

## THE KOREAN WAR: ON WHAT LEGAL BASIS DID TRUMAN ACT?

By Louis Fisher\*

### I. INTRODUCTION

President Harry Truman's commitment of U.S. troops to Korea in June, 1950 still stands as the single most important precedent for the executive use of military force without congressional authority. This article examines the legality of Truman's action, in terms of both the United States Constitution and the United Nations Participation Act of 1945, which establishes the procedure for making American troops available in response to requests by the UN Security Council. The action raises two principal questions: Did Truman act contrary to constitutional and statutory law? Is his action, supposedly grounded on UN Security Council resolutions, a valid precedent for contemporary presidential decisions? These questions have contemporary value because of the effort by President George Bush to rely on Security Council resolutions for an offensive operation against Iraq in 1990-1991 and President Bill Clinton's reliance on Security Council resolutions for air strikes in Bosnia and a threatened military invasion of Haiti in 1994.

In June 1950, President Truman ordered U.S. troops to Korea without first requesting congressional authority. For legal footing he cited resolutions passed by the Security Council.<sup>1</sup> In 1990 members of the Bush administration tried the same tactic, citing Security Council resolutions as sufficient support for the President to act militarily against Iraq without congressional authority.<sup>2</sup> President Clinton relied on UN resolutions and NATO agreements as sufficient authority to use military force in Bosnia without first seeking congressional approval.<sup>3</sup> On July 31, 1994, the UN Security Council adopted a resolution "inviting" all states, particularly those in the region of Haiti, to use "all necessary means" to remove the military leadership of that island.<sup>4</sup> At a news conference on August 3, Clinton denied that he needed authority from Congress to invade Haiti: "Like my predecessors of both parties, I have not agreed that I was constitutionally mandated" to obtain the support of Congress.<sup>5</sup> In a nationwide televised address on September

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<sup>1</sup> See SC Res. 82 (June 25, 1950), UN SCOR, 5th Sess., Res. & Dec. at 4, UN Doc. S/INF/5/Rev.1 (1950); SC Res. 83 (June 27, 1950), *id.* at 5.

<sup>2</sup> *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Comm. on Armed Services*, 101st Cong., 2d Sess. 702 (1990) (testimony of Secretary of Defense Dick Cheney); *Update on the Situation in the Persian Gulf: Hearings Before the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 8 (1990) (testimony of Secretary of State James A. Baker III). For pertinent resolutions, see, e.g., SC Res. 661 (Aug. 2, 1990), *reprinted in* 29 ILM 1325 (1990); SC Res. 678 (Nov. 29, 1990), *reprinted in id.* at 1565.

<sup>3</sup> 30 WEEKLY COMP. PRES. DOC. 219-20 (Feb. 6, 1994). For pertinent resolutions, see, e.g., SC Res. 816 (Mar. 31, 1993), SC Res. 836 (June 4, 1993), SC Res. 844 (June 18, 1993).

<sup>4</sup> SC Res. 940 (July 31, 1994).

<sup>5</sup> 30 WEEKLY COMP. PRES. DOC. 1616 (Aug. 3, 1994).

15, he told the American public that he was prepared to use military force to invade Haiti, referring to the UN resolution of July 31 and his willingness to lead a multinational force "to carry out the will of the United Nations."<sup>6</sup>

Is UN machinery a legal substitute for congressional action? If that were possible, the President and the Senate could rely on the treaty process to strip from the House of Representatives its constitutional role in deciding and participating in questions of war. Following that same logic, the President and the Senate, through the treaty process, could rely on the United Nations to determine trade and tariff matters, again bypassing the prerogatives of the House of Representatives. The history of the United Nations makes it very clear that all parties in the legislative and executive branches understood that the decision to use military force through the United Nations required prior approval from both Houses of Congress.

## II. THE LEAGUE OF NATIONS

The Treaty of Versailles was defeated by the Senate in 1919 and again in 1920, largely because a number of senators insisted that any commitments of U.S. troops to a world body (the League of Nations) first had to be approved by Congress. On that issue, and others, President Woodrow Wilson refused to yield.

On July 10, 1919, President Wilson submitted the Treaty, including the Covenant of the League of Nations, to the Senate.<sup>7</sup> The Covenant provided for an Assembly (giving each member nation an equal voice) and a Council (consisting of representatives from the United States, Great Britain, France, Italy, Japan and four other nations elected by the Assembly). Members pledged to submit to the League all disputes threatening war and to use military and economic sanctions against nations that threatened war. In an emotional address to the Senate, Wilson called the League of Nations a "practical necessity" and "indeed indispensable." He said that statesmen saw it as "the hope of the world . . . Shall we or any other free nation hesitate to accept this great duty? Shall we reject it and break the heart of the world?"<sup>8</sup>

Senator Henry Cabot Lodge (R., Mass.) favored U.S. participation in the League but proposed various "reservations" to protect American interests. The second of fourteen reservations concerned the congressional prerogative to decide questions of war:

The United States assumes no obligation to preserve the territorial integrity or political independence of any other country or to interfere in controversies between nations—whether members of the league or not—under the provisions of article 10, or to employ the military or naval forces of the United States under any article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide.<sup>9</sup>

<sup>6</sup> *Id.* at 1780 (Sept. 15, 1994).

<sup>7</sup> Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, 11 Martens (ser. 3) 323, 2 Bevans 43.

<sup>8</sup> 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8735 (James D. Richardson ed.) [hereinafter MESSAGES AND PAPERS].

<sup>9</sup> 58 CONG. REC. 8777 (1919).

Wilson opposed the Lodge reservations, claiming that they "cut out the heart of this Covenant" and represented "nullification" of the Treaty.<sup>10</sup> Wilson's theory of the treaty process was a simple one: the President proposes, the Senate acquiesces. There was no room in his philosophy of government for independent Senate thinking or the offering of legislative amendments and reservations.

Wilson had crisply revealed his attitude toward the Senate and presidential power in two books. In *Congressional Government* (1885), he advocated unilateral presidential negotiation with the complete exclusion of the Senate. These executive initiatives would supposedly get the country "into such scrapes, so pledged in the view of the world to certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscreet threats of the Department of State."<sup>11</sup> In *Constitutional Government in the United States* (1908), he reiterated this line of argument:

One of the greatest of the President's powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.<sup>12</sup>

This legislative strategy, fully articulated in Wilson's writings, failed abysmally with the Treaty of Versailles. After excluding the Senate from the negotiating sessions, the President tried to present it with a fait accompli. The result: a resounding political defeat for Wilson. He had never cultivated sufficient support among senators to have his handiwork approved; the Treaty was rejected in November 1919 and again in March 1920. Wilson appealed to the public in an exhausting campaign across the country, which led to his physical and emotional collapse. The dismal experience of a President "going it alone" would remain seared in the nation's memory, casting a shadow over future efforts to create the United Nations.

## III. CREATING THE UN CHARTER

America's entry into a world organization was revived in 1943 through a series of methodical steps: the Ball resolution, the Fulbright and Connally resolutions, and the Moscow Declaration. Those actions were followed by meetings at Dumbarton Oaks in 1944 and San Francisco in 1945. The issue of which branch takes the nation to war—Congress or the President—was ignored at some of these meetings and addressed at others. The predominant view held to prior authorization by Congress (both Houses) of any commitment of U.S. forces to the United Nations.

<sup>10</sup> 63 THE PAPERS OF WOODROW WILSON 451, and 64 *id.* at 47, 51 (Arthur S. Link ed., 1990 & 1991).

<sup>11</sup> WOODROW WILSON, CONGRESSIONAL GOVERNMENT 233-34 (1885).

<sup>12</sup> WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77-78 (1908).

On March 16, 1943, Senator Joseph Hurst Ball (R., Minn.) introduced a resolution calling for the formation of the United Nations.<sup>13</sup> The bipartisan nature of the resolution, which was joined by Senators Lister Hill (D., Ala.), Harold Burton (R., Ohio) and Carl Hatch (D., N.M.), commanded respectful attention. Senator Ball said that the "whole world, and our allies, know today that it is the United States Senate which will finally decide what will be the foreign policy of our country when the war ends." He noted that the Senate's constitutional power in the past had been used "negatively," reminding listeners of the rejection of the Treaty of Versailles. Senator Ball hoped that the decision on the United Nations would not become embroiled in partisan politics.<sup>14</sup> The Senate's debate on the Ball resolution said nothing about which branch of government would commit U.S. troops to war.

On the day that Ball introduced his resolution, Walter Lippmann wrote an article on the Senate's role in giving advice and consent to treaties. Lippmann had long been identified as a defender of the formulation of foreign policy by elites and executive officials. He now urged, in the *Washington Post*, that President Wilson's mistake over the Treaty of Versailles not be repeated. Ways and means had to be found of "enabling the Senate to participate in the negotiations."<sup>15</sup>

On September 20, the House debated a resolution introduced by J. William Fulbright (D., Ark.) to support the concept of a United Nations. The language was exceedingly brief:

*Resolved by the House of Representatives (the Senate concurring), That the Congress hereby expresses itself as favoring the creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace, among the nations of the world, and as favoring participation by the United States therein.<sup>16</sup>*

Acting with the approval of the Republican leadership on the Committee on Foreign Affairs, Congressman Hamilton Fish, Jr. (R., N.Y.) proposed that Fulbright's resolution end with the language "favoring participation by the United States therein *through its constitutional processes.*"<sup>17</sup> Fish explained that the additional language meant that any commitment to join the United Nations, made either by agreement or by treaty, "must go through in a constitutional way, either by a two-thirds vote of the Senate or by the approval of the entire Congress."<sup>18</sup> He warned that some members of Congress were prepared to oppose the Fulbright resolution because they were "afraid that some secret commitments will be entered into and that the Congress will be by-passed, and that the Constitution will be ignored."<sup>19</sup>

The House passed the Fulbright resolution, as introduced, by a vote of 252 to 23.<sup>20</sup> The following day it voted again, after adding the language "through its constitutional processes," and this time the margin was 360 to 29.<sup>21</sup> The House action sharply challenged the Senate's presumed monopoly over defining foreign policy for the legislative branch. The debate pointed out that both Houses had

acted on the declaration of war for World War II, voted funds to sustain it, and conscripted American soldiers to fight the battles.<sup>22</sup> Recalling the Senate's role in rejecting the Treaty of Versailles, Congressman Mike Monroney (D., Okla.) said he was "unwilling to surrender to 33 Members of the Senate, one-third of that body, the life or death veto over the security of future generations of Americans."<sup>23</sup>

The Senate ignored the Fulbright resolution, which had been introduced as a concurrent resolution and therefore needed concurrence by the Senate. Instead, the Senate considered a resolution (S. Res. 192) that required only its own action.<sup>24</sup> Debate on this resolution, the Connally resolution, stretched from October 25 through November 5. Like the House resolution, it included the phrase "through its constitutional processes" to prevent the President from joining the United Nations without explicit congressional support.<sup>25</sup> Congressional processes meant the "powers of Congress"—both Houses, not just the Senate.<sup>26</sup> A few senators thought of congressional action as solely through the treaty process, excluding the House,<sup>27</sup> but others recognized that international commitments (in this case, joining the United Nations) could be made either by treaty or by a majority of each House voting on a bill or joint resolution.<sup>28</sup>

The final version of the Connally resolution, approved by eighty-five votes to five, provides that the United States, "acting through its constitutional processes," joins in the establishment of an international authority with power to prevent aggression. The final paragraph states that any treaty made to effect the purposes of the resolution shall be made only with the concurrence of two-thirds of the Senate.<sup>29</sup> Senator Robert Taft (R., Ohio) said that the requirement for Senate action was added because the President had "shown some indications of a desire to do by executive agreement things which certainly in my opinion ought to be the subject of a treaty."<sup>30</sup>

Little was said during the lengthy Senate debate about congressional controls over the use of U.S. troops in a UN action. Senator Claude Pepper (D., Fla.) opposed any delegation of Congress's war-declaring power to an international body but believed that it would be permissible for U.S. troops to be used, without prior congressional approval, as a "police force" to combat aggression in small wars.<sup>31</sup> The loose notion of a "police action" would later be used by President Truman as a legal pretext for going to war in Korea without congressional approval. Truman was a member of the Senate at the time Pepper made that remark.

The Senate's action on the Connally resolution occurred during a four-nation conference that endorsed an international peacekeeping organization. On October 30, 1943, the United States, the United Kingdom, the Soviet Union and China issued the Moscow Declaration, which set forth several guiding principles. The declaration recognized "the necessity of establishing at the earliest practica-

<sup>22</sup> *Id.* at 7705 (Congressman Richards).

<sup>23</sup> *Id.* at 7706.

<sup>24</sup> S. Res. 192, 78th Cong., 1st Sess. (1943).

<sup>25</sup> 89 CONG. REC. at 9187 (Senator Willis, 1st column).

<sup>26</sup> *Id.* at 8662 (reading by the legislative clerk).

<sup>27</sup> *Id.* at 9187 (Senator Willis, 1st column); *id.* at 9189 (Senator Brooks); *id.* at 9205 (Senator Wherry).

<sup>28</sup> *Id.* at 9207 (Senator Hayden).

<sup>29</sup> S. Res. 192, 78th Cong., 1st Sess., 89 CONG. REC. at 9222.

<sup>30</sup> 89 CONG. REC. at 9101.

<sup>31</sup> *Id.* at 8742-43.

<sup>13</sup> S. Res. 114, 78th Cong., 1st Sess. (1943).

<sup>14</sup> 89 CONG. REC. 2031 (1943).

<sup>15</sup> Walter Lippmann, *Advice and Consent of the Senate*, WASH. POST, Mar. 16, 1943, at 11, quoted in *id.* at 2032.

<sup>16</sup> H. Con. Res. 25, 78th Cong., 1st Sess. (1943).

<sup>17</sup> See 89 CONG. REC. at 7646-49 (emphasis added).

<sup>18</sup> *Id.* at 7647.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 7655.

<sup>21</sup> *Id.* at 7728-29.

ble date a general international organization . . . for the maintenance of international peace and security."<sup>32</sup>

The same nations met a year later at Dumbarton Oaks, in Washington, D.C., to give further definition to the international organization. Legal specialists who monitored these meetings speculated on the procedures for going to war. Edwin Borchard later surmised: "Constitutionally, the plan seems to assume that the President or his delegate, without consulting Congress, the war-making and declaring authority, can vote for the use of the American quota of armed forces, if that can be limited when the 'aggressor' resists."<sup>33</sup> Two weeks after the end of the conference at Dumbarton Oaks, President Franklin D. Roosevelt delivered an address in which he indicated the need for advance congressional approval:

The Council of the United Nations must have the power to act quickly and decisively to keep the peace by force, if necessary. A policeman would not be a very effective policeman if, when he saw a felon break into a house, he had to go to the town hall and call a town meeting to issue a warrant before the felon could be arrested.

It is clear that, if the world organization is to have any reality at all, our representative must be endowed in advance by the people themselves, by constitutional means through their representatives in the Congress, with authority to act.<sup>34</sup>

But Borchard learned after Roosevelt's death that President Truman sent a cable from Potsdam stating that all agreements involving U.S. troop commitments to the United Nations would first have to be approved by both Houses of Congress.<sup>35</sup> Borchard believed that the Constitution required approval by both Houses, not merely the Senate,<sup>36</sup> but another perspective appeared in a letter to the *New York Times*. Six specialists in international law analyzed the President's authority to contribute troops to the United Nations. They recognized the risks in congressional prerogatives: "It is doubtless true that Congress will feel a certain hesitancy in permitting the President, acting through the Security Council, to engage even a small policing force in international action because it will fear that this might commit the United States to further military action and thus might impair the discretion of Congress in respect to engagement in 'war.'" Yet they suggested that Presidents in the past had had broad discretion in the use of military force, and had frequently acted without explicit congressional authority. The American constitutional system, they said, relied heavily on good faith actions and sensitive political judgment by the President: "Congress has always been dependent upon the good faith of the President in calling upon it when the situation was so serious that a large-scale use of force may be necessary."<sup>37</sup>

The meetings at Dumbarton Oaks were followed in 1945 by a conference in San Francisco, attended by fifty nations and lasting nine weeks. Unlike Wilson's futile strategy for the Versailles Treaty, U.S. participation in creating the United Nations included a major voice for Congress. Half of the delegation's eight members

<sup>32</sup> Declaration of Four Nations on General Security, 9 DEP'T ST. BULL. 308, 309 (1943).

<sup>33</sup> Edwin Borchard, *The Dumbarton Oaks Conference*, 39 AJIL 97, 101 (1945).

<sup>34</sup> 11 DEP'T ST. BULL. 447, 448 (1944).

<sup>35</sup> Edwin Borchard, *The Charter and the Constitution*, 39 AJIL 767, 767-68 (1945). See also text at note 52 *infra*.

<sup>36</sup> Borchard, *supra* note 35, at 770-71.

<sup>37</sup> John W. Davis, W. W. Grant, Philip C. Jessup, George Rublee, James T. Shotwell & Quincy Wright, Letter to the Editor, N.Y. TIMES, Nov. 5, 1944, §4, at 8E.

came from the legislative branch: Senators Tom Connally (D., Tex.) and Arthur H. Vandenberg (R., Mich.) and Representatives Sol Bloom (D., N.Y.) and Charles A. Eaton (R., N.J.).<sup>38</sup> John Foster Dulles, later to be Secretary of State under President Eisenhower, told the Senate Foreign Relations Committee in 1945 that, in the past he had had "some doubts as to the wisdom of Senators participating in the negotiation of treaties"; after his experience at the San Francisco Conference, he said, those doubts "were dispelled."<sup>39</sup>

The San Francisco Conference produced the United Nations Charter, which was submitted to the Senate for approval. The United Nations was to consist of a General Assembly (representing all member states), a Security Council (with eleven members, including China, France, the Soviet Union, the United Kingdom and the United States as permanent members), a Secretariat, an International Court of Justice, and specialized agencies. Chapter VII of the Charter dealt with UN responses to threats to the peace, breaches of the peace, and acts of aggression. Procedures were established to permit the United Nations to employ military force to deal with such threats. All UN members would make available to the Security Council, "on its call and in accordance with a special agreement or agreements," armed forces and other assistance for the purpose of maintaining international peace and security (Art. 43(1)). The agreements were to be concluded between the Security Council and member states and "shall be subject to ratification by the signatory states in accordance with their respective constitutional processes" (Art. 43(3)). Thus, the decision on who would grant that approval in the United States—Congress, the President, or the two branches acting jointly—was deliberately deferred. Each nation would determine for itself the "constitutional processes" to be followed.

From July 9 to July 13, 1945, the Senate Committee on Foreign Relations held hearings on the Charter. Leo Pasvolosky, a special assistant to the Secretary of State, was asked whether Congress would have ultimate control over the special agreements to use armed force. Pasvolosky replied: "That is a domestic question which I am afraid I cannot answer."<sup>40</sup> Senator Vandenberg volunteered that, in his opinion, the President would not need "the consent of Congress to every use of our armed forces."<sup>41</sup>

Dulles, an adviser to the U.S. delegation at San Francisco, testified that the procedure for special agreements would need the approval of the Senate and could not be done unilaterally by the President. "It is clearly my view," Dulles elaborated, "and it was the view of the entire United States delegation, that the agreement which will provide for the United States military contingent will have to be negotiated and then submitted to the Senate for ratification in the same way as a treaty."<sup>42</sup> Senator Connally agreed with that interpretation.<sup>43</sup> When Senator Walter F. George (D., Ga.) suggested that congressional approval could be by statute, involving both Houses, Dulles disagreed: "The procedure will be by treaty—agreements submitted to the Senate for ratification."<sup>44</sup> Senator Eugene Millikin (R., Colo.) tried to distinguish between "policing powers" (to be exercised exclusively by the President) and "real war problems" (reserved for congress-

<sup>38</sup> *The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess. 197 (1945).

<sup>39</sup> *Id.* at 644.

<sup>40</sup> *Id.* at 299.

<sup>41</sup> *Id.* at 646.

<sup>42</sup> *Id.* at 298.

<sup>43</sup> *Id.* at 645-46.

<sup>44</sup> *Id.* at 652.

sional action).<sup>45</sup> Dulles agreed with that concept: "If we are talking about a little bit of force necessary to be used as a police demonstration, that is the sort of thing that the President of the United States has done without concurrence by Congress since this Nation was founded."<sup>46</sup>

During floor debate, Senator Scott Lucas (D., Ill.) took sharp exception to Dulles's contention that special agreements would be referred to Congress as treaties to be disposed of solely by the Senate. Such agreements, Lucas said, required action by both Houses, and he cited constitutional passages giving to the entire Congress powers to raise and support armies and to make rules for the governance and regulation of the land and naval forces.<sup>47</sup> Action by both Houses was required to declare war and to appropriate funds for the military. Several senators agreed with Lucas in rejecting the proposition advanced by Dulles.<sup>48</sup>

As the debate continued, Senator Vandenberg requested that Dulles clarify his position. Dulles explained that, when the issue had come up in the hearings, he thought the question was between unilateral action by the President (through executive agreements) and retaining congressional control (which Dulles took to mean action on treaties). The central point he wanted to make, Dulles said, was that "the use of force cannot be made by exclusive Presidential authority through an executive agreement." He was positive about that. On the other issue—whether Congress should act by treaty or by joint resolution—he was less certain.<sup>49</sup>

At other points during the debate, Senator Harlan Bushfield (R., S.D.) said he had objected, "and I still object, to a delegation of power to one man or to the Security Council, composed of 10 foreigners and 1 American, to declare war and to take American boys into war." Such a proposal "is in direct violation of the Constitution." Congress did not have the power, Bushfield said, "to make such a delegation even if we desired to do so."<sup>50</sup> Senator Burton Wheeler (D., Mont.) was also emphatic on that point:

If it is to be contended that if we enter into this treaty we take the power away from the Congress, and the President can send troops all over the world to fight battles anywhere, if it is to be said that that is to be the policy of this country, I say that the American people will never support any Senator or any Representative who advocates such a policy; and make no mistake about it.<sup>51</sup>

President Truman, aware of the Senate debate on which branch controlled the sending of armed forces to the United Nations, wired a note to Senator Kenneth McKellar from Potsdam on July 27, 1945, in which he pledged: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them."<sup>52</sup> What did asking "Congress" for legislation mean? Senators understood that Congress "consists not alone of the Senate but of the two Houses."<sup>53</sup> With that understanding, the Senate approved the UN Charter by a vote of eighty-nine to two.<sup>54</sup>

Having approved the Charter, Congress now had to pass additional legislation to implement it and to determine the precise mechanisms for the use of force.

<sup>45</sup> *Id.* at 654.

<sup>46</sup> *Id.* at 655.

<sup>47</sup> 91 CONG. REC. 8021 (1945).

<sup>48</sup> *Id.* at 8021-24 (Senators McClellan, Hatch, Fulbright, Maybank, Overton, Hill, Ellender and George).

<sup>49</sup> *Id.* at 8027-28.

<sup>50</sup> *Id.* at 7156.

<sup>51</sup> *Id.* at 7988.

<sup>52</sup> *Id.* at 8185.

<sup>53</sup> *Id.* (Senator Donnell).

<sup>54</sup> *Id.* at 8190.

The specific procedures, brought into conformity with "constitutional processes," are included in the UN Participation Act of 1945.<sup>55</sup>

#### IV. THE UN PARTICIPATION ACT

Nothing in the passage of the Fulbright and Connally resolutions or the history of the UN Charter supports the notion that Congress, by endorsing the structure of the United Nations as an international peacekeeping body, altered the Constitution by reading itself out of the war-making power. Congress did not—it could not—do that, a conclusion driven home sharply by the legislative history of the UN Participation Act.

Under the UN Charter, in the event of any threat to the peace, breach of the peace, or act of aggression, the UN Security Council may decide in accordance with Article 41 to recommend "measures not involving the use of armed force." If those measures prove inadequate, Article 43 provides that all UN members shall make available to the Security Council—in accordance with special agreements—armed forces and other assistance. These agreements would spell out the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. As noted above, it was anticipated that the member states would ratify these agreements "in accordance with their respective constitutional processes."

"Constitutional processes" is defined in section 6 of the UN Participation Act of 1945. Without the slightest ambiguity, this statute requires that the agreements "shall be subject to the approval of the Congress by appropriate Act or joint resolution."<sup>56</sup> Statutory language could not be clearer. The President must seek congressional approval in advance. Two qualifications are included in section 6:

The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: *Provided*, That . . . nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.<sup>57</sup>

The first qualification states that, once the President receives the approval of Congress for a special agreement, he does not need its subsequent approval to provide military assistance under Article 42 (pursuant to which the Security Council determines that peaceful means are inadequate and military action is necessary). Congressional approval is needed for the special agreement, not for the subsequent implementation of that agreement. The second qualification clarifies that nothing in the UN Participation Act is to be construed as congressional approval of other agreements entered into by the President.

Thus, the qualifications do not eliminate the need for congressional approval. Presidents may commit armed forces to the United Nations only after Congress gives its explicit consent. That point is crucial. The League of Nations Covenant foundered precisely on whether congressional approval was needed before using

<sup>55</sup> Pub. L. No. 79-264, ch. 583, 59 Stat. 619 (1945) (22 U.S.C. §§287-287e (1988)).

<sup>56</sup> 22 U.S.C. §287d.

<sup>57</sup> *Id.* (amending language of Oct. 10, 1949, omitted).

armed force. The framers of the UN Charter knew that history and consciously included protections of congressional prerogatives.<sup>58</sup>

The legislative history of the UN Participation Act reinforces this interpretation. In his appearance before the House Committee on Foreign Affairs, Under Secretary of State Dean Acheson explained that only after the President receives the approval of Congress is he "bound to furnish that contingent of troops to the Security Council; and the President is not authorized to furnish any more than you have approved of in that agreement."<sup>59</sup> When Representative Edith Rogers remarked that Congress "can easily control the [Security] Council," Acheson agreed unequivocally: "It is entirely within the wisdom of Congress to approve or disapprove whatever special agreement the President negotiates."<sup>60</sup> Congressman John Kee wondered whether the qualifications in section 6 of the Act permitted the President to take action without consulting or submitting the matter to Congress. Acheson firmly rejected that possibility:

This is an important question of Judge Kee, and may I state his question and my answer so that it will be quite clear here: The judge asks whether the language beginning on line 19 of page 5, which says the President shall not be deemed to require the authorization of Congress to make available to the Security Council on its call in order to take action under article 42 of the Charter, means that the President may provide these forces prior to the time when any special agreement has been approved by Congress.

The answer to that question is "No," that the President may not do that, that such special agreements refer to the special agreement which shall be subject to the approval of the Congress, so that until the special agreement has been negotiated and approved by the Congress, it has no force and effect.<sup>61</sup>

Other parts of the legislative history support this understanding. In reporting the UN Participation Act, the Senate Foreign Relations Committee anticipated a shared, coequal relationship between the President and Congress:

Although the ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to fulfill the commitments assumed by the United States thereunder, the Congress must be taken into close partnership and must be fully advised of all phases of our participation in this enterprise. The Congress will be asked annually to appropriate funds to support the United Nations budget and for the expenses of our representation. It will be called upon to approve arrangements for the supply of armed forces to the Security Council and thereafter to make appropriations for the maintenance of such forces.<sup>62</sup>

The Foreign Relations Committee further noted that "all were agreed on the basic proposition that the military agreements could not be entered into solely by executive action."<sup>63</sup> Nevertheless, during floor debate, Senators Connally and Taft agreed that in "certain emergencies" the President and the Security Council

might be able to act without first obtaining authority from Congress.<sup>64</sup> These comments are interesting, but they do not change the statutory requirement that special agreements be approved in advance by "appropriate Act or joint resolution." Moreover, Connally and Taft seemed to be laboring under concepts left over from the San Francisco Conference and the Senate debate on the UN Charter. They were endorsing the President's ability to become engaged in "police actions" without any congressional involvement.

Connally's confusion became evident soon afterward when he agreed with Senator Kenneth Wherry (R., Neb.) that special agreements could be made by treaty.<sup>65</sup> That misinterpretation, originally pushed by Dulles and others, was explicitly corrected by section 6 of the UN Participation Act. Later, an amendment was offered in the Senate to authorize the President to negotiate a special agreement with the Security Council solely with the support of two-thirds of the Senate.<sup>66</sup> Senator Vandenberg opposed the amendment on these grounds:

If we go to war, a majority of the House and Senate puts us into war. . . .

. . . The House has equal responsibility with the Senate in respect of raising armies and supporting and sustaining them. The House has primary jurisdiction over the taxation necessities involved in supporting and sustaining armies and navies, and in maintaining national defense.

. . . [The Senate Foreign Relations Committee] chose to place the ratification of that contract in the hands of both Houses of Congress, inasmuch as the total Congress of the United States must deal with all the consequences which are involved either if we have a war or if we succeeded in preventing one.<sup>67</sup>

Vandenberg's reasoning prevailed. The great majority of senators, recognizing that the decision to go to war must be made by both Houses of Congress, defeated the amendment decisively, by fifty-seven to fourteen.<sup>68</sup>

The House of Representatives also designed the UN Participation Act to protect congressional prerogatives over war and peace. In reporting the bill, the House Committee on Foreign Affairs drew attention to the vote in the Senate rejecting the idea that special agreements could be handled solely by the Senate through the treaty process. The committee "believes that it is eminently appropriate that the Congress as a whole pass upon these agreements under the constitutional powers of the Congress."<sup>69</sup> During floor debate, Congressman Bloom, one of the delegates to the San Francisco Conference, underscored that point:

The position of the Congress is fully protected by the requirement that the military agreement to preserve the peace must be passed upon by Congress before it becomes effective. Also, the obligation of the United States to make forces available to the Security Council does not become effective until the special agreement has been passed upon by Congress.<sup>70</sup>

The restrictions on the President's power under section 6 to use armed force were clarified by amendments adopted in 1949, allowing the President on his own initiative to provide military forces to the United Nations for "cooperative ac-

<sup>58</sup> Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AJIL 74, 75-77 (1991).

<sup>59</sup> *Participation by the United States in the United Nations Organization: Hearings Before the House Comm. on Foreign Affairs*, 79th Cong., 1st Sess. 23 (1945).

<sup>60</sup> *Id.* at 25-26.

<sup>61</sup> S. REP. NO. 717, 79th Cong., 1st Sess. 5 (1945).

<sup>62</sup> *Id.* at 8.

<sup>64</sup> 91 CONG. REC. 10,965-66 (1945).

<sup>65</sup> *Id.* at 10,974.

<sup>66</sup> *Id.* at 11,296.

<sup>67</sup> *Id.* at 11,301.

<sup>68</sup> *Id.* at 11,303.

<sup>69</sup> H. REP. NO. 1383, 79th Cong., 1st Sess. 7 (1945).

<sup>70</sup> 91 CONG. REC. 12,267 (1945).

tion." However, presidential discretion to deploy these forces is subject to stringent conditions: they may serve only as observers and guards and in a noncombatant capacity, and they cannot exceed one thousand in number.<sup>71</sup> Moreover, in providing such troops to the United Nations, the President shall assure that they not involve "the employment of armed forces contemplated by chapter VII of the United Nations Charter."<sup>72</sup> Clearly, there is no opportunity in the UN Participation Act or its amendments for unilateral military action by the President.

#### V. THE KOREAN WAR

With these safeguards supposedly in place to protect congressional prerogatives, on June 26, 1950, President Truman announced to the American public that he had conferred with the Secretaries of State and Defense, their senior advisers, and the Joint Chiefs of Staff "about the situation in the Far East created by unprovoked aggression against the Republic of Korea."<sup>73</sup> He said that the UN Security Council had ordered the withdrawal of the invading forces to positions north of the 38th parallel, and that, "[i]n accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace."<sup>74</sup> At that point, he made no commitment of U.S. military forces.

On the next day, however, President Truman announced that North Korea had failed to halt the hostilities and to withdraw to the 38th parallel. He summarized the UN action in this manner: "The Security Council called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution. In these circumstances I have ordered United States air and sea forces to give the [South] Korean Government troops cover and support."<sup>75</sup>

In addition, Truman said that "the occupation of Formosa by Communist forces would be a direct threat to the security of the Pacific area and to United States forces performing their lawful and necessary functions in that area."<sup>76</sup> He warned that all members of the United Nations "will consider carefully" the consequences of Korea's aggression "in defiance of the Charter of the United Nations" and that a "return to the rule of force in international affairs" would have far-reaching effects. The United States, he promised, "will continue to uphold the rule of law."<sup>77</sup>

In fact, Truman violated the unambiguous statutory language and legislative history of the UN Participation Act. How could he pretend to act militarily in Korea under the UN umbrella without any congressional approval? The short answer is that he ignored the special agreements that were the vehicle for assuring congressional approval in advance of any military action by the President. With the Soviet Union absent, the Security Council voted nine to zero (with one abstention) to call upon North Korea to cease hostilities and withdraw its forces. Two days later, the Council requested military assistance from UN members to repel the attack, but by that time Truman had already ordered U.S. air and sea forces to assist South Korea.<sup>78</sup>

<sup>71</sup> Act to amend the United Nations Participation Act of 1945, ch. 660, §5, 63 Stat. 734, 735-36 (1949) (22 U.S.C. §287d-1(a) (1988)).

<sup>72</sup> *Id.*

<sup>73</sup> 1950 PUB. PAPERS 491.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 492.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See SC Res. 82 and 83, *supra* note 1.

Truman's legal authority was nonexistent for two reasons. First, it cannot be argued that the President's constitutional powers vary with the presence or absence of Soviet delegates to the Security Council. As Robert Bork noted in 1971, "the approval of the United Nations was obtained only because the Soviet Union happened to be boycotting the Security Council at the time, and the President's Constitutional powers can hardly be said to ebb and flow with the veto of the Soviet Union in the Security Council."<sup>79</sup>

Second, the Truman administration did not act pursuant to UN authority, even though it strained to make that case. On June 29, 1950, Secretary of State Acheson claimed that all U.S. actions taken in Korea "have been under the aegis of the United Nations."<sup>80</sup> Acheson was using "aegis" to suggest that the United States was acting under the legal banner of the United Nations, which of course was not the case.

Acheson falsely claimed that Truman had done his "utmost to uphold the sanctity of the Charter of the United Nations and the rule of law," and that the administration was in "conformity with the resolutions of the Security Council of June 25 and 27, giving air and sea support to the troops of the Korean government."<sup>81</sup> Yet Truman had committed U.S. forces before the Council called for military action. General MacArthur was immediately authorized to send ammunition to the South Korean defenders. On June 26, Truman ordered U.S. air and sea forces to give South Koreans cover and support.<sup>82</sup> After Acheson summarized the military situation for some members of Congress at noon on June 27, President Truman exclaimed: "But Dean, you didn't even mention the U.N.!"<sup>83</sup> Later that evening, the Security Council passed the second resolution. In his memoirs, Acheson admitted that "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution."<sup>84</sup> After he left the presidency, Truman was asked whether he had been prepared to use military force in Korea without UN backing. He replied, with customary bluntness: "No question about it."<sup>85</sup>

President Truman did not seek the approval of members of Congress for his military actions in Korea. As Acheson suggested, Truman might have wished only to "tell them what had been decided."<sup>86</sup> Truman met with congressional leaders at 11:30 A.M. on June 27, after the administration's policy was established and implementing orders issued.<sup>87</sup> He later met with congressional leaders to give them briefings on developments in Korea but never asked for authority.<sup>88</sup> Some consideration was given to presenting a joint resolution to Congress to permit legislators to voice their approval, but the draft resolution never left the executive branch.<sup>89</sup>

On June 29, at a news conference, Truman was asked whether the country was at war. His response: "We are not at war."<sup>90</sup> Asked whether it would be more

<sup>79</sup> Robert H. Bork, *Comments* [on Symposium on United States Action in Cambodia], 65 AJIL 79, 81 (1971).

<sup>80</sup> 23 DEP'T ST. BULL. 43 (1950).

<sup>81</sup> *Id.* at 46.

<sup>82</sup> 1950 PUB. PAPERS 529.

<sup>83</sup> GLENN D. PAIGE, *THE KOREAN DECISION* 188 (1968).

<sup>84</sup> DEAN ACHESON, *PRESENT AT THE CREATION* 408 (1969). See also Edwin C. Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-Making*, 55 AJIL 45, 53 (1961).

<sup>85</sup> MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 276 n. (1973).

<sup>86</sup> [1950] 7 FOREIGN RELATIONS OF THE UNITED STATES 182 (1976).

<sup>87</sup> *Id.* at 200-02.

<sup>88</sup> *Id.* at 257.

<sup>89</sup> *Id.* at 282-83 nn.1 & 2; *id.* at 287-91.

<sup>90</sup> 1950 PUB. PAPERS 503.

correct to call the conflict "a police action under the United Nations," he agreed: "That is exactly what it amounts to."<sup>91</sup> Nevertheless, the United Nations exercised no real authority over the conduct of the war. Other than token support from a few nations, it was an American war. The Security Council requested that the United States designate the commander of the forces and authorized the "unified command at its discretion to use the United Nations flag."<sup>92</sup> Truman named Gen. Douglas MacArthur to serve as commander of this so-called unified command.<sup>93</sup> Measured by troops, money, casualties and deaths, it remained an American war.

Federal courts had no difficulty in defining the hostilities in Korea as war. A U.S. district court noted in 1953: "We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war."<sup>94</sup> During Senate hearings in June 1951, Secretary of State Acheson conceded the obvious by admitting, "in the usual sense of the word there is a war."<sup>95</sup>

Truman's violation of constitutional and statutory requirements may have resulted from a mistaken reading of history. In deciding whether North Korean aggression could go unanswered, the President looked, in his own lifetime, to Japan's invasion of Manchuria and Germany's reoccupation of the Rhineland. He did not consider other historical parallels involving the use of force such as the American Civil War and Germany's nineteenth-century efforts at unification. Apparently, it did not occur to him that the situation in Korea resembled the latter more than it did the actions in Manchuria and the Rhineland.<sup>96</sup>

Even if the case could be made that the emergency facing Truman in June 1950 required him to act promptly without first seeking and obtaining legislative authority, nothing prevented him from returning to Congress and asking for a supporting statute or retroactive authority. John Norton Moore has made this point: "As to the suddenness of Korea, and conflicts like Korea, I would argue that the President should have the authority to meet the attack as necessary but should immediately seek congressional authorization."<sup>97</sup> I would put it a little differently. In a genuine emergency, a President may act without congressional authority (and without express legal or constitutional authority), trusting that the circumstances are so urgent and compelling that Congress will endorse his actions and confer a legitimacy on them that only Congress, as the people's representatives, can provide.

## VI. POLITICAL REPERCUSSIONS

Congress was largely passive in the face of Truman's usurpation of the war power. Some members offered the weak justification that "history will show that

<sup>91</sup> *Id.* at 504. On July 13, at a news conference, Truman again called the Korean war a "police action." *Id.* at 522.

<sup>92</sup> *Id.* at 520 (citing SC Res. 84 (July 7, 1950)).

<sup>93</sup> *Id.*

<sup>94</sup> *Weissman v. Metropolitan Life Ins. Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953); see also *Gagliormella v. Metropolitan Life Ins. Co.*, 122 F.Supp. 246 (D. Mass. 1954); *Carius v. New York Life Ins. Co.*, 124 F.Supp. 388 (D. Ill. 1954); and A. Kenneth Pye, *The Legal Status of the Korean Hostilities*, 45 GEO. L.J. 45 (1956).

<sup>95</sup> *Military Situation in the Far East (Part 3): Hearings Before the Senate Comms. on Armed Services and Foreign Relations*, 82d Cong., 1st Sess. 2014 (1951).

<sup>96</sup> RICHARD S. KIRKENDALL, HARRY S. TRUMAN AND THE IMPERIAL PRESIDENCY 11, 16 (1975).

<sup>97</sup> John Norton Moore, *The National Executive and the Use of the Armed Forces Abroad*, NAVAL WAR C. REV., Jan. 1969, at 28, 32.

on more than 100 occasions in the life of this Republic the President as Commander in Chief has ordered the fleet or the troops to do certain things which involved the risk of war [without seeking congressional consent]."<sup>98</sup> This list of alleged precedents for unilateral presidential action contains not a single military adventure that even comes close to the magnitude of the Korean War. As Edward S. Corwin noted, the list consists largely of "fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like."<sup>99</sup>

A few legislators insisted that Truman should have gone to Congress for authority first.<sup>100</sup> Congressman Vito Marcantonio (American Labor Party, N.Y.) delivered this indictment: "when we agreed to the United Nations Charter we never agreed to supplant our Constitution with the United Nations Charter. The power to declare and make war is vested in the representatives of the people, in the Congress of the United States."<sup>101</sup>

Senator Taft warned that if the President could intervene in Korea "without congressional approval, he can go to war in Malaya or Indonesia or Iran or South America." Taft conceded that U.S. entry into the United Nations created a new framework, "but I do not think it justifies the President's present action without approval by Congress." Referring to section 6 of the UN Participation Act, Taft noted that no special agreement had ever been negotiated by the Truman administration or submitted to Congress for its approval.<sup>102</sup>

Almost a year after the war began, several senators participated in a lengthy debate that thoroughly shredded the administration's legal pretenses. Truman's commitment of troops to Korea had violated the UN Charter, the UN Participation Act, and repeated assurances given to Congress by Acheson and other executive officials. Truman had used military force before the second Security Council resolution. It was a war, not a police action. It was an American, not a UN, operation. On all those points, the record is abundantly clear.<sup>103</sup>

Just as the Vietnam War spelled defeat for the Democrats in 1968, so the Korean War helped put an end to twenty years of Democratic control of the White House. "Korea, not crooks or Communists, was the major concern of the voters," writes Stephen Ambrose.<sup>104</sup> The high point of the 1952 campaign came on October 24, less than two weeks before the election, when Dwight D. Eisenhower announced that he would "go to Korea" to end the war.<sup>105</sup> The authors of a study on Eisenhower describe the crucial influence of the Korean War: "Dissatisfaction with the war destroyed Truman's popularity and had much to do with Eisenhower's emphatic victory in the election of 1952."<sup>106</sup>

Some leading academics rushed to Truman's support but failed to give proper attention to constitutional principles. Henry Steele Commager, a prominent histo-

<sup>98</sup> 96 CONG. REC. 9229 (1950) (Statement of Sen. Scott Lucas (D., Ill.)).

<sup>99</sup> Edward S. Corwin, *The President's Power*, NEW REPUBLIC, Jan. 29, 1951, at 16.

<sup>100</sup> 96 CONG. REC. 9233 (1950) (Statement of Sen. Arthur V. Watkins (R., Utah)); see also Arthur V. Watkins, *War by Executive Order*, 4 W. POL. Q. 539 (1951).

<sup>101</sup> 96 CONG. REC. at 9268. <sup>102</sup> *Id.* at 9323.

<sup>103</sup> 97 CONG. REC. 5078-5103 (1951).

<sup>104</sup> 1 STEPHEN E. AMBROSE, EISENHOWER: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT 569 (1983).

<sup>105</sup> *Id.*

<sup>106</sup> CHESTER J. PACH, JR., & ELMO RICHARDSON, THE PRESIDENCY OF DWIGHT D. EISENHOWER 46 (1991).



rian, was one. Writing in the *New York Times* on January 14, 1951, Commager remarked that the objections to Truman's unilateral actions "have no support in law or in history."<sup>107</sup> His own research into law and history, on this point, was superficial and misinformed. Consider this reasoning by Commager:

[I]t is an elementary fact that must never be lost sight of that treaties are laws and carry with them the same obligation as laws. When the Congress passed the United Nations Participation Act it made the obligations of the Charter of the United Nations law, binding on the President. When the Senate ratified the North Atlantic Treaty it made the obligations of that treaty law, binding on the President.

Both of these famous documents require action by the United States which must, in the nature of the case, be left to a large extent to the discretion of the Executive.<sup>108</sup>

Commager not only overstated the President's power under mutual defense treaties but ignored the statutory text and legislative history of the UN Participation Act.

Arthur M. Schlesinger, Jr., was also an early defender of Truman's action in Korea. In a letter to the *New York Times* on January 9, 1951, he disputed the statement by Senator Taft that President Truman "had no authority whatever to commit American troops to Korea without consulting Congress and without Congressional approval" and that by sending troops to Korea he had "simply usurped authority, in violation of the laws and the Constitution." Schlesinger said that Taft's statements "are demonstrably irresponsible." Harking back to Jefferson's use of ships to repel the Barbary pirates, Schlesinger claimed that American Presidents "have repeatedly committed American armed forces abroad without prior Congressional consultation or approval."<sup>109</sup>

Schlesinger neglected to point out that Jefferson admitted to Congress that he was "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." It was the prerogative of Congress to authorize "measures of offense also."<sup>110</sup> Congress enacted eleven statutes authorizing action by Presidents Jefferson and Madison in the Barbary wars.<sup>111</sup> Schlesinger did not, nor could he, cite a similar presidential initiative of the magnitude of the Korean War. Years later, he expressed regret that, in calling Taft's statement "demonstrably irresponsible," he had responded with "a flourish of historical documentation and, alas, hyperbole."<sup>112</sup>

Edward S. Corwin took Commager and Schlesinger to task by labeling them the "high-flying prerogative men."<sup>113</sup> However, Corwin himself had been careless in earlier publications in describing the scope of presidential war power. Writing in

1949, he observed that the original grant of authority to the President to "repel sudden attacks" had developed into an "undefined power—almost unchallenged from the first and occasionally sanctified judicially—to employ without Congressional authorization the armed forces in the protection of American rights and interests abroad whenever necessary."<sup>114</sup> He did note the significance of the UN Participation Act, which he said was based on the theory that American participation in the United Nations "is a matter for Congressional collaboration."<sup>115</sup>

By the late 1960s, with the nation mired in a bitter war in Vietnam, Commager and Schlesinger both publicly apologized for their earlier unreserved endorsements of presidential war power. By 1966, Schlesinger was counseling that "something must be done to assure the Congress a more authoritative and continuing voice in fundamental decisions in foreign policy."<sup>116</sup> In 1973 he stated that the "idea of prerogative was *not* part of presidential powers as defined by the Constitution," although it "remained in the back of [the framers'] mind."<sup>117</sup> Commager told the Senate in 1967 that executive-legislative relations in the conduct of foreign relations should be reconsidered,<sup>118</sup> and while testifying in 1971 he appealed for stronger legislative checks on presidential war power.<sup>119</sup>

## VII. CONCLUSION

President Truman's unilateral use of armed force in Korea violated the U.S. Constitution and the UN Participation Act of 1945. It is not a valid precedent for what President Bush planned to do in 1990–1991 against Iraq; nor is it a valid precedent for any military operations launched by President Clinton in Bosnia or Haiti, or for other UN "peacekeeping" operations. The decision to place U.S. troops in combat and to take the nation from a condition of peace to a state of war requires approval by Congress in advance. That was the constitutional principle in 1787. It has not changed today.

Presidents and their advisers point to more than two hundred incidents in which Presidents have used force abroad without first obtaining congressional approval.<sup>120</sup> Most of those actions were minor adventures taken in the name of protecting American lives or property at a time when U.S. intervention in neighboring countries was considered routine and proper. Is the bombardment of Greytown, Nicaragua, in 1854 an acceptable "precedent" for the current use of American military power? Are we comfortable citing America's occupation of Haiti from 1915 to 1934, or the repeated interventions in Nicaragua from 1909 to 1933? Today, such invasions would violate international law and regional

<sup>114</sup> Edward S. Corwin, *Who Has the Power to Make War?*, N.Y. TIMES, July 31, 1949, §6 (Magazine), at 14.

<sup>115</sup> *Id.*

<sup>116</sup> ARTHUR M. SCHLESINGER, JR., & ALFRED DE GRAZIA, CONGRESS AND THE PRESIDENCY 27–28 (1967).

<sup>117</sup> SCHLESINGER, *supra* note 112, at 9.

<sup>118</sup> *Changing American Attitudes towards Foreign Policy: Hearings Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 21 (1967).

<sup>119</sup> *War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 7–74 (1971).

<sup>120</sup> *The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 2 (1991) (Statement by Senator Joseph R. Biden, Jr., chairman).

<sup>107</sup> Henry Steele Commager, *Presidential Power: The Issue Analyzed*, N.Y. TIMES, Jan. 14, 1951, §6 (Magazine), at 11.

<sup>108</sup> *Id.* at 24.

<sup>109</sup> Arthur Schlesinger, Jr., *Presidential Powers: Taft Statement on Troops Opposed, Actions of Past Presidents Cited*, N.Y. TIMES, Jan. 9, 1951, at 28.

<sup>110</sup> 1 MESSAGES AND PAPERS, *supra* note 8, at 315 (1897).

<sup>111</sup> 2 Stat. 129 (1802); 2 Stat. 206 (1803); 2 Stat. 291 (1803); 2 Stat. 391 (1806); 2 Stat. 436 (1807); 2 Stat. 456 (1808); 2 Stat. 511 (1809); 2 Stat. 614 (1811); 2 Stat. 675 (1812); 2 Stat. 809 (1813); 3 Stat. 230 (1815).

<sup>112</sup> ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 139 (1973).

<sup>113</sup> Corwin, *supra* note 99, at 15.

treaties. We should not speak nonchalantly about "more than two hundred precedents," assuming that such numbers, by themselves, justify unilateral military action by the President. We need to examine the specific incidents. Are they attractive precedents for the use of force today? None of the two hundred incidents come close to justifying military actions of the magnitude and risk of those in Korea in 1950, Panama in 1989, Iraq in 1990, or Bosnia and Haiti in 1994.

The Korean War stands as the most dangerous precedent because of its scope and the acquiescence of Congress. In recognizing the importance of the Korean War and its threat to constitutional democracy, we should not attempt to confer legitimacy on an illegitimate act. Illegal and unconstitutional actions, no matter how often repeated, do not build a lawful foundation. If Presidents withdrew funds from the Treasury without appropriations from Congress, those actions would have no constitutional legitimacy, regardless of the number of infractions. As Gerhard Casper has remarked: "unconstitutional practices cannot become legitimate by the mere lapse of time."<sup>121</sup> Justice Frankfurter noted: "Illegality cannot attain legitimacy through practice."<sup>122</sup> Presidential acts of war, including Truman's initiative in Korea, can never be accepted as constitutional or as a legal substitute for congressional approval.

In May 1994, the Clinton administration released an unclassified summary of its policy for reforming multilateral peace operations. Conditions are established for deciding on U.S. participation in peace operations, "with the most stringent applying to U.S. participation in missions that may involve combat."<sup>123</sup> The policy directive states that the President "will never relinquish command of U.S. forces," although the President may place them under the operational control of a foreign commander when it serves U.S. security interests.<sup>124</sup> Seven proposals are put forth to increase the flow of information and consultation between the executive and legislative branches, including "periodic consultations with bipartisan Congressional leaders on foreign policy engagements that might involve U.S. forces, including possible deployments of U.S. military units in UN peace operations."<sup>125</sup> The summary report also supports legislation to amend the War Powers Resolution to introduce a consultative mechanism with a small core of congressional leaders and to eliminate the sixty-day withdrawal provision.<sup>126</sup>

As a means of diminishing, or extinguishing, the constitutional role of Congress in matters of going to war, it would be difficult to top this position paper. The President, in concert with the UN Security Council and such regional alliances as NATO, claims sufficient constitutional authority to use military force without ever seeking, or obtaining, approval from Congress. A regular series of meetings and briefings with key congressional leaders are sufficient gestures to meet the constitutional test, according to the Clinton administration. Will Congress accept this subordinate, second-class role? Will the American people be satisfied with these

<sup>121</sup> Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 479 (1976).

<sup>122</sup> *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940).

<sup>123</sup> BUREAU OF INTERNATIONAL ORGANIZATION AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 10161, *THE CLINTON ADMINISTRATION'S POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS I* (1994), reprinted in 33 ILM 795, 798 (1994).

<sup>124</sup> *Id.* at 2, 33 ILM at 798-99. <sup>125</sup> *Id.* at 14, 33 ILM at 812.

<sup>126</sup> *Id.* at 15, 33 ILM at 813. For the War Powers Resolution, see 50 U.S.C. §§1541-1548 (1988). For the 60-day withdrawal provision, see §1544(b).

procedures? What ever happened to the expectation of the Framers that Congress, as the people's representatives, would have to approve in advance any use of U.S. forces against foreign governments?

One hesitates to conclude that the United States has reached the point in its constitutional evolution where Presidents can use military force against other countries solely on the basis of resolutions passed by the UN Security Council. Yet, even if it could be argued that Haiti in 1994 somehow posed a "threat" to the United States, springing from refugees or some other factor, is it constitutional for the President to seek approval for military action from the United Nations rather than Congress? Anything even approaching an affirmative response would indicate how far the United States has departed from constitutional and democratic values, representative government and republican principles.