of a limited power to meet sudden attacks on the United States,[34] the president was to have no greater authority than to exercise military command once hostilities had been initiated.[35]

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30. U.S. CONST. art. I, § 8, cl. 11.

31. Lofgren, *supra* note 13, at 693.

32. *Id.*

33. *Id.* at 696-97 (footnote omitted).

34. *See* the remarks of Roger Sherman, James Madison, and Elbridge Gerry in the text accompanying note 7 *supra.*

35. See text accompanying notes 25-26 *supra*; *see Hearings on War Powers Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess., at 189-90 (1973) [hereinafter cited as *Hearings on War Powers*]:

II. Subsequent Interpretation of the War Powers Clause

A. The Argument for Adaption by Usage

The framers of our Constitution were men of experience who knew that emergencies would arise from time to time in the affairs of the Republic. The *Mayaguez* seizure was just such a situation, but by their understanding only Congress would have had the power to authorize the subsequent military retaliation.[36] Nevertheless, investigation into this original intent has been of limited interest to those scholars who advocate a wider presidential war power than that outlined above. It has been argued that the expressed intentions of the framers may be dismissed as ancient history, of little relevance to our nation's present super power status.[37] This section contrasts such a rejection of the framers' intent with judicial construction of the war powers clauses.

"Adaption by usage" is a shorthand way of expressing the idea that if a certain practice, admittedly contrary to the intention of the framers, is followed for a certain length of time, it will achieve legitimation without the formalities of constitutional amendment. Arguing that repeated practice has legitimized the use of an executive agreement in place of a treaty, Myres McDougal of the Yale Law School and Asher Lans proposed a theoretical basis for the adaption by usage concept:

> The powers of the different branches of the Government must move in the same orbits and they cover the same objects. Nor is it of supreme importance today to indulge in literary speculation

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"*Mr. Biester.* [Do you] agree that the framers intended the Congress to have the dominant role in determining whether we went to war?

. . . .

"[Professor Alexander M. Bickel]. The only problem that the framers faced was how to vest this power in Congress without getting themselves into the kind of problem they faced under the Articles of Confederation where Congress began to wage war as a committee.

"That is why they chose 'declare' as against 'make.' They came entirely from the other direction. There was no doubt in their minds that the war power was to be legislative. The problem was how to keep the President as effective Commander-in-Chief.

"It was not even a shared power, I think, in their minds."

36. See text accompanying notes 1-35 *supra.*

37. *See, e.g.,* Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEXAS L. REV. 833, 843-44 (1972): "The most serious illusion of legal positivism is the notion that 'the original intention' of those who drafted and voted for a law is thereafter knowable, save as a guideline of broad purpose or principle. . . . It is psychologically impossible for a man of the twentieth century, however learned and sensitive, to perceive the world as the men of 1787 did. There is no way for him to reproduce the structure and climate of their universe—to understand as they did the relation of the several parts to each other and the weight which various fears, concerns and ambitions had in their minds. (citation omitted.)" Professor Rostow seems to imply that the historical search is of little value, for the object of the investigation—an approximation of the historical truth about a culture, political institution, etc.—is an unknowable, somewhat analogous to the mystery of the Trinity in Christian theology.

> about why the Framers created these overlaps or how some of the Framers may have expected such conflicts to be resolved. The important fact today, from any consciously adaptive or instrumental approach to the Constitution, is the fact that this very great flexibility . . . affords opportunity . . . for the development by usage of procedures, immediately responsible to the democratic will of the whole country . . . .[38]

Once the value of historical inquiry is dismissed, and the "democratic will of the whole country" appealed to,[39] these authors assert that the chief justification for adaption by usage is its flexibility:

> The ultimate advantage of usage over formal textual alteration as a method of constitutional change is that, while it preserves the formal symmetry of the document, it reduces the danger of freezing the structures of government within the mold dictated by the expediences or political philosophy of any given era.[40]

Utilization of the adaption by usage theory to justify expansion of the president's war powers[41] received its first serious discussion in a 1912 monograph prepared by J. Reuben Clark, the Solicitor of the State Department.[42] Professor Francis Wormuth of the political science faculty at the University of Utah who located the monograph, noted that with two exceptions, all of Clark's examples of presidential use of force without congressional authorization "could be regarded as nonpolitical interposition for the protection of citizens."[43] Although Clark suggested that the president's executive power supplied a tentative constitutional basis for these unauthorized acts, he also admitted that this justification was made "with no thought or pretense of more than a cursory consideration. It is entirely possible that a more detailed and careful study would lead to other or modified conclusions."[44] Clark's argu-

38. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 220-21 (1945) (footnote omitted) [hereinafter cited as McDougal & Lans].

39. According to McDougal and Lans, the president embodies our nation's "democratic will" because of his "unique responsibility to the voters of the whole nation." *See id.* at 534. Even if one assumes that the president is somehow more accountable to the electorate than a senator or representative, the fact remains that war-making under our Constitution is a congressional prerogative, and was never intended to be exercised by one man no matter how overwhelmingly he was elected.

40. McDougal & Lans, *supra* note 38, at 294.

41. For a defense of this position and a list of incidents which constitute the usage *see Hearings on War Powers Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 354-55 (1971) (remarks of Senator Goldwater) and *id.* at 359-75 ("Chronological List of 153 Military Actions Taken by the United States Abroad Without a Declaration of War").

42. J. CLARK, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d ed. 1934) [hereinafter cited as CLARK].

43. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 663 (1972) (footnote omitted) [hereinafter cited as Wormuth].

44. CLARK, *supra* note 42, at 48.

ment, as summarized by Wormuth, is that: 1) international law is part of the law of the United States; 2) United States citizens abroad are protected by international law; 3) under the Constitution, the president "shall take Care that the Laws be faithfully executed;"[45] and therefore 4) the president may himself carry out "non-political interposition" in his rightful execution of international law. Wormuth dismisses this syllogism in an abrupt fashion:

> The weakness of the argument, of course, is that citizens of the United States have no rights whatever at international law. Foreign states owe duties to the United States and not to its citizens. The vindication of the rights of the United States at international law has been entrusted by the Constitution to Congress and not to the President.[46]

After World War II proponents of unrestrained presidential war-making power used the adaption by usage argument to claim that the commander in chief clause gave the president war powers much broader than the framers had envisioned.[47] After President Truman ordered our troops into battle in South Korea, Secretary of State Dean Acheson recommended to the president that he report to Congress on the developing situation in the war zone. "I also recommended," recalls Acheson, "that the President should not ask for a resolution of approval but to rest on his constitutional authority as Commander in Chief of the armed forces."[48] Mentioning a 1950 State Department memorandum his staff had prepared listing eighty-seven instances in which Truman's predecessors had taken military action without a declaration of war, Acheson asserted that he never had "any serious doubt . . . of the President's constitutional authority to do what he did."[49]

The following justification for the Vietnam war, given by the State Department in 1966, further illustrates the tendency of modern presidents to assume powers beyond those of directing a war which Congress has declared:

> Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.[50]

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45. U.S. CONST. art. II, § 3, cl. 1.
46. Wormuth, *supra* note 43, at 663.
47. See text accompanying notes 13-26 *supra.*
48. D. ACHESON, PRESENT AT THE CREATION 414 (1969).
49. *Id.* at 415.
50. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEPT. STATE BULL. 474, 484 (1966).

In 1973, a State Department spokesman, responding to a request that he state the authority under which President Nixon ordered the bombing of Cambodia after all American troops had left Vietnam, answered that the president had the right as commander in chief to order any military action he considered necessary to bring the war in Indochina to an end.[51]

These views, resting upon the adaption by usage theory, indicate acceptance of an expansion of presidential power to decide when our national security is sufficiently endangered to require the use of military force. President Ford may have had such a constitutional theory in mind when he asserted that his "constitutional executive power and his authority as Commander-in-Chief" gave him the power to order the military retaliation after the *Mayaguez* seizure.[52] This position certainly contradicts the expectations of the members of the adopting and ratifying conventions.[53]

B. Judicial Interpretation of the War Powers Clauses

The interpretation given the war powers clauses by the judiciary stands in sharp contrast to the seemingly limitless claims made by proponents of the adaption by usage argument. Early opinions of the Supreme Court, or by members of the Court sitting as circuit justices, are of particular value since they were written by men who attended the Constitutional Convention of 1787 or the subsequent ratifying conventions. They therefore had first-hand knowledge of the intended meaning of the phrases "declare War" and "commander in chief."

In two cases which determined the right to maritime prizes captured in the "quasi-war" with France during the late 1790's, the Supreme Court underlined the plenary character of congressional authority to initiate hostilities and to establish their scope. In *Bas v. Tingy*[54] Justice Chase commented on the breadth of the clause "to declare War:"

> Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law

51. *See Hearings on War Powers, supra* note 35, at 135-36.

52. See text accompanying note 179 *infra.*

53. See text accompanying notes 1-35 *supra.*

54. 4 U.S. (4 Dall.) 37 (1800). In this case Bas, plaintiff in error and master of the *Eliza*, an American merchant vessel captured by a French privateer, was ordered to pay salvage to Tingy, defendant in error and commander of the American naval vessel which recaptured the *Eliza* from the French. Such payment was required by the Act of March 2, 1799 (1 Stat. 716) as an incentive for naval participation in the "quasi-war."

> of nations; but if a partial [war] is waged, its extent and operation depend on our municipal [i.e., national] laws.[55]

Justice Chase, in discussing the limits placed on this particular war by Congress, recognized that Congress at times *will* specify the scope of war:

> [C]ongress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port. . . . So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.[56]

Justice Paterson, who had served as a delegate from New Jersey to the Constitutional Convention, repeated his colleague's emphasis on the exclusive authority of Congress to initiate, and place limits on, all types of hostilities: "As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations."[57]

In *Talbot v. Seeman*[58] the Court was asked to order salvage paid to a United States warship for the recapture of a neutral vessel from the French. Chief Justice Marshall looked to Congress as the source of the individual rights involved and for a definition of America's relationship with France during the hostilities: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."[59] The chief justice would have found most peculiar the State Department's claim[60] that the president also has power to order military operations when he considers this step necessary to preserve our national security.

The indictment in *United States v. Smith*[61] alleged that William Smith planned and outfitted in New York a military expedition against the Spanish in what is now Venezuela thereby violating an act of Congress.[62] Smith sought to compel a number of President Jefferson's

55. *Id.* at 43.
56. *Id.*
57. *Id.* at 45.
58. 5 U.S. (1 Cranch.) 1 (1801).
59. *Id.* at 28.
60. See text accompanying note 50 *supra.*
61. 27 F. Cas. 1192 (No. 16342a) (C.C.D.N.Y. 1806). Smith was acquitted by the jury. United States v. Smith, 27 F. Cas. 1233, 1245 (No. 16342a) (C.C.D.N.Y. 1806). For the complete report of this case *see* T. LLOYD, THE TRIALS OF WILLIAM S. SMITH AND SAMUEL G. OGDEN (1807). For an excellent discussion of this case and the light it sheds on the questions of executive privilege, implied presidential war-making power and the president's power to dispense with or suspend our nation's laws, *see* Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden,* 2 HAST. CONST. L.Q. 309 (1975).
62. Smith allegedly violated the Act of June 5, 1794, ch. 50, § 5, 1 Stat. 384, which prohibited any person within the jurisdiction of the United States from initiating or aiding a military expedition against any country with which America was at peace.

appointees, including Secretary of State James Madison, to appear as witnesses to testify that Smith's expedition had the support of the president. In ruling that this testimony was immaterial, Justice Paterson of the Supreme Court, sitting in his capacity as circuit justice, commented upon the extent of the president's executive powers:

> The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government.[63]

Justice Paterson then answered defense counsel's argument that the president himself had war-making power and thus could authorize Smith's adventure:

> Does [the president] possess the power of making war? That power is exclusively vested in congress; for, by the eighth section of the 1st article of the constitution, it is ordained, that congress shall have power to declare war, grant letters of marque and reprisal, raise and support armies, [etc.] . . . .
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> . . . Congress does not choose to go to war; and where is the individual among us who could legally do so without their permission?[64]

The Supreme Court has made similar pronouncements regarding the lack of presidential war-making power in cases arising out of the Mexican War,[65] the Civil War[66] and the Korean war,[67] when, as has already been noted,[68] President Truman's advisors advanced claims of

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63. 27 F. Cas. 1192, 1230 (No. 16342a) (C.C.D.N.Y. 1806).

64. *Id.* at 1230-31. Lest it be objected that such a constitutional scheme could not safeguard national security in the face of true emergencies, Congress at an early date provided for these situations by statute. By the Act of Feb. 28, 1795, ch. 36, §§ 1-2, 1 Stat. 424, the president was authorized to call out the militia in the case of invasion or imminent danger of invasion of the United States, an insurrection in any state, or to suppress "combinations" against the laws of the United States. The provisions which take effect in a situation of insurrection or interference with state or federal authority are still in force. 10 U.S.C. §§ 331-33 (1970).

65. *See* Fleming v. Page, 50 U.S. (9 How.) 603 (1850). "[The president's] duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command. . . . The power of the President . . . was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government." *Id.* at 615 (Taney, C.J.).

66. The Prize Cases, 67 U.S. (2 Black) 635 (1862). "By the Constitution, Congress alone has the power to declare a national or foreign war. . . . [The president] has no power to initiate or declare a war either against a foreign nation or a domestic State." *Id.* at 668 (Grier, J.).

67. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

68. See text accompanying note 48 *supra.*

unlimited executive war-making based on the commander in chief clause. In 1952 during the Korean War a strike interrupted production at most of the large steel mills. President Truman, claiming that "a work stoppage would immediately jeopardize and imperil our national defense . . . and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field,"[69] ordered the mills seized "by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States . . . ."[70] Truman acted entirely without statutory authorization since Congress had rejected an amendment to the Taft-Hartley Act[71] which would have permitted such governmental seizures as a method of preventing work stoppages and settling labor disputes.[72] The claim therefore presumably rested on the theory of implied or inherent powers, somehow derived from an amalgam of the president's constitutional powers as executive and commander in chief. The mill owners argued that the president's order was a usurpation of the legislative function which the Constitution had expressly conferred on Congress and not on the president. The Court in the *Steel Seizure Case*[73] held that the president had no authority to issue such an order and that consequently the seizure orders could not stand. In the opinion, written by Justice Black, the Court rejected the theory of inherent powers, explaining that "The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control."[74]

While the opinions in the *Steel Seizure Case* do not directly discuss the power of a president to wage war without congressional permission, at least two of the concurring justices took pains to counter the argument that the president has certain inherent powers. Justice Frankfurter wrote:

> Absence of authority in the President to deal with a crisis does not 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.[75]

In Justice Jackson's view the constitutional rule was absolute:

69. Exec. Order No. 10,340, 3 C.F.R. 861 (Comp. 1952) *reprinted in* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 590-91 (1952).

70. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 591 (1952).

71. Labor Management Relations Act, 1947, 29 U.S.C. §§ 171-82 (1970).

72. *See* 93 CONG. REC. 3637-45 (1947).

73. 343 U.S. at 586-89.

74. *Id.* at 588.

75. *Id.* at 603-04 (Frankfurter, J., concurring).

> The appeal . . . that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. . . . I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so . . . .[76]

Thus, the Supreme Court has adhered to the framers' intent that Congress have plenary war powers and that the president's powers as supreme military officer be limited to conducting congressionally authorized military operations and repelling sudden attacks on the United States. Arguments for inherent powers, advanced by presidents who felt restrained by these constitutional precepts, have been recognized by the Court as without merit and possibly dangerous, in that inherent emergency powers might tend to kindle emergencies. Regarding the adaption by usage argument, the Court, speaking through Chief Justice Warren in *Powell v. McCormack*,[77] ruled "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[78]

III. Congressional Reassertion of Its War-Making Authority

A. The Background of the War Powers Resolution

One of the many lessons of the Vietnam debacle was the danger that lies in congressional deference to presidential war-making. By giving open-ended approval to any course of conduct the president might have deemed necessary "to prevent further aggression," the Tonkin Gulf Resolution of 1964[79] represented the nadir in Congress' flight from its constitutional responsiblity to decide on the question of war. The resolution stated:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.
>
> . . . .

76. *Id.* at 649-50 (Jackson, J., concurring).

77. Powell v. McCormack, 395 U.S. 486 (1969). The Court noted the argument that congressional precedent would indicate a contrary ruling, but held that the House is without power to exclude any member-elect who meets the constitutional requirements for membership.

78. *Id.* at 546-47.

79. Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

> Section 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.[80]

The record of debate in the Senate on this resolution provides an appalling illustration of the irresponsible attitude of Congress at that time. The following exchange occurred between Senator Fulbright, chairman of the Foreign Relations Committee and President Johnson's floor manager for the resolution, and Senator Brewster of Connecticut:

> Mr BREWSTER. [M]y question is whether there is anything in the resolution which would authorize or recommend or approve the landing of large American armies in Vietnam or in China.
>
> Mr FULBRIGHT. There is nothing in the resolution, as I read it, that contemplates it. I agree with the Senator that this is the last thing we would want to do. However, the language of the resolution would not prevent it. *It would authorize whatever the Commander in Chief feels is necessary.*[81]

It took five years, fifty thousand American combat deaths, bitter opposition to the war at home, and transition from a Democratic to a Republican administration in the White House before Congress began to reassert the authority it had delegated to the president by the Tonkin Gulf Resolution. In 1969 the Senate adopted the National Commitments Resolution, which expressed the sense of the Senate that:

> [A] national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.[82]

The Senate Foreign Relations Committee understood the resolution to be:

> [A]n invitation to the executive to reconsider its excesses, and to the legislature to reconsider its omissions, in the making of foreign policy, and in the light of such reconsideration, to bring their foreign policy practices back into compliance with that division of responsibilities envisioned by the Constitution and sanctioned by the Constitution and sanctioned by over a century of usage.[83]

President Nixon, however, chose not to accept an "invitation" which carried no force of law. He ordered American forces to invade Cambodia in 1970 and to support the South Vietnamese invasion of

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80. *Id.*

81. 110 CONG. REC. 18,403 (1964) (emphasis added).

82. S. Res. 85, 91st Cong., 1st Sess., in 115 CONG. REC. 17,245 (1969).

83. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON NATIONAL COMMITMENTS, S. REP. No. 129, 91st Cong., 1st Sess. 30 (1969).

Laos in 1971 without seeking the advice and consent of Congress.[84] He did this even though the repealed Gulf of Tonkin Resolution[85] could no longer be used as a possible basis for claiming congressional authorization.[86]

During 1973 the last United States combat soldier left Southeast Asia, the Paris Accords were signed, and revelations stemming from the Watergate affair shattered the nation's confidence in the Nixon administration. Given this combination of circumstances, chances were excellent that Congress would pass some form of war powers legislation and override the anticipated Nixon veto.

The War Powers Resolution of 1973,[87] the product of a three year effort in both houses of Congress and termed by one of its chief sponsors a means to "restore the rightful role of Congress under the Constitution,"[88] was a measure that reconciled House Joint Resolution 542, with Senate Bill 440, styled as a Senate amendment to the House Joint Resolution. Its purpose and policy section includes a statement of presidential war-making authority:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[89]

Other provisions of the resolution require the president to consult with Congress whenever possible before introducing United States armed forces into hostilities or where imminent involvement in hostilities is clearly indicated, and to continue consultation until the armed forces are no longer involved in the hostile situation.[90] In order to provide Congress with the information it needs to decide whether or not to authorize military action,[91] the president must submit written reports to

84. S. REP. No. 220, 93d Cong., 1st Sess. 5 (1973).

85. Act of Jan. 12, 1971, PUB. L. No. 91-672, § 12, 84 Stat. 2053.

86. The question of whether or not the Tonkin Gulf Resolution was the equivalent of an antecedent declaration of war is discussed in Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 23-28 (1972). Professor Van Alstyne takes the position that until January 12, 1971, when Richard Nixon signed the repeal measure, the war in Southeast Asia was congressionally authorized, but that after this date President Nixon's direction of the war was unconstitutional.

87. War Powers Resolution, 50 U.S.C. § 1541 *et seq.* (Supp. 1973).

88. 119 CONG. REC. 33,038 (1973) (remarks of Representative Zablocki).

89. War Powers Resolution, § 2(c), 50 U.S.C. § 1541(c) (Supp. 1973).

90. *Id.* § 3, 50 U.S.C. § 1542.

91. "Joint Explanatory Statement of the Committee of Conference," H.R. REP. No. 547, 93d Cong., 1st Sess. (1973), *reprinted in* 119 CONG. REC. 33,037 (1973) [hereinafter cited as Joint Explanatory Statement of the Committee of Conference].

the speaker of the House and the president pro tempore of the Senate, setting forth the circumstances that made the introduction of the armed forces necessary, the constitutional and legislative authority for this action, and his estimate of the scope and duration of the involvement. The initial presidential report must be submitted within forty-eight hours of the introduction of force. The president is also required to provide such other information as Congress may request following this initial report, as well as supplementary reports at least every six months while the armed forces are engaged in a hostile situation.[92]

The law provides for automatic termination of any military action within sixty days of the forty-eight hour reporting period unless Congress has declared war or otherwise authorized the use of force, has extended by law the sixty day period, or is unable to convene as a result of an armed attack on the United States.[93] Notwithstanding this provision, presidential use of the armed forces can be terminated by a concurrent resolution of Congress, which is not subject to presidential veto.[94] The interpretation section[95] advises that nothing in the law is intended to add to or subtract from the constitutional authority of Congress or the president, or to grant the president any war-making authority which "he would not have had in the absence of this joint resolution."[96]

B. Analysis of the War Powers Resolution

The Senate amendment to the House Joint Resolution, Senate Bill 440, contained a section entitled "Emergency Use of the Armed Forces," which would have given the president a specific grant of authority to introduce the United States into hostilities or into situations where imminent involvement in hostilities was indicated.[97] Proposed subsection (1) of section 3 included a reiteration of the president's constitutionally recognized authority to repel sudden attacks on the United States, its territories and possessions, and to forestall the immediate threat of such an attack.[98] It also proposed to grant the president power to take "necessary and appropriate" retaliatory action if such an attack were to occur.[99] Since the power to retaliate is not embodied in the president's role as commander in chief,[100] this subsec-

92. War Powers Resolution, § 4, 50 U.S.C. § 1543 (Supp. 1973).
93. *Id.* § 5(b), 50 U.S.C. § 1544(b).
94. *Id.* § 5(c), 50 U.S.C. § 1544(c).
95. *Id.* § 8, 50 U.S.C. § 1547.
96. *Id.* § 8(d), 50 U.S.C. § 1547(d).
97. S. 440, 93d Cong., 1st Sess. § 3 (1973).
98. *Id.* § 3(1).
99. *Id.*
100. See text accompanying notes 7-17 *supra.*

tion is best characterized as an attempted delegation of authority by Congress under the "necessary and proper" clause of the Constitution.[101] Subsection (2) would have given the president authority to repel an attack against the armed forces, or to forestall an imminent threat thereof, but no power to retaliate.[102] Subsection (3) would have authorized the president to make carefully limited use of the military to "protect while evacuating" United States citizens and nationals whose lives would be endangered on the high seas or in another country.[103] While the Foreign Relations Committee report on Senate Bill 440 implied that the president was given all the authority arrayed in subsections (1) to (3) of section 3 by the Constitution,[104] it acknowledged that the only support for this statement was the assumption held by the delegates to the Constitutional Convention that the president had the power to repel sudden attacks.[105] The proposed subsection (3) of the Senate's version must therefore be seen as another attempted delegation under the necessary and proper clause. Subsection (4) of section 3 of Senate Bill 440 declared that all other use of the armed forces in hostilities must be pursuant to specific statutory authorization.[106]

The preconference House Joint Resolution 542[107] contained no provision similar to section 3 of Senate Bill 440. Representative Dante Fascell, a senior member of the House Committee on Foreign Affairs responsible for the legislation, explained that such an emergency provision was avoided for fear that it would dangerously expand the type of

101. U.S. CONST. art. I, § 8, cl. 17: "[Congress shall have power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

102. S. 440, 93d Cong., 1st Sess. § 3(2) (1973).

103. *Id.* § 3(3): "to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country."

104. *See* S. REP. No. 220, 93d Cong., 1st Sess. 2-3 (1975).

105. "Subsections (1), (2), and (3) are codifications of the President's authority to 'repel sudden attacks' and protect U.S. nationals whose lives are endangered abroad—powers based on established precedent and the intention of the Constitutional Convention, as evidenced by Madison's notation about 'leaving to the Executive the power to repel sudden attacks'." *Id.* See text accompanying notes 7-17 *supra*.

106. S. 440, 93d Cong., 1st Sess. § 3(4) (1973).

107. H.R.J. Res. 542, 93d Cong., 1st Sess. (1973).

military action the president could take without congressional authorization:

> To specifically define his authority as S. 440 seeks to do, would give the President statutory authority he does not now have. House Joint Resolution 542 avoids this, and in addition specifically states that the proposal does not add to any existing powers of the President.[108]

The Senate and House proposals for war powers legislation were thus in direct conflict on the crucial question of whether to delegate additional war powers to the president. This conflict is dramatically exposed when the alternative approaches are applied to the *Mayaguez* incident. Had the conference committee accepted the Senate version, specifically subsection (3) of section 3,[109] the president would have had express authorization to use the armed forces to rescue the *Mayaguez* and its crew, since this would have been an action to protect, while evacuating, our citizens on the high seas or in a foreign country. The House version, on the other hand, gave the president no express authority to use military force in a situation such as that presented by the *Mayaguez* seizure. The constitutionality of President Ford's direction of the military operations after the *Mayaguez* seizure therefore rests squarely on whether or not the War Powers Resolution in its final form delegated such authority to the president.

The House position was adopted by the conference committee and included in the War Powers Resolution as the "Purpose and Policy" section, a portion of which is quoted above.[110] The conference report explained that "[s]ubsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill (section 3)."[111] Senator Eagleton of Missouri argued that this compromise destroyed any effect the bill might have had:

> [The declaration of presidential authority] is in the "Purpose and Policy" section of this bill. It is in essence no more binding than a "whereas" clause in a Kiwanis Club resolution.
>
> So the words in section 2(c) do not mean a thing. . . . In effect, the very heart of the Senate bill, S. 440, have [sic] been placed in the "whereas" section—the pious pronouncement of nothing.[112]

Senator Javits of New York, the chief architect of Senate Bill 440, defended the compromise with the explanation that when the conference committee stated that subsequent sections were not dependent on the

108. 119 CONG. REC. 21,228 (1973).
109. See text accompanying note 103 *supra*.
110. See text accompanying note 89 *supra*.
111. Joint Explanatory Statement of the Committee of Conference, *supra* note 91.
112. 119 CONG. REC. 33,555 (1973).

language of subsection 2(c), it merely announced that the delineation of the president's war powers under the commander in chief clause does not call the subsequent provisions of the law into effect.[113] The consultation[114] and reporting requirements,[115] for example, apply to any presidential use of the armed forces, whether or not within the scope of subsection 2(c).[116]

Whatever the meaning of the conference report language, the declaration contained in subsection 2(c) is at least important "as a refutation of excessive and overblown claims of authority argued in recent years by executive branch lawyers for the President."[117] The Constitution is binding on the president; more binding in its restriction on presidential action than any congressional delegation of its own war powers could be. What is constitutionally valid in subsection 2(c) of the war powers resolution is inescapably binding on the president even if purpose and policy sections of a statute typically have no binding effect.

A much more serious objection to the war powers resolution is that by limiting unauthorized presidential military actions after sixty, or in some cases, ninety days, the law implicitly delegates unfettered war

113. 119 CONG. REC. 33,555 (1973) (remarks of Senator Javits).

114. See text accompanying note 90 *supra*. H.R. REP. No. 287, 93d Cong., 1st Sess. (1973), *reprinted in* 2 U.S. CODE, CONG. AND ADMIN. NEWS, 93d Cong., 1st Sess. 2344 (1973) explains, at 2350-51, that the "use of the word 'every' reflects the committee's belief that such consultation prior to the commitment of armed forces should be inclusive. In other words, it should apply in extraordinary and emergency circumstances—even when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization.

"At the same time, through use of the word 'possible' it recognizes that a situation may be so dire, e.g. hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible . . . .

. . . .

"A considerable amount of attention was given to the definition of *consultation*. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of the action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available."

115. See text accompanying notes 91-92 *supra*.

116. *See* 119 CONG. REC. 33,550 (1973).

117. 119 CONG. REC. 33,549 (remarks of Senator Javits). The president's independent constitutional war-making authority comes into play only to repel a sudden attack on the United States, its territories or possessions. Subsection 2(c) does not mention an independent presidential power to order punitive retaliation. Nor is the president allowed, without congressional authorization, to order military action pursuant to an attack on the armed forces—as subsection 2(c) incorrectly states. This provision may possibly be read as congressional recognition that an armed forces unit subjected to an unprovoked attack would of course have the right of self-defense. The president cannot, however, order military action without congressional permission.

powers to the president for that period.[118] It is possible to read subsections 5(b)[119] and 5(c)[120] together with section 4[121] to mean that the president would be authorized, for a period of at least sixty days, without the necessity of further congressional sanction, to send United States armed forces into combat as long as he reports these actions within forty-eight hours to the appropriate members of Congress. Moreover, while the War Powers Resolution cautions against a construction which would give the president more authority than he would have if the law were not in effect,[122] the following exchange between Representative Eckhardt and Representative Zablocki, who chaired the subcommittee which drafted House Joint Resolution 542 and who was on the conference committee responsible for the War Powers Resolution in its final form, lends some support to such a construction:

> Mr. ECKHARDT. If Congress may withdraw authority or may negative the Presidential authority by virtue of concurrent resolution, such action implies that the President did not have authority in the beginning and Congress is merely asserting its authority in that area.
>
> If that is the case, one must infer, it seems to me, that *the President is acting within an area pre-empted for Congress by the Constitution except for the passage of this resolution.*
>
> Now, as I understood the gentleman to answer me, he does not intend to give the President additional authority, but the gentleman concedes that the President may act beyond his authority, and we only include this section [section 5] as a means by which Congress can reaffirm the fact that the presidential action was wrongful in the first place.

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118. *See* 119 CONG. REC. 33,870, 33,872, 36,207 (1973) (remarks of Representatives Abzug, Holtzman and Thomson, respectively).

119. War Powers Resolution, § 5(b), 50 U.S.C. § 1544(b) (Supp. 1973) provides that "Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

120. *Id.* § 5(c), 50 U.S.C. § 1544(c): "Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."

121. See text accompanying note 92 *supra.*

122. See text accompanying note 96 *supra.*

Mr. ZABLOCKI. [T]hat is exactly right.[123]

What does this mean? Subsection 8(d) declares that the War Powers Resolution gives the president no additional authority.[124] Representative Zablocki asserted that he did not intend to give the president additional authority, but as this author understands the above exchange, especially the underlined phrase, Representative Zablocki tacitly acknowledged that despite the resolution, he expected the president to persist in the unconstitutional practice of making war without congressional approval, while Congress continued to play a reactive role.

Such an interpretation cannot be ignored, nor can it be countered solely by reference to the language of subsection 8(d). Future advocates of unauthorized military action might claim that subsection 5(b) delegated war powers to the president which permit him to make war anywhere in the world, at least for sixty to ninety days. Assuming that this interpretation is possible, the next inquiry must be into the constitutionality of this delegation of legislative power to the executive.

Chief Justice Marshall established the foundations of the law of delegation in *Wayman v. Southard*:[125] "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[126] Marshall recognized, of course, the distinction between "those important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[127] An unconditional sixty to ninety day delegation of war-making authority to the president is certainly no matter of "less interest," in light of the potential for mass destruction in a war of even this relatively short period. More recently, in *Schechter Poultry Corp. v. United States*,[128] the Supreme Court again ruled that it was not within the power of Congress to avoid its constitutional responsibility:

> The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.

123. 119 CONG. REC. 33,860 (1973) (emphasis added).

124. War Powers Resolution, § 8(d), 50 U.S.C. § 1547(d) (Supp. 1973): "Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution."

125. 23 U.S. (10 Wheat.) 1 (1825).

126. *Id.* at 42.

127. *Id.* at 43.

128. 295 U.S. 495 (1935).

> . . . [T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.[129]

It is obvious that a congressional grant to the president of sixty to ninety days of unfettered power to make war anywhere in the world for any reason whatever is insufficiently defined to be a valid delegation of an essential legislative function. Professor William Van Alstyne of the Duke University Law School argues, however, that no delegation by Congress of its war powers is constitutionally permissible.[130] At the heart of his thesis is the belief that the "specific contingencies which give sense and shape to the general doctrine permitting limited delegations of legislative power in other areas of congressional responsibility are *already* provided for in respect to war, *so far as it was felt safe to do so.*"[131] For example, Professor Van Alstyne points out that the president is given the capacity to respond to the emergency situation of a sudden attack on the United States. His role of commander in chief makes him the master of military strategy once war has been authorized by Congress. In addition, congressional war powers are sufficiently flexible to enable Congress to declare either total or limited wars, and to strictly prescribe the aims and objects of any use of the nation's armed forces.[132]

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129. *Id.* at 529-30.

130. Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 16-19 (1972).

131. *Id.* at 17.

132. Van Alstyne stresses that "pursuit of national interest by sustained extraterritorial uses of direct force was textually reserved to Congress alone after alternative formulations were pressed on precisely the grounds that conventionally rationalize a limited power to delegate an interstitial lawmaking authority to the executive, *viz.*, superior expertise in the executive, the need for flexibility in the face of rapidly changing circumstances, the cumbersomeness of parliamentary processes, and a residual power to check the executive in the event of displeasure with the manner in which he might make war. To the extent that such arguments were considered to have merit, they were accommodated by *other* means among the several war-related clauses. To the extent that they were not thus accommodated, the conclusion seems inescapable that they were rejected and correspondingly, that no further latitude of executive control was to be permitted than that already provided for." *Id.* at 16-17. The Constitution may no more be changed through legislative delegation of the war power than through usage. James Madison espoused the prevailing sentiment of the framers when he wrote that: "Every just view that can be taken of this subject, admonishes the public of the necessity of

Whether one applies the *Schechter* standard of legislative delegation to the question of delegation of war powers,[133] or agrees with Van Alstyne that even limited delegation in this area is impermissible, the War Powers Resolution is unconstitutional if it authorizes the president at his sole discretion to commit the United States to armed conflict even if only for a period of sixty to ninety days. The Christmas season bombing of the Hanoi-Haiphong area in 1972, ordered by President Nixon, without any congressional authorization, took far less than sixty days to accomplish. Consider further the catastrophic results certain to follow from a preemptive or first strike nuclear attack on an adversary similarly armed. Should the right to make such a decision belong to one individual? Even if the sixty to ninety day delegation does not contemplate nuclear war, this interpretation of the War Powers Resolution, if accepted, gives the president the authority to make such a decision.[134]

Although the prior analysis suggests that the War Powers Resolution may be unconstitutional, it is perhaps more accurate to say that the ambiguity of this law provides the opportunity for an unconstitutional interpretation by a president unwilling to seek prior congressional permission for military operations. In such a case the question centers on the particular wisdom, rather than the constitutionality, of including the time limit. A future president may argue that despite the subsection 8(d) provision against a construction of the law which would alter his constitutional war making authority,[135] the War Powers Resolution recognizes, and implicitly legitimates, a sixty day exercise of any war powers the president may claim. Congress might order him to cease hostilities by the concurrent resolution procedure of subsection 5(c) before these sixty days are over,[136] but even in that case the president

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a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including *the power of judging the causes of war, is fully and exclusively* vested in the legislature; that the executive has no right, *in any case*, to decide the question, whether there is or is not cause for declaring war." 6 J. Madison, *Letters of Helvidius* in WRITINGS 138, 174 (G. Hunt ed. 1906) *quoting* Berger, *supra* note 10, at 48 (emphasis partially added).

133. See text accompanying notes 128-29 *supra*.

134. While explaining the limited authority that section 3 of S. 440 would have granted the president, Senator Eagleton remarked that "[t]he questions of whether to expressly prohibit the President from initiating a preemptive nuclear attack was debated at some length. I finally had to concede that, in the final analysis, all any legislation can expect to achieve is to hold the President legally and politically accountable for his actions. The consequences that would follow a first strike nuclear attack by the United States would make the question of political and legal responsibility moot." 119 CONG. REC. 24, 543-44 (1973).

135. See note 124 *supra*.

136. See note 120 *supra*.

could certify to Congress, as subsection 5(b) provides,[137] that the safety of the armed forces requires that military action continue for another thirty days while these same forces are being withdrawn.

The War Powers Resolution may spare us from protracted presidential wars such as our country endured in both Korea and Vietnam, but it is not clear that it will be at all effective in controlling a president before the war takes on an extended character. Most wars have been popular in their first sixty days. Some military actions are completed before they have a chance to become unpopular. The president who ordered the action may overwhelm Congress and the electorate with his version of the facts and his interpretation of the crisis. Sixty days may not be enough time for facts other than the official version to emerge and for critics of the presidential policy to receive an adequate hearing. What this suggests, of course, is that the mere enactment of a law limiting presidential power is incapable of controlling a determined president. The reassertion of Congress' constitutionally mandated authority may depend less on war powers legislation than on the development of congressional will and capacity to decide when to utilize or hold in abeyance our military might. The War Powers Resolution may be seen as a necessary step in this development. Claims that the president's war-making power is all encompassing have at last been challenged. Thus the stage was set for a reversal of the post World War II practice whereby presidents have committed the United States to participation in wars without congressional permission.

The next section of this note considers the *Mayaguez* affair as an indication of whether or not Congress considers itself ready to go beyond legislative enactment and fully assume its war-making prerogative.

IV. The Capture of Mayaguez and its Aftermath

A. Chronology of Events

On May 12, 1975 at 12:21 a.m., E.D.T.,[138] the United States merchant ship *Mayaguez* was fired on, boarded and seized by a Cambodian naval vessel in the Gulf of Thailand, sixty miles off the coast of Cambodia and seven nautical miles southwest of Poulo Wai Island.[139]

137. See note 119 *supra.*

138. All times given are Eastern Daylight Time. To convert to Gulf of Thailand time add eleven hours.

139. This chronology of the *Mayaguez* affair has been compiled from two sources 1) PENTAGON ANSWERS TO CONGRESSIONAL INQUIRY, obtained through the office of Congressman Ron Dellums [hereinafter cited as PENTAGON ANSWERS]; and 2) the N.Y. Times, May 16, 1975, at 14, col. 2. Neither chronology will hereafter be cited for the timing of an event mentioned in the text unless there is a significant discrepancy between the two sources, in which case both accounts will be given.

That afternoon a White House spokesman asserted that the ship was taken in international waters and that President Ford considered this seizure to be "an act of piracy" by the new communist government in Cambodia,[140] which had taken power only the month before following the collapse of the Lon Nol regime. State Department lawyers would not openly discuss the international legal aspects of the seizure, but they downplayed the president's charge of piracy, noting that under international law this term is not applied when the aggressor vessel flies a national flag.[141] The legal questions surrounding the immediate seizure were complex. While Cambodia claimed that its territorial waters extend for twelve miles from its shoreline, its sovereignty over Poulo Wai was disputed by South Vietnam. State Department officials thereby acknowledged that the ship could be said to have been in Cambodia's territorial waters when it was seized.[142] Subsequent attempts to classify the seizure have described it as a violation of the *Mayaguez*'s "right of innocent passage" on an established trade route, and as such a clear violation of international law.[143]

President Ford learned of the seizure about 7:40 a.m. After chairing a meeting of the National Security Council at noon, he demanded, through the State Department, that Cambodia release the ship immediately, adding that "[f]ailure to do so would have the most serious consequences."[144] At 4:30 that afternoon a representative of the liaison office of the People's Republic of China was summoned to the State Department to relay this demand to Cambodian authorities. The Chinese representative refused to accept the message.[145] Later that afternoon two United States Navy destroyers, a support ship and an aircraft carrier were ordered to the Gulf of Thailand from various

140. N.Y. Times, May 13, 1975 at 1, col. 8.

141. *Id.* at 19, col. 7. A pirate has been defined as "one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet." United States v. Baker, 24 F. Cas. 962, 965 (No. 14,501) (C.C.S.D.N.Y. 1861).

142. N.Y. Times, May 13, 1975, at 19, col. 7.

143. This characterization was made in a resolution adopted by the Senate Foreign Relations Committee on May 14, intended as a "vote of confidence" for President Ford. N.Y. Times, May 15, 1974, at 18, col. 7. For the purposes of this note it is unimportant whether the passage of the *Mayaguez* was genuinely innocent. It is also unimportant whether, as the Cambodians belatedly claimed, the *Mayaguez* was on an intelligence mission that was part of a broader clandestine power to subvert and overthrow the revolutionary government. *See Text of Cambodian Communique*, N.Y. Times, May 16, 1975, at 15, col. 6. What is important is which branch, Congress or the Executive, is charged by the Constitution with the duty to interpret, and if necessary enforce international law.

144. N.Y. Times, May 13, 1975, at 19, col. 5.

145. PENTAGON ANSWERS, *supra* note 139 (answer to question number 1).

locations in the western Pacific. By midnight of the twelfth, the Cambodians had moved the *Mayaguez* from Poulo Wai to the vicinity of Koh Tang, an island thirty miles off the Cambodian coast.[146] At 12:10 a.m. on the thirteenth, a representative of the United States liaison office in Peking delivered messages to the Cambodian embassy there,[147] and also to the foreign ministry of the People's Republic of China.[148]

At 6:55 on the morning of the thirteenth, the president directed the Commander in Chief Pacific to keep the *Mayaguez* away from the Cambodian mainland. Later that morning the National Security Council convened and issued orders to isolate Koh Tang and to prevent arrival or departure of vessels from the area. That evening between 6:00 and 7:00 congressional leaders were notified by telephone of the president's orders to prevent the movement of the ship and crew. At 8:30 p.m., an A-7 aircraft sank a Cambodian patrol boat after it appeared that an attempt was being made to remove the *Mayaguez* crewmen to the mainland. At 10:40 that night the president chaired a third meeting of the National Security Council, and by midnight discretionary authority was given to naval pilots to attack and sink any small craft in the vicinity of Koh Tang. Until this time all decisions to sink any vessels had been made in Washington.

The next day, May 14, at 11:00 a.m., congressional leaders received phone calls from the White House informing them that three Cambodian patrol boats had been sunk and four damaged by United States air strikes. That afternoon, State and Defense Department officials explained the situation to members of the House International Relations Committee, the House Armed Services Committee and the Senate Foreign Relations Committee. After a late afternoon National Security Council meeting the president himself held a one hour meeting with a bipartisan group of selected congressmen, telling them of his decision to begin military operations against Cambodia, including air attacks against military facilities near the port of Sihanoukville.

146. The following account is derived mainly from PENTAGON ANSWERS, answer to question number 1.

147. The content of the message was not disclosed.

148. PENTAGON ANSWERS, question number 2: "What specific diplomatic options were considered and rejected by the National Security Council in seeking the release of the *Mayaguez* and its crew?" Answer: "Because of the urgency of the situation and the lack of direct channels to the Cambodian authorities in Phnom Penh, it was judged that the only effective and rapid channels were those used—the approach to the Chinese here and in Peking, and the direct delivery of a message to the Cambodian representative in Peking. No other government which might have been helpful in the situation has any representation in Phnom Penh and thus any effective contact with the authorities there." At 7:15 a.m. on May 14, according to the PENTAGON ANSWERS, the People's Republic of China foreign ministry returned the United States message for the Cambodians. The record does not indicate whether a Cambodian reply accompanied this return.

Because of a mistaken intelligence report that the *Mayaguez* crewmen were being held on Koh Tang, a marine helicopter assault was ordered against the island to free them. At 7:07 p.m. Phnom Penh domestic radio carried a message in Cambodian which agreed to American demands for the release of the ship and its crew.[149] This broadcast, monitored and translated into English by the Foreign Broadcast Information Service, was shown to the president at 8:15 p.m. In the meantime, at 7:09 p.m. the marines arrived at Koh Tang. The unexpectedly heavy ground fire forced three of the eight helicopters in the assault wave to crash on the beach or in the water and disabled two more, making it necessary for them to return to the United States air base at Utapao, Thailand with the marines they carried still on board. Another group of marines boarded the *Mayaguez* from the destroyer *U.S.S. Holt* about 9:00 p.m. and found no one on board the ship.

At 10:23 p.m. the destroyer *U.S.S. Wilson* sighted a boat flying a white flag near Koh Tang. Thirty minutes later the *Wilson* radioed the Pentagon that at least thirty caucasians were in the boat—actually all thirty-nine crewmen of the *Mayaguez* were aboard. This news was not relayed to the president until 11:14 p.m., despite the fact that radio communication between Washington and the task force was instantaneous and uninterrupted.[150]

Fighter-bombers took off from the flight deck of the *U.S.S. Coral Sea* at 10:15, eight minutes before the boat containing the crewmen was sighted. The first strike against the mainland reached Ream airfield at 10:57 where bombs cratered the runway, destroying seventeen Cambodian aircraft and an airplane hangar. At 11:16, two minutes after learning that the crewmen were safe in American hands, the president ordered all offensive operations to cease and the marines to withdraw from Koh Tang. However, at 11:50 p.m. naval planes bombed a petroleum and lubricants depot near Sihanoukville, causing extensive damage.[151] Furthermore, another marine assault was directed at Koh Tang at 11:45 p.m. in order to protect the withdrawal of the marines already there who were under heavy fire. Cambodian ground fire hit three more helicopters but none crashed. The withdrawal was completed about 9:15 a.m. on May 15. American casualties included fifteen dead, three missing and fifty wounded.[152] Another twenty-three serv-

149. PENTAGON ANSWERS chronology contends that the wire made no mention of the ship's crew, but the Times account said that the Cambodian broadcast, which appeared on news agency wires at 8:19 p.m. "made it clear that the Cambodians were ready to accede to American demands." N.Y. Times, May 16, 1975, at 14, col. 1.

150. *Id.*

151. Disclosure of this second attack on mainland Cambodia was made a day later than disclosure of the other military events of May 14. *See* N.Y. Times, May 17, 1975, at 1, col. 7.

152. N.Y. Times, May 21, 1975, at 16, col. 1.

icemen died when their helicopter crashed after taking off from Nakhom Phanom Air Base in northeast Thailand on its way to Utapao. Although these men were deployed as a potential rescue force, they were not counted as combat casualties by the Pentagon since they saw no hostile action.[153] No casualty account was available from the Cambodians.

B. The Political and Constitutional Implications of the Mayaguez Incident

The seizure of the *Mayaguez* and its bloody aftermath has occurred at a time when the question of our country's policy regarding the use of military force as an arm of foreign relations remains unresolved. The spring of 1975 saw the final defeat of American supported governments in Vietnam, Laos, and Cambodia accompanied by an increased concern among the small body of men that directs United States foreign policy that our international stature had been diminished. Apparently feeling that our allies doubted America's resolve to protect its interests, members of the administration concluded that the world needed to be reassured of the power of the United States president to use military force when these interests were threatened.[154] Unfortunately, most of the discussion of our foreign policy after Vietnam has centered around the rather limited question of whether we are capable of using military force when the need arises rather than the more fundamental question of what those occasions are that make military action necessary.

The *Mayaguez* incident must be analyzed both in political and constitutional terms, because it was an outgrowth of this limited view of international relations and because it has implications concerning Congress' declaration in the War Powers Resolution "to fulfill the intent of the framers of the Constitution . . . ."[155] The constitutional and political considerations should not be treated separately where the mode of decision making will often determine the validity or soundness of the decision made. If Congress will not exercise its constitutional function of choosing war or peace after full consideration of all the issues involved, such decisions will fall to the president and his advisors, whose policy discussions are likely to be nonadversarial. It is the rare executive appointee who will not fall into line, become a "team player" in the

153. N.Y. Times, May 22, 1975, at 1, cols. 2-3.

154. The New York Times reported that administration officials, including Secretary of State Kissinger and Secretary of Defense Schlesinger, were "eager to find some dramatic means of underscoring President Ford's stated intention to 'maintain our leadership on a worldwide basis,'" and that these same officials made it clear that "they welcomed the opportunity to show that Mr. Ford had the will and the means to use American power to protect American interests." N.Y. Times, May 16, 1975, at 1, col. 6.

155. § 2(a), 50 U.S.C. § 1541(a) (Supp. 1973).

face of a president (or a national security advisor or secretary of state) whose mind is set on a particular course of action.[156]

Why was the *Mayaguez* captured in the first place? While the Cambodian authorities publicly claimed that the vessel was on some sort of spy mission,[157] a more plausible explanation for the Cambodian conduct was proposed as early as May 13, 1975.[158] A Cambodian gunboat had stopped—and after a thorough search, released—a Panamanian ship on May 7 in the area where the *Mayaguez* was captured. After the fall of Phnom Penh to the communists in April, refugees fled the country in three Cambodian ships which ended up in the hands of the United States Navy at Subic Bay in the Philippines. A reasonable explanation for the Cambodian policy of detaining ships could be that they were seeking an American prize with which to barter for the return of the three ships held at Subic Bay.[159]

While the author does not know for certain why the Cambodians thought it necessary to harass shipping in the Gulf of Thailand in early May of 1975, the theory that the *Mayaguez* was seized for bargaining purposes suggests that they were not completely oblivious to the possibility of negotiation for the ship's release. But administration policy makers made no serious diplomatic attempts to secure the peaceful release of the ship and its crew.[160] Rather, the seizure was interpreted as a direct challenge to our country's willingness to protect its interests.

At the first meeting of the National Security Council on May 12 the senior members of the council quickly agreed that this time the United States would not allow itself to be maneuvered into the type of situation which prevailed after the seizure of the spy ship *Pueblo* by the North Koreans in 1969.[161] A suggestion was made before the National

156. *See, e.g.*, the concurring remarks of George Reedy, who served as special assistant and then press secretary to President Lyndon Johnson, in *Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 464-66 (1971).

157. *See Text of Cambodian Communique*, N.Y. Times, May 16, 1975, at 15, col. 6.

158. *See* 121 CONG. REC. E 2379 (daily ed. May 13, 1975) *reprinting* Bradsher, *Intelligence Blunder? Danger Signs Ignored*, Washington Star, May 19, 1975, at 8, col. 4.

159. The vessel need not have been of United States registry as long as the seizure could spark some diplomatic activity. An American owned ship flying a Panamanian or the Liberian "flag of convenience" would be sufficient.

160. See text accompanying notes 144-49 *supra*. The Cambodians had at most 32 hours notice from the first demand for release on the afternoon of May 12 until the first Cambodian gunboat was sunk by American war planes. It seems that every Cambodian vessel in the area was then attacked. This is hardly an atmosphere conducive to diplomatic negotiation and compromise. See also note 154 *supra*, documenting the avidity with which Secretaries Kissinger and Schlesinger approached the opportunity to demonstrate President Ford's determination to show that America was still capable of quick military response.

161. N.Y. Times, May 19, 1975, at 8, col. 4 (city ed.).

Security Council (and immediately rejected by President Ford) that if the *Coral Sea* were somehow delayed on its way to the Gulf of Thailand, B-52's should bomb targets in Cambodia "to frighten the Cambodian Government away from making humiliating demands on Washington."[162] The *New York Times* quoted "high ranking administration sources" in its May 14 issue as viewing the seizure to be a welcome opportunity for display of American determination in Southeast Asia after the fall of the governments supported by the United States in Cambodia and South Vietnam.[163] While President Ford's report to Congress attempted to justify the military operation solely by the necessity for "rescue of the captured American crew along with the retaking of the ship *Mayaguez*,"[164] when he addressed a North Atlantic Treaty Organization meeting in Brussels on May 23, Ford characterized the decision to use combat forces in the *Mayaguez* affair as a "clear, clear indication that we are not only strong but we have the will and the capability of moving" to meet challenges.[165]

Why Cambodia's "challenge" had to be met with immediate armed force at the cost of fifteen American combat deaths is as unclear as the nature of the challenge itself. A week after the marines landed on Koh Tang some *Mayaguez* crewmen disclosed that the Cambodians had offered to let Captain Miller and at least part of the crew return to the *Mayaguez* for the purpose of radioing the Americans to call off the air attacks. Captain Miller told a reporter that he turned down the offer not only because he did not want to divide his crew members, but also because any boat returning to the *Mayaguez* that night risked being sunk by American planes.[166] This report is further evidence that the Cambodians were willing to negotiate for the release of the ship and its crew as early as the night of the thirteenth,[167] and that without the administration's reaction the marine assault on Koh Tang and the air attacks on the mainland might have been avoided entirely.

Speculation on what might have been is of limited value. The president and his advisors made some attempts to effect a diplomatic resolution, but the military response was stayed only until the Seventh Fleet task force could reach the Gulf of Thailand preparatory to the

162. *Id.*

163. N.Y. Times, May 14, 1975, at 18, col. 2; see note 154 *supra*.

164. "Communication from the President of the United States," H.R. Doc. No. 151, 94th Cong., 1st Sess. (1975), reprinted in 121 CONG. REC. H 4080-81 (daily ed. May 15, 1975) [hereinafter cited as "Communication from the President of the United States"].

165. N.Y. Times, May 24, 1975, at 1, col. 8.

166. N.Y. Times, May 21, 1975, at 16, col. 2.

167. See text accompanying notes 158-59 *supra* for a plausible explanation of why the *Mayaguez* was seized in the first place, *viz.*, to give the Cambodians leverage in possible negotiations with the United States for the release of the three Cambodian vessels held at Subic Bay.

attack on Koh Tang. It may be that even before this time American attacks against Cambodian boats foreclosed the possiblity that the *Mayaguez* and its crew could be recovered without loss of American lives.[168]

Analysis of the three day *Mayaguez* crisis, however, must go beyond a discussion of the wisdom of the particular tactics used to free the ship and its crew to a discussion of the legal framework within which the decision to use military force was made. Any war-making power the president has in the absence of congressional authorization derives from the Constitution. The War Powers Resolution of 1973 was intended to refute the view, espoused by recent presidents, that the power of the commander in chief is what the president defines it to be.[169] In the words of Senator Javits, the floor leader and a chief sponsor of both Senate Bill 440 and the final compromise, House Joint Resolution 542, "[i]f this challenge is not met successfully by the Congress, I do not see how it can prevent the further erosion of its powers."[170]

168. Lest it be thought that the seizure of American vessels is an extraordinary occurrence in the twentieth century, mention should be made of the continuing saga of the United States tuna fleet and its difficulties with Latin American governments that claim a 200 mile territorial sea limit. From 1961 (the first year that reliable records were kept) through 1972, 175 United States tuna boats were seized for fishing without a license in disputed waters, with Ecuador and Peru accounting for 164 of the seizures. An official seizure occurs when a fishing boat is taken into port after being forcibly boarded and detained. The total amount of fines and fees assessed against the tuna fleet from 1961-72 was over five million dollars. The largest single fine was $157,740, imposed by Ecuador against the tuna clipper *Apollo* at the time of its second seizure. Ecuadorian officials warned the captain of the *Apollo* that his three million dollar clipper would be confiscated outright if he were again caught fishing without a license within the country's 200 mile claim area. Approximately 25 of the seizures involved gunfire, causing property damage, at least one serious injury, and the obvious risk of explosion, sinking and death. In 1969, the United States tuna boat *San Juan* took sixty rounds of machine gunfire, suffering $50,000 damage, for defying an order from a Peruvian patrol boat to put into port.

Since the United States does not recognize claims for a 200 mile territorial sea, these captures are naturally regarded as illegal. But not once have we resorted to armed force to vindicate our position. Rather, our approach to the 200 mile claims dispute and the resultant seizures has been a *two decade* attempt to settle the matter by quiet diplomacy through proposals to allow an international organization, such as the World Court, to arbitrate the matter, through direct negotiations with a group of the 200 mile claimants, or through bilateral negotiations with the claimant country. For a detailed explanation of the ongoing dispute over the 200 mile claims *see* B. SMETHERMAN & R. SMETHERMAN, TERRITORIAL SEAS AND INTER-AMERICAN RELATIONS 16-31 (1974). This chapter documents the facts and episodes narrated above. While the author does not contend that the legality of seizing a foreign vessel fishing in disputed waters is comparable to that of seizing a ship exercising the right of innocent passage through territorial waters, it is obvious that the United States has shown a laudable capacity for diplomatic response in the face of challenges similar to the *Mayaguez* seizure.

169. 119 CONG. REC. 33,549-51 (remarks of Senator Javits).

170. *Hearings on War Powers, supra* note 35, at 6.

Unfortunately, Congress' immediate reaction to the *Mayaguez* seizure was an outpouring of uncritical clamor for quick military action. If Cambodia would not release the ship within twenty-four hours, Representative Crane of Illinois suggested a "direct 'rifle shot' punitive attack that would demonstrate to the Cambodians that it would not be worth the cost to hold this U.S. vessel."[171] Representative Young of Florida seemed to suggest that Congress was incompetent to exercise its war-making power: "We have appeased our adversaries until we are the laughingstock of the world . . . . We have bound our Commander in Chief with a War Powers Act that compels him to wait while the Congress dawdles, debates, restricts, and pontificates. . . ."[172] Even Senator Case of New Jersey, a strong supporter of the War Powers Resolution, said that the president was acting within his authority to use force as a "police action" to secure the release of the *Mayaguez*.[173]

Congressional response to President Ford's method of freeing the *Mayaguez* was somewhat more critical. Senators McGovern of South Dakota and Nelson of Wisconsin questioned the wisdom of military action under circumstances where more emphasis should have been placed on diplomatic initiative.[174] Representative Holtzman of New York doubted the constitutionality of President Ford's action,[175] while Representatives Seiberling of Ohio and Drinan of Massachusetts wondered how the unauthorized hostilities could be reconciled with the War Powers Resolution.[176] Representative Broomfield of Michigan, however, declared that "the White House adhered scrupulously to the requirements of the War Powers Act," and that he was "very pleased with the close and careful consultation the White House offered the Congress."[177] The Senate Foreign Relations Committee passed a resolution which, while it never received the consideration of the full Senate, was intended as a vote of senatorial confidence in the president's decision to recover the *Mayaguez* by use of force. The committee resolved that "we support the President in the exercise of his constitutional powers within the framework of the War Powers Resolution to secure the release of the ship and its men."[178]

President Ford announced in his May 15 report to Congress that "[t]his operation was ordered and conducted pursuant to the Presi-

171. 121 CONG. REC. H 3960 (daily ed. May 13, 1975).
172. 121 CONG. REC. H 4062 (daily ed. May 14, 1975).
173. N.Y. Times, May 13, 1975, at 19, col. 7.
174. 121 CONG. REC. S. 8461-62 (daily ed. May 16, 1975).
175. 121 CONG. REC. H 4124 (daily ed. May 15, 1975).
176. 121 CONG. REC. H 4214 (daily ed. May 19, 1975) (remarks of Representative Seiberling), and *id.* H 4560-61 (daily ed. May 21, 1975) (remarks of Representative Drinan).
177. 121 CONG. REC. H 4080 (daily ed., May 15, 1975).
178. N.Y. Times, May 15, 1975, at 18, col. 7.

dent's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces."[179] Roderick Hills, counsel to the president, told reporters that Mr. Ford had acted under his constitutional war powers to protect the lives and property of Americans abroad, and that while he could not cite the exact article and section of the Constitution bestowing such power on the executive, the president's inherent right to use forces for this purpose, he said ". . . had not been challenged. The only open question was the appropriate level of military response."[180]

Mr. Ford thus offered no specific authority for the proposition that he could use the armed forces to rescue United States citizens without prior authorization. In a similar situation in 1859 President James Buchanan proceeded more cautiously. In a regular message to Congress of December 28, 1859, Buchanan found it necessary to:

> . . . recommend to Congress that authority be given to the President to employ the naval force to protect American merchant vessels, their crews and cargoes, against violent and lawless seizure and confiscation in the ports of Mexico and the Spanish American States when these countries may be in a disturbed and revolutionary condition.
>
> . . . .
>
> Congress possess the sole and exclusive power under the Constitution "to declare war." . . . But after Congress shall have declared war and provided the force necessary to carry it on the President, as Commander in Chief of the Army and Navy, can alone employ this force in making war against the enemy.[181]

President Buchanan further recognized that Congress' power to declare war was not confined to general wars, but extended to any conflict, no matter how inconsequential or limited: "Without the authority of Congress the President can not fire a hostile gun in any case except to repel the attacks of an 'enemy'."[182] Whatever Gerald Ford understood the constitutional powers of the commander in chief to be, these powers are no more expansive now than they were in Buchanan's time. The president remains the supreme military commander of the armed forces, with the duty to defend the United States in the event of sudden attack. The Constitution is clear that all other hostilities must be specifically authorized by Congress. Despite the ambiguous language of the War Powers Resolution, it should not be construed as enlarging the president's powers but rather as reaffirming the constitu-

179. "Communication from the President of the United States," *supra* note 164, at H 4081.

180. N.Y. Times, May 15, 1975, at 18, col. 3.

181. 5 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 569 (J. Richardson, ed. 1897).

182. *Id.* at 570.

tional allocation of the power to declare war to the legislative branch and the power to conduct war to the executive branch.

Obviously, the War Powers Resolution served as no more effective a brake on unauthorized presidential war-making during the *Mayaguez* episode than did the Constitution. The declaration of the scope of the president's power as commander in chief in subsection 2(c)[183] was completely ignored. No possible reading of this language gives the president the power to rescue Americans abroad without congressional authorization. In fact, a Senate amendment which would have delegated such power to the president was specifically rejected by the Committee on Conference.[184] Mr. Ford complied with none of the applicable provisions of the War Powers Resolution save subsection 4(a), requiring that a report to Congress be made within forty-eight hours of his use of force.[185] Section 3 requires that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ."[186] Senator Javits, defending House Joint Resolution 542 before final passage against charges that it was not strict enough, explained that the "statutory requirement of advance consultation as well as continuing consultation with the Congress, is to be read as maximal rather than minimal."[187] The consultation section recognizes that sudden emergencies may arise which make it impossible for the president to consult with Congress in advance, but in this case the president is still governed by the declaration of authority in subsection 2(c). Javits also warned that while consultation may lead to a declaration of war or some other specific congressional authorization, it was no substitute for these formal legislative measures.[188]

The Pentagon Answers indicate that the president held at least two meetings with the National Security Council before ordering American planes to prevent the movement of the *Mayaguez*,[189] and that in two further National Security Council meetings the decision was made to send the marines onto Koh Tang and to launch air attacks against the mainland.[190] Yet congressional leaders were merely informed of decisions already made, and, in some cases, already implemented.[191] When

183. War Powers Resolution, § 2(c), 50 U.S.C. § 1541(c) (Supp. 1973).
184. See text accompanying notes 103-10 *supra*.
185. War Powers Resolution, § 4(a), 50 U.S.C. § 1543(a) (Supp. 1973).
186. *Id.* § 3, 50 U.S.C. § 1542.
187. 119 CONG. REC. 33,550 (1973).
188. *Id.*
189. PENTAGON ANSWERS, *supra* note 139 (answer to question number 1.).
190. *Id.*
191. See text accompanying notes 138-53 *supra*. Note 114 *supra* delineates the legislative intent behind the consultation requirement of subsection 2(c) of the War Powers Resolution.

questioned by reporters, congressional leaders, including Senators Mansfield, Case and Eastland, in addition to Representatives O'Neil and Rhodes, had to admit that the president had not made the slightest pretense of consulting them, but had merely told them what he intended to do about the seizure.[192] Representative John Anderson of Illinois was "disappointed" that the president had found it necessary to do no more than inform a few selected congressmen of his decisions a few hours before he notified the press. Anderson complained that the president's approach "doesn't really fit the new era of divided responsibility."[193] "Divided responsibility" is an odd way to characterize a constitutional scheme giving Congress almost plenary war powers; what the words *do* point to is the continuing reluctance of Congress to take initiative in this area. The president was able to ignore the War Powers Resolution because he could foresee that Congress itself would not hold him to its dictates.[194] The Senate Foreign Affairs Committee resolution supporting the president "in the exercise of his constitutional powers within the framework of the War Powers Resolution,"[195] made it clear that even members of the committee which had labored three years to draft and enact into law effective war powers legislation would not insist that the law be complied with.

After Mayaguez

Troubled by the fact that President Ford ignored both Congress and the War Powers Resolution in the *Mayaguez* episode, Senator Eagleton quickly proposed three amendments to rectify the situation.[196] The first amendment to the War Powers Resolution would declare that the president has the right to rescue endangered citizens even in the absence of any congressional authorization.[197] In effect this amendment would avoid future embarrassment of Congress by granting the president the authority to proceed as President Ford did in the *Maya-*

192. *See* N.Y. Times, May 15, 1975, at 18, cols. 4-6 city ed.

193. *Id.* at col. 4.

194. Although President Ford did report to Congress within forty-eight hours of ordering the armed forces into combat, even here he explained that he was doing this "[i]n accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution. . . ." "Communication from the President of the United States," *supra* note 159. By merely "taking note" of the reporting requirement was the president implying that he considered the War Powers Resolution to be no more binding on him than, for example, a resolution expressing the "sense of the Senate"?

195. N.Y. Times, May 15, 1975, at 18, col. 7. Fairness to Senator McGovern requires that the *New York Times* report that the committee vote was unanimous, *id.*, be balanced against the senator's claim that he had "never at any time approved the handling of this matter." 121 CONG. REC. S 8461 (daily ed. May 16, 1975).

196. 121 CONG. REC. S. 8825-27 (daily ed. May 21, 1975).

197. S. 1790, 94th Cong., 1st Sess. § 1 (1975).

guez episode. It would delegate Congress' power relative to such incidents while requiring that the evacuation take place "as expeditiously as possible and with a minimum of force."[198] The second amendment would replace the phrase "consult with Congress" in section 3 with the words "seek the advice and counsel of Congress."[199] Senator Eagleton hopes that this amendment will assure that "Congress [sic] view will be represented and considered prior to the introduction of forces."[200] The final amendment, by enlarging the definition of "members of the Armed Forces of the United States," would apply the War Powers Resolution to the use of civilian combatants, such as American mercenaries directed by the C.I.A., as well as to the United States military.[201]

It may be wise for Congress to delegate to the president a carefully defined power to rescue endangered citizens since it has demonstrated that it wants no part of a decision to use force if such measures become necessary. The second proposed amendment, on the other hand, seems positively otiose. Would President Ford have acted any differently had this amendment been law when the *Mayaguez* events took place? He might have gone into a bit more detail on his reasons for using the marines, but, given the lack of initiative of Congress, the final decision would surely have been the same. The Eagleton amendments say nothing at all about who shall make the all important decision to declare war or remain at peace.

Former Secretary of Defense Schlesinger recently announced that NATO forces are prepared to make first use of theater or battlefield nuclear weapons to avoid a defeat in Europe by Warsaw Pact conventional forces. "The attacks should be delivered," said Schlesinger, "with sufficient shock and decisiveness to forcibly change the perceptions of the Warsaw Pact leaders and create a situation conducive to negotiations."[202] This threat has been neither repudiated nor qualified by the president, nor has it been challenged by Congress. A preemptive nuclear strike would almost certainly cause retaliation and escalation resulting in the utter destruction of both antagonists. The need for congressional reassertion of its war-making prerogative has never been more pressing, but neither the War Powers Resolution nor the proposed Eagleton amendments are equal to the task. In referring to Mr. Ford's management of the *Mayaguez* incident, one Congressman said that "[t]he President's action has broad support because it was quick, sure, and above all, successful. I wonder what would now be said had it

198. 121 CONG. REC. S 8826 (daily ed. May 21, 1975).
199. S. 1790, 94th Cong., 1st Sess. § 2 (1975).
200. 121 CONG. REC. S 8826 (daily ed. May 21, 1975).
201. S. 1790, 94th Cong., 1st Sess. § 3 (1975).
202. N.Y. Times, May 30, 1975, at 1, col. 2.

turned out differently."[203] This expresses the present situation exactly, and indicates that little has changed since 1968 when Professor Kurland wrote that:

> We are prepared, according to our loyalties, to back a President that we admire and condemn the one that we dislike, when what we should be doing is to recognize the wisdom of the Constitutional provisions that would preclude the unlimited exercise of power that we have witnessed by each of our recent chief executives and the unalloyed cowardice of the Congress in allowing such arrogation of power to the executive branch.[204]

Only Congress can prevent the war powers from passing irrevocably to the executive branch. If it continues to neglect its responsibility in the sorry fashion of *Mayaguez*, by not demanding that the decision to use armed forces be made only by vote of the two houses in Congress assembled, no president will hesitate to conduct an unconstitutional war, as long as he thinks that his use of force will be quick, sure, and successful. But the Constitution requires that Congress make the decision, not the president and his anonymous National Security Council. The decision to use the armed forces must be subjected to the closest congressional scrutiny, with every opinion receiving a full hearing. This method does not ensure the wisdom of the ultimate decision, but if we are to preserve our constitutional form of government it is the only way we may go to war.

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203. 121 CONG. REC. H 4570 (daily ed. May 21, 1975) (remarks of Representative Duncan).

204. Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 624.