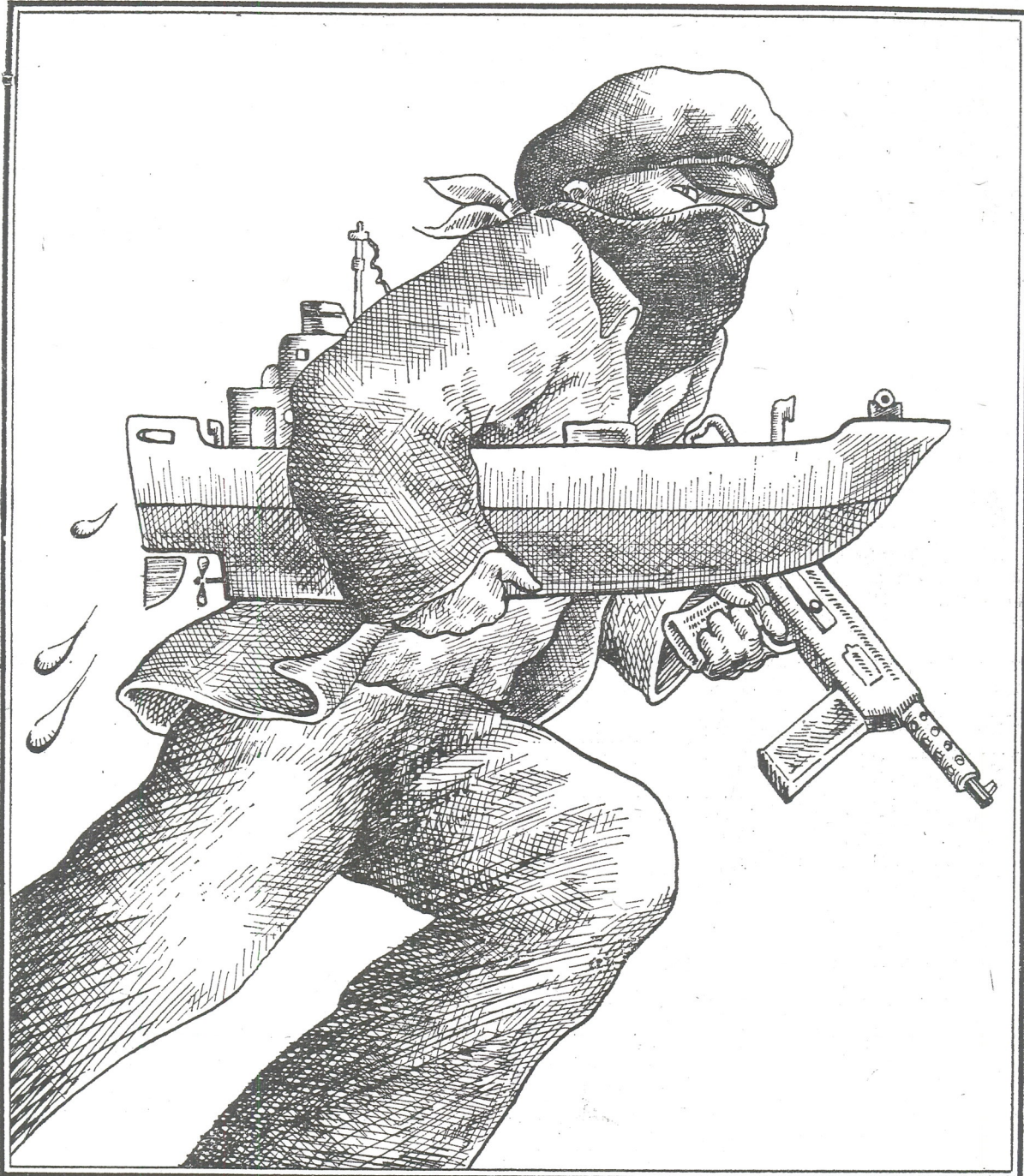


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The Mayaguez Incident and the



Jean Francois Allou

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Constitution

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## By Raoul Berger

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CAMBRIDGE, Mass. — Once more Congress has abdicated its constitutional responsibility, carried away by a wave of "rally round the flag" fever. The Senate Foreign Relations Committee hastened to set its seal on the President's "exercise of his constitutional powers" in sinking Cambodian patrol boats in order to regain the captured merchant vessel *Mayagüez*.

What powers? President Ford invoked his "constitutional executive power and his authority as Commander in Chief." His counsel, Roderrick Hills, explained that Mr. Ford "acted under his constitutional war powers to protect the lives and property of Americans."

We are not, of course, at war with Cambodia, so that resort to the "war powers" is farfetched; and those powers were by design very limited.

As to "protection" of Americans abroad, President James Buchanan recognized in 1859 that the power to afford such protection resided in Congress. He advised Congress, "I deem it my duty to recommend the passage of a law authorizing the President to employ the naval forces for the purpose of protecting the lives and property of American citizens passing in transit across the Panama routes."

The Act of July 27, 1868, directs the President, when citizen is unjustly deprived of his liberty by a foreign country, "to use such means, not amounting to acts of war, to obtain

the release, and promptly to report to Congress."

Suppose that the patrol boats that the United States sunk, instead of belonging to pygmy Cambodia, had been those of the Soviet Union. Is it for the President alone to make the fateful judgment that may plunge us into war? Such situations call for the "collective judgment" of President and Congress, as the War Powers Resolution of 1973 requires.

That requirement is not satisfied by merely "informing" selected members of Congress of the forthcoming hostilities, but by genuine "consultation" before a decision is made, as is stated in the conference committee report on the resolution.

By his invocation of the "constitutional executive power" and that of "Commander in Chief," Mr. Ford apparently signals that he does not consider his "constitutional" powers to be limited by the resolution, a view that seems to be shared by the Senate committee. Of course, if the President possesses the "constitutional powers" to which he lays claim, they cannot be limited by Congress, and the President is free to sink us into yet another Vietnam quagmire.

It is idle to look to the words "executive power" for war-making authority, for the powers comprehended therein were painstakingly enumerated by the Framers of the Constitution. In that enumeration the sole grant of "war power" is contained in the words "Commander in Chief," a limited grant.

Because opponents of the Constitution raised the specter of "detested" monarchical power, Alexander Ham-

ilton downgraded the grant, explaining that the words "Commander in Chief" merely made the President "first General."

Louis Henkin, professor of constitutional law at Columbia University, has justly observed that generals "even when they are 'first' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others"—by the Congress, as the Founders made abundantly clear.

The power to "declare war," meaning, as Justice Joseph Story stated, the "power to make and carry on war," was lodged in Congress exclusively. The purpose, James Wilson explained to the Pennsylvania ratification convention, was to guard against being "hurried" into war, so that no "single man [can] . . . involve us in such distress." It was designed, said James Madison, to hobble the "executive propensity to war." In addition to "commanding" troops in a war so "declared," the President is authorized to repel an invasion, and by the terms of the War Powers Resolution an attack upon the armed forces. Manifestly, the bombing of the Cambodian patrol boats falls in none of these categories.

Does the President have an "inherent right," as his counsel Mr. Hills postulates, to undertake hostilities for the "protection" of American citizens and property? President Buchanan did not think so. The constitutional records disclose that the Founders jealously insisted on a Federal Government of enumerated, strictly limited powers.

Defending the Constitution in the Virginia ratification convention, Gov. Edmund Randolph said that the powers of the Government "are enumerated," that it "has no power but what is expressly given it." In the same convention, it was stated that the "legality of any power" is to be tested by the question, "Is it enumerated in the Constitution." Such citations can be multiplied, and they are reinforced by the pervasive Colonial distrust of executive power. To conjure up an "inherent" executive power in the teeth of the Framers' studied efforts to limit it is to charge them with leaving the barn door wide open.

When the claim to "inherent power" was made in support of President Harry S. Truman's seizure of the steel mills to prevent a strike during the Korean war, it was emphatically rejected by Justice Robert H. Jackson.

In what is considered his finest opinion, Mr. Jackson stated that the Framers "made no provision for exercise of extraordinary authority because of a crisis." Emergency powers, he said, "are consistent with free government only when their control is lodged elsewhere than in the executive who exercises them"—that is, in Congress. Claims of "inherent power" are a euphemism for stepping out of bounds, for exercise of a power that was not conferred. Such claims, particularly when they assert power exclusively lodged in Congress, endanger our democratic system.

The paramount harm that flows from this fresh Cambodian adventure is the disruption of the constitutional allocation of powers, the invasion of powers confided exclusively to Congress. Approval by individual members cannot make such invasion constitutional. The Supreme Court has declared: "One branch of government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on strict observance of this salutary rule."

Richard M. Nixon has taught us anew that power grows by what it feeds on, and that to condone unauthorized expansion is to undermine the foundations of our democratic society.

It is a reproach to Congress that, having just shaken us loose from a disastrous war, sustained in no small part by Congressional acquiescence—it is once more ready to approve a Presidential exercise of its own power. Thereby it gives its sanction to yet another dismal "precedent" that future Presidents will not be slow to invoke against Congress.

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