ARTICLE

TRUMAN, KOREA, AND THE CONSTITUTION: DEBUNKING THE "IMPERIAL PRESIDENT" MYTH

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A central tenet of the post-Vietnam conventional wisdom has been that, beginning with President Harry Truman's June 1950 decision to ignore Congress in committing U.S. combat forces to hostilities in Korea, and continuing through the 1960s and '70s in Indochina, modern American Presidents have usurped the constitutional authority of Congress to pass judgment upon decisions to send American soldiers to "war." The controversial 1973 War Powers Resolution[1] is but one of numerous legislative initiatives predicated almost entirely upon this perception.

The argument that the conflict in Indochina was a "presidential war" has never been very persuasive to anyone who remembered the overwhelming 504-2 margin by which Congress approved legislation in August 1964 authorizing President Johnson to use armed force in defense of South Vietnam, Laos, and Cambodia;[2] and even strong Senate critics of the war like

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1. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541-1548 (1988)).

2. The 1964 Gulf of Tonkin Resolution provided in part that "the maintenance of international peace and security in southeast Asia" was "vital" to U.S. national interest,

Jacob Javits (R-N.Y.),[3] Thomas Eagleton (D-Mo.),[4] and the 1967 Senate Foreign Relations Committee majority under Chairman J. William Fulbright (D-Ark.),[5] recognized that Congress had constitutionally authorized that conflict by the Gulf of Tonkin Resolution.[6] Former Stanford Law School Dean John Hart Ely has recently added his influential voice to putting to rest the myth that the Vietnam conflict was a "presidential war,"[7] concluding in his 1993 study *War and Responsibility* that "the Tonkin Gulf Resolution of 1964 was a reversion to the pre-1950 pattern: We have seen that it was presented to the Congress and voted on as what it said it was, an authorization to wage war against North Vietnam."[8]

There still remains the problem of "presidential war" in Korea, however, and Dr. Louis Fisher, of the Library of Congress's Congressional Research Service, argues in a recent issue of the *American Journal of International Law* that President Harry

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and declared that "the United States is therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any" protocol state of the SEATO treaty (which included South Vietnam and Cambodia) "requesting assistance in defense of its freedom." Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Pub. L. No. 91-672, § 12 (Jan. 12, 1971).

3. In March 1964 Senator Javits said, "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy." 112 CONG. REC. 4374 (1966).

4. *See, e.g.*, 116 CONG. REC. 20,982 (1970) ("[T]he Gulf of Tonkin Resolution . . . was an authorization for this war and it was relied on by President Johnson, and its phraseology is broad enough to permit a war, even to permit an expanded war, as I read it . . . .").

5. The Committee's 1967 report on the National Commitments Resolution, S. Res. 85, 91st Cong., 1st Sess. (1969), provided in part, "The Committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to Formosa, the Middle East, and the Gulf of Tonkin are a proper method of granting authority." S. REP. NO. 797, 90th Cong., 1st Sess. 25 (1967). During the August 1964 Senate floor debates on the Gulf of Tonkin Resolution, this exchange occurred between Chairman Fulbright and ranking Republican John Sherman Cooper (R-Ky.):

> Mr. COOPER. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?
>
> Mr. FULBRIGHT. That is the way I would interpret it.

110 CONG. REC. 18,049 (1964).

6. Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Pub. L. No. 91-672, § 12 (Jan. 12, 1971).

7. "[A]s the constitutional requirement of congressional authorization has historically been understood, Congress does indeed appear (years of denial and doubletalk notwithstanding) to have authorized each of these phases of the war." JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL ISSUES OF VIETNAM AND ITS AFTERMATH 12 (1993). It is my understanding—based upon an extended exchange of letters about six or seven years ago, and remarks he made in a Charlottesville, Virginia conference in June 1995, that Dr. Louis Fisher, whose recent writing on Korea is discussed *infra*, now shares the view that Congress constitutionally authorized the conflict in Vietnam.

8. ELY, *supra* note 7, at 53.

Truman's commitment of U.S. troops to Korea in June 1950 "stands as the single most important precedent for the executive use of military force without congressional authorization."[9] Indeed, one might even suggest that if President Truman's actions in sending troops into combat in Korea without specific statutory authorization can be sustained as constitutional, the widely-held view that "imperial presidents" have led the nation into "unconstitutional presidential wars" during the Cold War era will be left hanging on the slender threads of relatively insignificant operations like Grenada and Panama—actions for which there are scores of precedents throughout our history. The issue is of far more than historical interest, for it illuminates the current debate over the President's legal authority to send U.S. forces into harm's way when authorized by the United Nations Security Council in situations as diverse as Kuwait, Somalia, Haiti, and Bosnia-Herzegovina.

Reappraising the allegation that Truman acted unconstitutionally in Korea is particularly appropriate at this time, both because it is a fundamental premise of several highly-praised recent books and articles advocating an expanded congressional role in foreign affairs,[10] and because this past December marked the 50th anniversary of U.S. ratification of the U.N. Charter—the treaty upon which the Korean intervention was legally based—and enactment of the U.N. Participation Act[11] to implement that treaty. This Article, therefore, will explore the President's authority to commit U.S. combat forces in response to armed international aggression pursuant to the U.N. Charter as that document was understood and elucidated by the Senate and House of Representatives half-a-century ago.

Admittedly, searching for "original intent" often can be a difficult and controversial process. But in the field of treaty interpretation there are a number of recent Senate resolutions affirming that, "[u]nder the United States Constitution," a treaty's meaning "is to be determined in light of what the Senate understands the treaty to mean when it gives its advice and

9. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 21 (1995).

10. *See, e.g.*, JOHN H. ELY, WAR AND RESPONSIBILITY 10-11, 151-52 (1993); LOUIS FISHER, PRESIDENTIAL WAR POWER 70-91 (1995); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION 106 (1990) ("President Truman responded to the Korean invasion by committing American troops to combat without consulting Congress . . . .").

11. Pub. L. No. 79-264, 59 Stat. 619 (1945) (codified at § 287-287e (1988)).

consent,"[12] so this line of inquiry is clearly an appropriate starting point for reexamining post-Vietnam congressional interpretations of presidential authority under the Charter.

I. BACKGROUND

Because much of the discussion to follow will involve events that occurred more than half-a-century ago, it is useful to review the context surrounding the ratification of the U.N. Charter and enactment of the U.N. Participation Act. Every member of the Seventy-Ninth Congress understood the human horror of World War II, and most had clear memories as well of World War I a quarter-of-a-century earlier; above all, there was a desire to avoid World War III. The debates further reflect a widespread belief that the Senate's failure to consent to the ratification of the League of Nations Covenant,[13] the subsequent national mood of isolationism,[14] and the neutrality acts that had prohibited President Franklin D. Roosevelt from going to the aid of victims of

12. ABM Treaty Interpretation Resolution, S. Res. 167, 100th Cong., 1st Sess. (1987) (enacted), *reprinted in* JOHN NORTON MOORE, GUY B. ROBERTS & ROBERT F. TURNER, NATIONAL SECURITY LAW DOCUMENTS 681 (1995); *see also* Senate Resolution of Ratification of the INF Treaty, Exec. Rep. No. 100-15 (Apr. 14, 1988), *reprinted in* MOORE, *supra*, at 685 ("[T]he United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification . . . ."). For a critical commentary on this approach to treaty interpretation, see Robert F. Turner, *Beware the Tyranny of the Senate*, WALL ST. J., Feb. 22, 1988, at 20.

13. Senator Olin Johnston (D-S.C.), for example, argued that "most of us now realize . . . that if the United States had adopted President Woodrow Wilson's proposals for a League of Nations there would not have been a Second World War." 91 CONG. REC. 8179 (1945). Senator Abe Murdock (D-Utah) quoted President Wilson as having predicted that a failure to carry out his pledge to establish a League would mean "we would some day send millions of boys, instead of hundreds of thousands, to their death in order to redeem the pledge . . . ." *Id.* at 11,022. Senator Murdock added, "To me, what Mr. Wilson said was one of the most justified predictions ever made. His prediction came true. Now, following the Second World War, we find almost a unanimity in the United States Senate for doing the job which it refused to do following Mr. Wilson's prediction after the First World War." *Id.; see also id.* at 6875-76 (statement of Sen. Connally (D-Tex.)) (describing the difference between the League of Nations and the United Nations); *id.* at 6916 (statement of Sen. Overton (D-La.)) (stating that the U.N. Charter has its origin in the League of Nations); *id.* at 8167 (statement of Sen. Taylor (D-Idaho)) (arguing that the U.S. refusal to join the League of Nations led to war).

14. Senator James Murray (D-Mont.) said that "[w]hen the war clouds were growing in Europe, our policy of isolation constituted a signal to aggressor nations of that continent that we did not intend to take our proper stand with the peaceful law-abiding nations of the world in case of armed aggression. That position of neutrality played into the hands of the dictators who were then planning for war." *Id.* at 8130. Representative Herman Kopplemann (D-Conn.) argued that "isolation . . . has given us two wars in one generation." *Id.* at 12,286; *see also id.* at 11,089 (statement of Sen. Morse (R-Or.)) (arguing that isolationism will lead to another war).

armed international aggression,[15] had made the war more, rather than less, likely. Public opinion overwhelmingly supported ratification of the Charter,[16] and there was widespread support for the view expressed by Senator Tom Connally, the Chairman of the Foreign Relations Committee and a member of the U.S. Delegation to San Francisco that had helped draft the U.N. Charter, in remarks on the Senate floor:

> How important is it that we authorize the President to take such action in collaboration with the other United Nations in order to maintain world peace[?] During the past 25 years, Mr. President, the greatest lesson of our generation, a lesson which has been indelibly impressed upon the minds of the American people, is that world peace is indivisible. The virus of war, like disease germs and radio waves, recognizes no boundary lines. . . . In the shrinking world in which we now live, the only sure way to stay out of war is to prevent it, to stop it before it begins. This is the basic assumption of the United Nations Charter.[17]

There also was a far greater appreciation of the constitutional responsibilities of the President in the field of foreign relations than exists today,[18] as well as a recognition that effective peacekeeping in the atomic age would require both "secrecy"[19]

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15. *Id.* at 8130 (statement of Sen. Morse) (arguing the U.S. position of neutrality "played into the hands of the dictators who were then planning for war").

16. "Between 80 and 90 percent of the American people, apparently, want us to vote for the San Francisco Charter." *Id.* at 8183 (statement of Sen. Willis (R-Ind.)). The American Institute of Public Opinion (AIPO), directed by George Gallup, asked the following question over a period of eight years leading up to April, 1945: "Do you think the United States should join a world organization with police power to maintain world peace?" Twenty-six percent said yes in 1937, by 1942 the figure had risen to 59%, and in 1945 the number responding affirmatively reached 81%. When those responding in the affirmative to the 1945 question were asked to rate the intensity of their conviction on this issue, 83% responded "very important" and another 11% said it was "fairly important." *The Quarter's Polls*, 9 PUB. OPINION Q. 223, 253 (1945). A National Opinion Research Center poll released in mid-July, 1945, also reported that 81% of Americans favored joining a new world organization. *See id.* at 384. In response to a *Fortune* magazine poll taken in late July, 1945, 80.2% of Americans said the new international organization should "[p]revent any member country from starting a war of its own against an outside country." *The Fortune Survey*, FORTUNE, Aug. 1945, at 250, 250, *quoted in The Quarter's Polls*, 9 PUB. OPINION Q. 365, 385 (1945). "Senate approval of the United Nations charter" was supported by a margin of greater than 20 to 1 in an AIPO poll taken in late July. *The Quarter's Polls*, 9 PUB. OPINION Q. 365, 385 (1945).

17. 91 CONG. REC. at 10,968; *see also id.* at 8177 (statement of Sen. Andrews (D-Fla.)) (stating that the idea that the U.S. is safe from international strife was "blown up at Pearl Harbor").

18. *See generally* Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT'L L. 903 (1994).

19. For example, when Senator Eugene Millikin (R-Colo.) asked whether the President should be required to keep Congress "currently advised" on matters which might lead to a U.N. decision to use force, Senator Arthur Vandenberg (R-Mich.) (the ranking Republi-

and "speed and dispatch"[20]—qualities which the Founding Fathers also recognized were institutional competencies of the Executive, rather than the Legislative, branch.[21] Of particular importance, it was widely understood that, in addition to his general control over the management of the nation's foreign intercourse,[22] the President's constitutional duty to "take Care that

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can on the Foreign Relations Committee and another delegate to the San Francisco Conference) responded, "I think it would be impracticable to set that down as an indispensable requirement, because I can conceive of discussions and considerations in the Security Council with respect to which it might not be desirable to disclose the full purpose of the Security Council in any such fashion as would be required by a definitive notification to the Congress. . . . I think that must be left in the discretion of the President . . . ." 91 CONG. REC. at 10,978-79. For a discussion of secrecy and the Founding Fathers, see Turner, *supra* note 18, at 921-29.

20. A major reason for excluding Congress from the decisionmaking process in response to international aggression was the need for prompt action. Senator William Knowland (R-Cal.) illustrated the problem effectively during Senate floor debate on the U.N. Participation Act when he remarked, "Is it not a fact that it has taken us approximately 5 days in the Senate to discuss the particular legislative proposal now pending? My recollection is that in 5 days Holland, a nation which had tried to maintain its neutrality, had tried to keep out of the war, and had successfully kept out of the last war, was completely overrun and dominated by Nazi Germany in the same period of time we have been discussing the pending bill." 91 CONG. REC. at 11,399. Foreign Relations Committee Chairman Tom Connally argued that "[t]o await action by Congress, involving debate in both branches of the Congress as to the calling out of troops in the case of such an incident, would perhaps mean postponing calling them until after there was any occasion for using them at all." *Id.* at 10,965; *see also id.* at 11,405 (statement of Sen. Connally) ("Under the plan proposed by the Senator from Montana, in the case of an emergency, when the action must be instantaneous or not at all, the President would have to say, 'Well, we will talk about that. We are going to take the matter back to Congress' and before Congress could even act the invasion would take place, and then it would be too late to act."). Even Senator Robert Taft (R-Ohio) agreed that enforcement action under the Charter "must be immediate." *Id.* at 11,084; *see also id.* at 6875-76 (statement of Sen. Connally) (arguing the Security Council needs the ability to act speedily); *id.* at 11,084 (statement of Sen. Taft) ("action must be immediate"); *id.* at 11,161 (arguing there should be no more delay in responding to hostility than necessary); *infra* notes 93, 96, 154-55, 179 and accompanying text (arguing against impeding a rapid U.S. response to international aggression).

21. *See, e.g.*, THE FEDERALIST NO. 64, at 434-35 (John Jay) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 70, at 471, 475-76 (Alexander Hamilton); THE FEDERALIST NO. 74, at 500, 505, 507 (Alexander Hamilton); Turner, *supra* note 18, at 921-26.

22. The House Foreign Affairs Committee report on the U.N. Participation Act, for example, referred to the President's "constitutional powers and obligations with respect to the conduct of this country's foreign relations" and cited the "well-known case of *United States v. Curtiss-Wright Export Corporation* (299 U.S. 304 (1936))." H.R. REP. NO. 1383, 79th Cong., 1st Sess. 6 (1945). During Senate debate on the Charter, Senator Claude Pepper (D-Fla.) quoted Thomas Jefferson's conclusion that "[t]he transaction of business with foreign nations is executive altogether." 91 CONG. REC. at 8076. For a detailed discussion of the Executive Power Clause as a textual commitment of control over foreign affairs to the President, see Turner, *supra* note 18, at 929-49. Senator Connally explained that "our representative on the Security Council shall represent the President of the United States, and vote as he is directed to vote by the President, the constitutional head of our Government, the man upon whom devolves the duty of carrying on our foreign relations." 91 CONG. REC. at 10,966; *see also id.* at 8075 (statement of Sen. Pepper) (arguing the President has the power to enforce laws and treaties); *id.* at 11,390 (statement of Sen. O'Daniel (D-Tex.)) (arguing the President and Secretary of State are in charge of foreign affairs).

the Laws be faithfully executed"[23] included responsibility (and authority) to carry out the nation's obligations under a treaty like the U.N. Charter.[24] Thus, Senator Scott Lucas (D-Ill.)—a member of the Foreign Relations Committee who, as Senate Majority Leader in 1950, would counsel President Truman against seeking formal congressional approval for sending troops to Korea[25]—asserted during the Charter debate:

> Under the Constitution the President is bound to execute faithfully the laws of the country and to protect the lives and liberty and property of the American people and also to carry out faithfully the execution of treaties. In so doing he, of course, can send the forces of this country anywhere, and it has been done more than a hundred times without any act of Congress.[26]

Even Senator Burton Wheeler (R-Mont.), who led the fight to preserve the congressional prerogative "to declare war" during the 1945 debates,[27] acknowledged that "not every use of arms or every contest" constituted "war."[28] Among the many powerful statements by senior members was this from third-term Senator Warren Austin (R-Vt.), a member of the Committee on Foreign Relations:

> Mr. President, I am one of those lawyers . . . who believes that the general powers of the President—not merely the war powers of the President but the general authority of the President—are commensurate with the obligation which is imposed upon him as President, that he take care that the laws are faithfully executed. . . .

Senator Taft acknowledged, "Congress cannot make an agreement with another nation. We are not permitted to do that by the Constitution." *Id.* at 8028.

23. U.S. CONST. art. 2, § 3.

24. Perhaps the seminal exposition on the President's duty and authority to use "the force of the nation" to "execute a treaty" was made by Representative (later Chief Justice) John Marshall (F-Va.), during the 1800 House of Representatives debate on the case of Jonathan Robbins. Marshall argued that this power arose from the fact that the "executive power" of the nation was vested in the President by Article II, Section 1 of the Constitution. 1 ANNALS OF CONG. 613-15 (Joseph Gales ed., 1851).

25. *See infra* pp. 574-75.

26. 91 CONG. REC. at 8022. Senator Olin Johnston argued, "In my opinion, the United Nations Charter is a treaty. This being true, the President of the United States has a legal right to see that this treaty is carried out, and, if necessary, may use reasonable force in seeing that it is properly executed. . . . After having secured the necessary funds, I have no doubt that the President of the United States could use a reasonable amount of force to assure that the agreements of the United Nations Charter are put into execution." *Id.* at 8179.

27. *See infra* notes 87-95 and accompanying text.

28. 91 CONG. REC. at 11,392.

> Of course, there are other specific references in the Constitution which show that he has authority to employ armed forces when necessary to carry out specific things named in the Constitution; but the great over-all and general authority arises from his obligation that he take care that the laws are faithfully executed. . . . [T]here is no doubt in my mind of his obligation and authority to employ all the force that is necessary to enforce the laws.
>
> It may be asked, How does a threat to international security and peace violate the laws of the United States? Perhaps, Mr. President, it would not have violated the laws of the United States previous to the obligations set forth in this treaty. Perhaps we have never before recognized as being true the fundamental doctrine with which I opened my remarks ["that a threat to international security and peace occurring anywhere on earth constituted a direct threat to the security and peace of the United States"[29]]. But we are doing so now. We recognize that a breach of the peace anywhere on earth which threatens the security and peace of the world is an attack upon us; and after this treaty is accepted by 29 nations that will be the express law of the world. It will be the law of nations, . . . and it will be the law of the United States, because we shall have adopted it in a treaty. . . .
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> So I have no doubt of the authority of the President in the past, and his authority in the future, to enforce peace. I am bound to say that I feel that the President is the officer under our Constitution in whom there is exclusively vested the responsibility for maintenance of peace.[30]

Senator Austin included in his remarks a lengthy memorandum by a distinguished group of international law scholars (including Philip C. Jessup[31] and Quincy Wright[32]) that concluded, "So far as international law is concerned any employment of constitutional 'war' powers by the United States, if authorized by the international organization to enforce international obligations, would not be 'war.'"[33]

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29. *Id.* at 8059.

30. *Id.* at 8064-65.

31. Professor Jessup served as a judge on the International Court of Justice between 1960 and 1969.

32. Among his other distinctions, Professor Wright served as president of both the American Society of International Law and the American Political Science Association. His 1922 treatise on foreign relations remains a classic in the field. *See* QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922).

33. 91 CONG. REC. at 8066.

II. Senate Debate on the U.N. Charter

In an effort to avoid repeating some of President Wilson's mistakes in trying to establish a League of Nations, on February 13, 1945, President Roosevelt appointed a bipartisan delegation to the San Francisco Conference that negotiated the U.N. Charter—a delegation that included the chairmen and ranking Republicans of both the Senate Foreign Relations and House Foreign Affairs Committees. Half of the delegation's eight members were from the Congress.

The Charter was signed on June 26, 1945, and six days later was submitted to the Senate in person by President Truman with a request for prompt advice and consent to ratification. Extensive public hearings began a week later, but the issue already was being actively debated on the Senate floor. The Senate considered the issue of consenting to the ratification of the Charter over a period of about six weeks between mid-June and final approval on July 28, 1945, but at no time was there any serious doubt over the outcome.[34] In the end, the resolution of ratification was approved 89-2, with another four absent senators recording their support for ratification of the treaty.[35]

Time and again during the debate, senators emphasized that ratification of the treaty would commit the United States to use military force in response to armed international aggression, and potential critics were warned not to lie "in ambush to nullify or 'submarine' this agreement"[36] or to hold their fire "with the belief that some day when the implementing statutes and the special agreements come to us for congressional action then will be the hour to draw the military teeth from this new international agreement."[37] For example, Senator Taft—who half-a-decade later would become President Truman's leading critic on the constitutionality of the Korean commitment—asserted during the Charter ratification debate that "we commit ourselves" to make armed forces available to the United Nations "by ratifying

34. Senator Lucas observed "the unparalleled unity in the Senate upon the charter." 91 Cong. Rec. at 8019. For information about public opinion polls during the period, see *supra* note 16.

35. *See* 91 Cong. Rec. at 8190.

36. *Id.* at 8026 (statement of Sen. Barkley (D-Ky.)).

37. *Id.* at 8019 (statement of Sen. Lucas); *see also id.* at 8023 (statement of Sen. McClellan (D-Ark.)) (claiming that after ratification of the U.N. Charter the United States will have incurred an obligation to furnish troops).

this original treaty,"[38] and said, "If we assume certain definite obligations I am prepared to leave to the President the performance of those obligations."[39]

Dr. Fisher observes in his recent *American Journal of International Law* article that "[l]ittle was said during the lengthy Senate debate about congressional controls over the use of U.S. troops in a UN action."[40] This probably was because the senators understood that, once the commitment was made through ratification of the Charter, its execution in specific instances was exclusively an executive responsibility and thus was beyond the direct control of Congress.[41] Senator Walter George (D-Ga.), for example—the second most senior Democrat on the Foreign Relations Committee—expressed the view that the "international obligation" to act collectively in response to armed aggression "cannot be whittled away or watered down by any subsequent action of Congress, unless we repudiate the treaty."[42]

No issue received more attention, either during the Charter ratification debate or the subsequent consideration of the U.N. Participation Act, than the approval process for the agreements envisioned by Article 43 of the Charter.[43] During the Foreign Relations Committee hearings on the Charter, John Foster Dulles suggested that these would be approved as formal treaties,[44] but several senators argued that a joint resolution would be preferable—because the commitment involved powers expressly vested jointly in the Senate and the House of Representatives by the

38. *Id.* at 8153.

39. *Id.* at 8154.

40. Fisher, *supra* note 9, at 25.

41. Discussing the related issue of the President's imposing an embargo pursuant to U.N. Security Council authorization—a power traditionally viewed as vested in Congress under its Article I, Section 8, Clause 3 power "[t]o regulate Commerce with foreign Nations"—Senator Leverett Saltonstall (R-Mass.) asked whether the Congress might override the President's decision by statute. Senator Connally responded, "There would be a terrible row, I should think. That is about all that would happen, because if we bind ourselves by treaty to do it, and if we enact the bill, and if the President acts under it, I do not know anything we could do to undo it, except to defeat the President in the next election, or perhaps to repeal the act." 91 CONG. REC. at 10,969.

42. *Id.* at 8024.

43. "All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. . . . The agreement or agreements . . . . shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." U.N. CHARTER art. 43.

44. *See The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess. 641, 645-46 (1945) [hereinafter *Charter Hearings*].

Constitution. Senator Taft suggested that the President might make such an agreement without any congressional involvement.[45] Although Senator Connally acknowledged that the method of approval was left by the Charter text for each country to decide, and in some countries the executive might well act alone,[46] the overwhelming understanding was that, in the United States, either the Senate or the Congress would formally be involved.[47]

What is particularly noteworthy, however, is that most of this debate over protecting the constitutional role of the House—both during the Charter ratification process and during the subsequent consideration of the U.N. Participation Act—focused not on the power of Congress "to declare war,"[48] but instead on other expressed powers of Congress. For example, Senator Lucas argued that the House should be involved because the entire Congress held the powers "to raise and support armies" and make rules for the governance and regulation of the land and

45. "I think we have a choice between an agreement made by the President and a treaty, so far as the Constitution is concerned. It may be that the President may desire and ask for congressional authority to make an agreement, but I am very much afraid that if he has the authority to make it at all he can make it just as readily without congressional approval as with congressional approval. I do not know of any rule under which the act of the President would not be effective until we ratified it." 91 CONG. REC. at 8028. There is more than a little logic to this statement—particularly if one accepts the characterization of these agreements as working out the "precise details of the obligation," Senate Foreign Relations Committee Report on U.N. Participation Act, *quoted in* 91 CONG. REC. at 11,296—as it is widely recognized that the President may make "executive agreements" pursuant to the authority of a treaty. *See, e.g.*, Robert F. Turner, *The Constitutional Framework for the Division of National Security Powers Between Congress, the President, and the Courts, in* NATIONAL SECURITY LAW 749, 809 (John Norton Moore, Frederick S. Tipson & Robert F. Turner eds., 1990). Indeed, the "precise details" of military deployments are at the heart of the President's commander-in-chief function and may be beyond both the institutional competence and constitutional mandate of Congress. Senator Austin's contention that ratification of the Charter made an armed attack anywhere in the world "an attack upon us" as a matter of law, *see supra* note 30 and accompanying text, would also support the case for presidential authority to act unilaterally, as it has always been conceded that the President may "repel sudden attacks" without any need for congressional authorization. *See, e.g.*, 4 THE WRITINGS OF JAMES MADISON 227 (Gaillard Hunt ed., 1903).

46. *See* 91 CONG. REC. at 8028.

47. An assurance to this effect was given by President Truman: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them." Telegram from President Harry S. Truman to Senator Kenneth McKellar (July 27, 1945).

48. "Congress shall have Power . . . To declare War . . . ." U.S. CONST. art. I, § 8, cl. 11. To be sure, this power was occasionally mentioned in connection with Article 43 agreements, *see, e.g.*, 91 CONG. REC. at 11,301 (statement of Sen. Vandenberg), but the majority view appears to have been that use of these forces would not amount to "war." *See, e.g.*, *infra* note 82 and accompanying text.

naval forces.[49] This view was reflected in the Foreign Relations Committee report on the U.N. Participation Act[50] and in other statements by individual senators.[51] A somewhat different theory was advanced by Senator Connally, who reasoned:

> Since the obligation exists to furnish the forces, I think it is desirable, probably, to have the concurrence of the House of Representatives in the approval of the agreements. Appropriations will be involved for the maintenance of the armed forces. The House of Representatives always claims the right to have a hand in appropriations.[52]

Other speakers combined both of these legislative powers as justification for involving the House of Representatives, but also did not mention the power to declare war.[53]

Although a detailed discussion of whether the power to declare war may be exercised by treaty as well as by statute is unnecessary for present purposes[54] and is beyond the scope of this Article, it is worth recording both that Professor John Hart Ely recently has made a strong case for the existence of such a power[55] and that Dr. Louis Fisher's rationale for a contrary con-

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49. 91 CONG. REC. at 8021. During the hearings before the House Foreign Affairs Committee on the 1949 amendments to the U.N. Participation Act, a senior State Department spokesman asserted that "under the Constitution, American military personnel cannot be made available to foreign powers or foreign organizations except by authority of law . . . ." 96 CONG. REC. 5083 (1951) (testimony of Assistant Secretary Ernest A. Gross). The constitutional basis for this conclusion is unclear, but the view is consistent with the argument that the President needed specific legislative authority to assign U.S. forces to U.N. Security Council control (for example, pursuant to an Article 43 agreement), but would not need such authority to deploy those same forces directly pursuant to a Security Council resolution if U.N. command or control were not involved.

50. "The precise details of the obligation—such as the exact amount of the forces to be contributed and the places where they are to be stationed—is not a matter for treaty consideration but for legislative sanction by the Congress under its constitutional powers to raise and support armies, to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces." S. REP. NO. 717, 79th Cong., 1st Sess. 8 (1945), *quoted in* 91 CONG. REC. at 11,296.

51. For example, Senator Joseph Ball (R-Minn.) contended that it was "abundantly clear that the President alone cannot make this second [Article 43] agreement effective . . . . I do not see how either an executive agreement by the President, or the ratification of a treaty by the Senate alone could supersede or repeal clause 14 of section 8 of article I of the Constitution, which vests in Congress—including both Houses and the President—the power to make rules for the Government and regulation of the land and naval forces." 91 CONG. REC. at 8107.

52. *Id.* at 10,965.

53. *See, e.g., id.* at 7999 (statement of Sen. Ferguson (R-Mich.)).

54. This is at least true if one accepts the view unanimously embraced by the Foreign Relations and Foreign Affairs Committees that the use of force under the authority of the Security Council in response to armed aggression is not an act of "war." *See infra* note 82 and accompanying text. For a discussion of the present writer's view that such acts do not involve the power to declare war, see Turner, *supra* note 18, at 915-21.

55. *See* ELY, *supra* note 7, at 15.

clusion seriously undermines his own premise.[56] I also have addressed this issue recently elsewhere for readers who are interested.[57]

Dr. Fisher's conclusion that President Truman acted unlawfully is ultimately premised upon two assumptions: (1) that the constitutional Framers expected "that Congress, as the people's representatives, would have to approve in advance any use of U.S. forces against foreign governments;"[58] and (2) that no Charter obligation to resist international aggression existed in the absence of an Article 43 agreement.[59] Although there were individual statements made in support of a wide range of views, considered as a whole the 1945 debates do not indicate that either assumption was widely-shared by members of Congress. On the contrary, widespread agreement was expressed that the President could commit U.S. military forces to hostilities in response to foreign attack,[60] to protect U.S. citizens and property abroad,[61] to execute treaty obligations,[62] and for a range of other

56. Dr. Fisher writes that, if "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," it follows by "the same logic" that "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." Fisher, *supra* note 9, at 22. In reality, the Constitution does not say that Congress shall have the "exclusive" or "sole" power over either commerce or war, and virtually every Article I, Section 8 power has been regulated as well by treaty. *See* Turner, *supra* note 18, at 918-19.

57. *See* Turner, *supra* note 18, at 916-20.

58. Fisher, *supra* note 9, at 39. Earlier, he asserts that "[t]he 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." *Id.* at 37.

59. *See id.* at 29-32. Although the Soviet Union took the position that the Security Council was powerless to act in response to armed aggression in the absence of Article 43 agreements, this view was expressly rejected by the International Court of Justice in its advisory opinion, *Certain Expenses of the United Nations*: "[A]n argument which insists that all measures taken for the maintenance of international peace and security must be financed through agreements concluded under Article 43, would seem to exclude the possibility that the Security Council might act under some other Article of the Charter. The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded." Certain Expenses of the United Nations, 1962 I.C.J. 151, 167 (1962). As early as 1950, Oscar Schachter—then Deputy Director of the General Legal Division of the U.N. Secretariat's Legal Department—wrote, "It is true that the armed forces mentioned in Article 43 were designed to provide a speedy means of implementing action under Article 42 and to fix the obligations of the Member states. But there is clearly nothing in the text of Article 42 which would preclude the Council from applying it without the use of the forces contemplated under Article 43." Oscar Schachter, *The Place of Law in the United Nations*, *in* 1950 ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 205, 220 (Clyde Eagleton & Richard W. Switt eds., 1951).

60. *See* 91 CONG. REC. 8074-78 (1945) (statement of Sen. Pepper).

61. *See id.* at 7991 (statement of Sen. Connally).

purposes below the threshold requiring a formal declaration of war.[63]

Under the Law of Nations as understood when the Constitution was written, no declaration of war was considered necessary except when what we today would call an "aggressive" war was being initiated;[64] and the offensive-defensive distinction was made during the Philadelphia debates in drafting the Constitution[65] and in subsequent practice[66] and judicial interpretation.[67] The issues arose again in this exchange during the House floor debate on the U.N. Participation Act:

> Mr. ROBSION of Kentucky. Under this bill, is there any way for our delegate to put this Nation into war?
>
> Mr. JARMAN. Absolutely not.
>
> Mr. ROBSION of Kentucky. Well, when those forces are called together and he votes for us to contribute men and ships to prevent any aggression or to stop it, would that be putting us into war?
>
> Mr. JARMAN. . . . [S]hould it become necessary for the Security Council to use those forces of the United Nations, it would not be a question of war but a sincere effort to prevent war, just as we . . . kill a mad dog who is attacking our child.
>
> Mr. ROBSION of Kentucky. But if the other side would fight back, of course, you would have a war, would you not? . . .
>
> Mr. JARMAN. If it is spread sufficiently, it would be a war, but it would not be aggressive war.[68]

With respect to Dr. Fisher's second assumption, the debates in both Houses do show that it was expected that an Article 43 agreement would be negotiated with the Security Council subject

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62. Foreign Relations Committee Chairman Connally was one of several senators to make the point that "the President has on about 140 occasions sent the armed forces of this Republic to distant parts of the earth not alone to protect American lives and American property but in response to treaty obligations. . . . It is the duty of the President of the United States to enforce the laws, and a treaty legally ratified by the Senate is a law of the United States. That has been done repeatedly. That doctrine still lives." *Id.* at 7990-91. Senator Alben W. Barkley (D-Ky.), also a member of the Foreign Relations Committee, responded, "I wish to say that I agree with the Senator from Texas." *Id.* at 7991.

63. *See, e.g., supra* p. 539 (recording the statement of Senator Lucas).

64. *See* Turner, *supra* note 18, at 906-10.

65. *See id.* at 910.

66. *See, e.g., infra* notes 220-21 and accompanying text.

67. "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And . . . it is none the less a war, although the declaration of it be 'unilateral'. . . . 'A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.'" *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (citation omitted).

68. 91 CONG. REC. 12,268 (1945).

to approval by Congress; but it does not follow that no treaty obligation existed in the absence of such an agreement. Quite the contrary, it was widely understood that the basic commitment to help resist armed international aggression was made by U.S. ratification of the Charter. In fact, the possibility that no Article 43 agreement would be negotiated was foreseen and discussed on the Senate floor by members of the Foreign Relations Committee before the Senate consented to ratification of the Charter:

> Mr. TUNNELL. Is it not true that when this treaty is ratified we have an obligation? . . . Suppose there never is an agreement of any type, we are still under obligation to furnish the forces provided in this treaty. Is that not true?
>
> Mr. LUCAS. I will say to the Senator from Delaware, that in my opinion, when we ratify this Charter under article [43] we are legally and morally bound to furnish forces of some kind or character to help keep the peace of the world.[69]

III. The U.N. Participation Act

The U.N. Charter was not fully self-executing, and was implemented through enactment of the U.N. Participation Act[70] in December 1945. Following the unanimous recommendation of the Senate Foreign Relations Committee,[71] the Senate approved the statute on December 4, by a vote of 65-7.[72] Two weeks later, following a brief, two-hour debate, the House gave its approval by vote of 344-15.[73]

It was clear from the record that both chambers believed that the basic commitment to act collectively in response to armed international aggression already had been made. The unanimous report of the House Foreign Affairs Committee, for example, recorded that:

> The basic decision of the Senate in advising and consenting to ratification of the Charter resulted in the undertaking by this country of various obligations which will actually be carried

69. *Id.* at 8024. The *Congressional Record* text actually refers to "article 47" rather than article 43, but this is almost certainly an error, as Article 47 of the Charter deals with the Military Staff Committee to "advise and assist" the Security Council on military matters. Senator Lucas almost certainly had in mind Article 43. Senator Taft added shortly thereafter, "They are merely supplementary agreements, which I fully agree we are obligated to enter into. I think we must enter into them in good faith after we have ratified this Charter." *Id.* at 8025.

70. Pub. L. No. 79-264, 59 Stat. 619 (1945) (codified at 22 U.S.C. § 287-287e (1988)).

71. *See* 91 Cong. Rec. at 11,086.

72. *See id.* at 11,409.

73. *See id.* at 12,288.

> out by and under the authority of the President as the Chief Executive, diplomatic, and military officer of the Government. Among such obligations is that of supplying armed forces to the Security Council concerning which provision is made in section 6. . . . [T]he 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 . . . .[74]

Dr. Fisher's denial notwithstanding,[75] it is abundantly clear that Congress understood that the President would be authorized under the Charter to commit U.S. troops to hostilities in response to armed international aggression; and reconciling that power with the Article I, Section 8 authority of Congress to declare war was approached in a variety of ways. A few members simply asserted that the Charter or the U.N. Participation Act were unconstitutional—and voted against one or both of them because they would "give the President complete power to involve this country in war . . . ."[76] Others argued that the nature of war had changed, and that in the future there would simply "be no time for debates, consultations, and declarations;"[77] and still others, such as Senator Fulbright, argued that the power to declare war was really not very important. Consider this exchange between Fulbright and Senator Wheeler, who had offered an

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74. H.R. REP. No. 1383, 79th Cong., 1st Sess. at 4-5 (1945).

75. "Nothing in . . . 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." Fisher, *supra* note 9, at 29. Several observations can be made about this assertion. First of all, Congress has never possessed the war-*making* power. Giving Congress the power "to make war" was considered at the Philadelphia Convention of 1787, but at the motion of James Madison and Elbridge Gerry this was with but a single dissenting vote *rejected*, and Congress was instead given the more limited power "to declare war." 4 THE WRITINGS OF JAMES MADISON, *supra* note 45, at 227. As will be discussed, although some senators apparently believed they were surrendering the congressional role in "war" in 1945, *see, e.g., infra* notes 76-79 and accompanying text, the majority view appears to have been that defensive uses of military force pursuant to a Security Council resolution would not be "war," *see infra* notes 82-86 and accompanying text. This view is consistent with the historical understanding of "declarations of war" under international law. *See* Turner, *supra* note 18, at 906-10.

76. 91 CONG. REC. at 11,084 (statement of Sen. Taft). Although Taft voted for ratification of the Charter, he opposed passage of the U.N. Participation Act, arguing that the statute delegated authority over embargoes and war "completely to the President, without any guide whatever as to the course which he should pursue. We give him the power to destroy our trade or the economic life of any other nation, or destroy its citizens and cities, or even the nation itself, without consulting the Congress." *Id.* at 11,083; *see also id.* at 12,274 (statement of Rep. Robsion (R-Ky.)) (arguing enactment would cede the congressional power to declare war); *id.* at 12,284 (statement of Rep. Smith (R-Ohio)) (arguing the President could send troops into battle without consulting Congress).

77. *Id.* at 11,085 (statement of Sen. Johnston).

amendment to require congressional approval before U.S. troops could be committed to hostilities pursuant to a Security Council decision:

> Mr. FULBRIGHT. Is it the Senator's thought that the Congress has ever had much influence on whether or not the Nation went to war?
>
> Mr. WHEELER. No; it is not. . . .
>
> Mr. FULBRIGHT. In the case of the Japanese attack, neither the Congress nor the President made the decision. It was made in Tokyo.
>
> Mr. WHEELER. Of course.
>
> Mr. FULBRIGHT. In that case it was immaterial whether the Congress or the President, under the Constitution, had the power to make war.
>
> Mr. WHEELER. When a country is attacked, everyone recognizes that as a matter of sovereignty it has the right to resist the attack. . . .
>
> Mr. FULBRIGHT. As a practical matter, the Senator does not seriously believe, does he, that the right of Congress to make war will ever be very significant in modern warfare?
>
> Mr. WHEELER. Of course not. Not only is it not significant in modern times, but it never has been.
>
> Mr. FULBRIGHT. I do not see why the Senator thinks it is necessary to argue that the war power must remain in Congress, when it has never been important.[78]

In a somewhat similar vein, other members argued that the issue of surrendering control over "war" to the President was of little concern, both because the Commander-in-Chief already had the effective power to "put this Nation into war," and because decisions to use forces made available to the Security Council would be subject to the "veto" of "[a]ny one of the so-called Big Five powers . . . ."[79]

An important exchange occurred during the Charter ratification debate on July 25 between two senators who would eventually become, respectively, Chairman of the Foreign Relations Committee and Majority Leader:

> Mr. FULBRIGHT. Does . . . [Senator Lucas] agree that the power of the President to order the use of military force does not arise out of the treaty, but that it arises out of the Constitution of the United States, and that it is the President's duty,

78. *Id.* at 11,396; *see also id.* at 11,400 (statement of Sen. Fulbright) (arguing Congress's declaration of war in World War II was superfluous).

79. *Id.* at 12,269 (statement of Rep. Jennings (R-Tenn.)).

whenever necessary, to marshall [sic] military force in the defense of the country?

Mr. LUCAS. There is no question about that. But we are giving to the President additional power which he does not now have. . . . Under the Constitution of the United States the President has the power to call out the troops for the purpose of faithfully enforcing the laws of the land, including treaties in situations which may involve the property rights, or personal rights, of an American citizen. . . . Let us assume . . . [a] hypothetical case. We will assume that, in the absence of this treaty, a dispute takes place between *Bulgaria* and *Rumania* which threatens the peace of Europe. If there be no American interest involved, either a personal or a property interest, I do not believe that the President would have any authority to send troops for the purpose of quelling such a disturbance taking place between those two nations.

Mr. FULBRIGHT. *Will this charter be a recognition that our Nation may become involved in that dispute?*

Mr. LUCAS. *There can be no question about it.* As a result of the scientific development of war implements during the past 10 or 15 years, a dispute taking place along the border of any country in the world which may threaten the peace of the country involved, also threatens the peace of the United States.[80]

This exchange is particularly significant in light of the ongoing debate over the President's legal authority to commit troops to Bosnia Herzegovina, as the former Yugoslavia bordered both Bulgaria and Romania.

Turning to the issue of congressional control over the President's exercise of these new Charter responsibilities, the exchange continued:

Mr. FULBRIGHT. Would not the Senator agree that if the Congress undertook to restrict the President in the exercise of that power which is placed within his discretion for the purpose of enforcing law and protecting our interests, it would be wrong to do so?

Mr. LUCAS. I agree with the Senator.

Mr. FULBRIGHT. There has been some talk to the effect that we could control and say to the President, "No; you cannot use these forces."

Mr. LUCAS. I do not agree with that at all.[81]

80. *Id.* at 8031-32 (emphasis added).

81. 91 CONG. REC. at 8032.

If there was a majority view on the relationship between the President's authority under the Charter and the power of Congress to declare war, it was probably that the Declaration of War Clause was irrelevant in this context because the commitment of U.S. armed forces into hostilities pursuant to a decision of the Security Council was an act of "peace" rather than "war." Thus, the unanimous House Foreign Affairs Committee report on the U.N. Participation Act quoted at length from the earlier unanimous Senate Foreign Relations Committee's report on ratification of the U.N. Charter:

> [T]he committee is convinced that any reservation to the Charter, or any subsequent congressional limitation designed to provide, for example, that employment of the armed forces of the United States to be made available to the Security Council under special agreements referred to in article 43 could be authorized only after the Congress had passed on each individual case would clearly violate the spirit of one of the most important provisions of the Charter. . . .
>
> Preventive or enforcement action by these forces upon the order of the Security Council *would not be an act of war* but would be international action for the preservation of the peace and for the purpose of preventing war. *Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war.*
>
> The committee feels that a reservation or other congressional action such as that referred to above *would also violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress.*[82]

82. H.R. REP. No. 1383, 79th Cong., 1st Sess. 7-8 (1945) (emphasis added). It should be noted that this language was in reference to troops expected to be made available to the Security Council through an Article 43 agreement, however that distinction would not seem to be material to the issue at hand. If it is not an act of "war" for U.S. troops to be sent to defend a victim of international aggression if they have first been assigned to Security Council command, it would presumably not be an act of "war" for those same troops to perform the same mission under U.S. command pursuant to Security Council authorization. Without explicit reference to Article 43, during the Senate debate over enactment of the U.N. Participation Act, Foreign Relations Committee Chairman Connally argued, "As to declaring war, that is not a question which is involved here at all. . . . I am convinced that the Presidential use of armed forces in order to participate in the enforcement action under the Charter would in no sense constitute an infringement upon the traditional power of Congress to declare war." 91 CONG. REC. at 10,968. A similar debate occurred on July 10, during the Foreign Relations Committee hearings on the Charter, when Senator Harold Burton (R-Ohio) referred to the power of representatives of seven states on the Security Council (including the five permanent members) to commit the entire world to combat: "The 7 can order 50 to war and proceed with it." Senator Vandenberg interjected, "I am challenged by the language used by the Senator from Ohio when he says that 7 nations can order 50 nations to war. . . . [T]hat certainly is not the theory upon which we are operating. Seven nations are going to order 50 nations to

Although many apparently felt that "peacekeeping" was not "war" irrespective of its magnitude, others drew a distinction between a limited use of military force in a "police" operation and the commitment of the entire U.S. military to "war." For example, one senator distinguished between spending $1 billion to send 100,000 troops into combat under the Charter as a part of "an international police force," and spending $300 billion to send 4 million troops to "war" as "an expeditionary force."[83] He added that the President would only be able to commit "a limited force—not the whole force of all our people," saying that "when the whole force and strength of the United States is required, of course there is only one body which can make that force available through a resolution of war, and that is the Congress of the United States."[84] Indeed, it was quite common to characterize the envisioned deployment by the Security Council of multinational troops in response to international aggression as the use of a "police force,"[85] and to argue that "throughout our history the use of a police force to enforce the laws and treaties of the United States has never been regarded as war."[86]

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the use of force to preserve peace, which is a totally different conception." Senator Burton responded, "I may say that I concur entirely in the Senator's point of view," and Chairman Connally added, "I wish to concur in Senator Vandenberg's observation that it is not a warlike act; it is an effort to preserve the peace." *Charter Hearings, supra* note 44, at 291-92. The final paragraph of this quotation from the Committee's report presumably resulted from the strongly-held views enunciated by Senator Vandenberg during the July 10 hearing: "I think that if we were to require the consent of Congress to every use of our armed forces, it would not only violate the spirit of the Charter, but it would violate the spirit of the Constitution of the United States, because under the Constitution the President has certain rights to use our armed forces in the national defense without consulting Congress. It has been done 72 times within the last 150 years. It is just as much a part of the Constitution as is the congressional right to declare war. . . . I beg your pardon for this explosion, but I feel very deeply on this subject . . . ." *Id.* at 299-300.

83. 91 CONG. REC. at 8073 (statement of Sen. Pepper). During the hearings on the Charter, John Foster Dulles told the Foreign Relations Committee that the U.S. contingent assigned to the Security Council under an Article 43 agreement "might be half of the Air Force or half of the Navy of the United States," emphasizing that the actual size of the force would not be known until an agreement was negotiated. *Charter Hearings, supra* note 44, at 654.

84. 91 CONG. REC. at 8075.

85. *See, e.g., id.* at 7987 (statement of Sen. Wheeler) (quoting John Foster Dulles); *id.* at 8073, 8074 (statement of Sen. Pepper); *id.* at 8154 (statement of Sen. Taft); *id.* at 8175 (statement of Sen. Andrews); *id.* at 12,271 (statement of Rep. Luce); *id.* at 12,280 (statement of Rep. Mundt (R-S.D.)); *id.* at 12,286 (statement of Rep. Kopplemann). Senator Burton described the role of the Security Council as that of a "sheriff." *See id.* at 5947, 8017.

86. *Id.* at 8143 (statement of Sen. Wagner (D-N.Y.)). Senator Charles O. Andrews, a former judge, responded to the contention that a commitment of U.S. forces by the President under Security Council authority "would be tantamount to a declaration of war," by arguing, "The authority of the American delegate on the Security Council to approve action by that body to punish acts of aggression of one nation against another clearly

IV. The Wheeler Amendment

In arguing that Congress must approve specific deployments of U.S. combat forces to implement U.N. Security Council resolutions, Dr. Fisher relied in no small part upon the statement of Senator Burton Wheeler (R-Mont.), one of the most outspoken isolationists in the years leading up to World War II, that the American people would never support any senator or representative who embraced a policy that would allow the President to "send troops all over the world to fight battles anywhere."[87] There is an implication that this reflected the prevailing thinking in the Senate, but it is in error; indeed, Senator Wheeler acknowledged that on the pending measure, "my voice does not carry very much weight any more in the Senate"[88]—and he took more than a little ribbing from his colleagues because, despite his clear opposition to this aspect of the Charter, he was facing reelection in 1946 and already had announced that he would vote *for* the very popular Charter.[89] As it turned out, Senator Wheeler suffered the fate of most of the unrepentant isolationists and failed even to obtain his party's nomination in 1946 to stand for a fifth term in the Senate.

Senator Claude Pepper, a member of the Foreign Relations Committee, inquired whether Senator Wheeler knew "of a single poll or . . . of any responsible evidence that the American people were not in favor of this international organization having teeth in it, which means the power to use force," or "if the Senator

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comes within the purview of this police power of the Security Council. The powers of our delegate would be exercised and would be equivalent to the President's constitutional power to use the armed forces in any immediate contingency that threatens peace of the world." After referencing the President's "executive power" under Article II, Section 1 of the Constitution, Senator Andrews said, "It is thus seen that the Constitution is clear as to the powers of the President to be exercised in all contingencies and operations of military forces that might arise with regard to our duties to the United Nations under its charter. . . . He would be acting in self defense for the people of the United States in case of aggression upon our territory or to prevent a threatened attack or aggression upon the territory of a neighbor or member nation." *Id.* at 8175-76.

87. Fisher, *supra* note 9, at 28 (quoting 91 Cong. Rec. at 7988). Describing a conversation he had engaged in with the "editor of a prominent newspaper," Senator Wheeler said during Senate debate on the U.N. Participation Act, "He said: 'I understand you are . . . opposed to giving the President the power to project us into war.' That was as he expressed it. I said, 'That is right.' He said, 'Well, Senator, if you do not agree to that and we do not agree to it, Russia will never go into this thing.' " 91 Cong. Rec. at 11,027.

88. 91 Cong. Rec. at 11,392.

89. When Sen. Claude Pepper remarked that Senator Wheeler "is coming around to support the Charter before the next election in his State," Wheeler responded angrily, "I resent that." *Id.* at 7988. For evidence of the overwhelming public support for the Charter, see *supra* note 16.

thinks the American people are so silly as not to know that if force is used, we have got to supply a part of it?" Senator Wheeler responded that he was "not interested in polls," and asserted that "if all the people of the United States of America wanted to violate the Constitution of the United States, I, as a member of the Senate, having taken an oath to uphold that Constitution, would uphold it."[90]

Ultimately, Senator Wheeler sought to resolve his problem with the Charter by proposing an amendment to the U.N. Participation Act on December 4, the final day of Senate debate, providing that:

> [T]he President shall have no authority, to make available to the Security Council any armed forces to enable the Security Council to take action under article 42 of said charter, unless the Congress has by appropriate act or joint resolution authorized the President to make such forces available . . . in the specific case in which the Council proposed to take action.[91]

Senator Wheeler's proposal took up more time than any other amendment considered by the House or Senate in connection with the United Nations, and was strongly attacked by colleagues who argued that the nation was already bound on this issue by the clear language of the Charter.[92] Typical of the response was that of Senator James Tunnell (D-Del.), who as a member of the Foreign Relations Committee had played an active role in the debates on the United Nations: "If the object is completely to destroy [the United Nations], then adopt a provision that it is necessary to go back to Congress every time there is a desire to do something, and the world organization will be destroyed, so far as its usefulness is concerned."[93]

Even Senator Taft recognized that the Wheeler Amendment would undermine the Charter regime. He had reluctantly voted in favor of the Charter, but in the end he opposed passage of the

90. 91 CONG. REC. at 7989.

91. *Id.* at 11,392.

92. "If the English language means anything at all, we are already obligated. Are we going to say to the world, 'Yes, we are a member of the United Nations, but if some difficulty arises we want the right to hold a session of Congress, which may last anywhere from 1 month to a year, and determine whether or not we will carry out our obligation'? That is what has been suggested." *Id.* at 11,403 (statement of Sen. Tunnell).

93. *Id.* at 11,404. Senator Connally added, "Under the plan proposed by the Senator from Montana, in the case of an emergency, when the action must be instantaneous or not at all, the President would have to say, 'Well, we will talk about that. We are going to take the matter back to Congress' and before Congress could even act the invasion would take place, and then it would be too late to act." *Id.* at 11,405.

U.N. Participation Act. However, he argued that if the United States was going to accept this tremendous new obligation, it was "morally and legally obligated" to implement it in good faith. He explained:

> I propose to vote against the Wheeler amendment because if we adopt section 3 we shall have voted to give our delegate the power to do as he pleases, and once having done that we are morally and legally obligated. Therefore, I shall vote against the amendment, but I think the objection that should be made is to the fact that we are laying down no rules, but under section 3 are giving our delegate unlimited power to act against any nation in any case where that one man thinks that the use of force against some nation will promote peace and security, if you please. . . . The power we give, I think, is the greatest power over life and death that has ever been given, but once we have given that power by adopting section 3, and once the individual, acting under the authority we have given him, has voted on behalf of the United States for the use of force I think we are morally and legally obligated to go through with it.[94]

Moments later, the Wheeler Amendment was rejected by a margin of more than seven to one, receiving only nine affirmative votes.[95] Given this overwhelming vote and the accompanying debate, it is simply not credible to contend that the Senate in 1945 expected the President to come to Congress for specific statutory authorization every time it became necessary to use armed force to uphold the Charter.

A Taft Amendment to deny legal effect to presidentially-imposed economic sanctions after a period of three months (unless authorized by Congress during that period) was then rejected by voice vote,[96] and the U.N. Participation Act was passed with only seven dissenting votes (including those of Senators Taft and

94. *Id.* at 11,405. Earlier in the debate on the U.N. Participation Act, Senator Taft remarked, "I want to make it clear that I am wholly in favor of giving authority to the Security Council to use armed force, permitting its use without reference to Congress. . . . I have always felt that the crucial point of action on the part of the United States was when our representative voted on the Security Council at the direction of either the President of the Congress. Once the vote is cast, it seems to me we are in duty bound, under the Charter, to go ahead with the armed forces which the Senator is discussing." *Id.* at 10,966.

95. *See* 91 CONG. REC. at 11,405. The final vote was 9-65, with 22 members not voting.

96. *See id.* at 11,408-49. Senator Barkley argued that the Taft Amendment would "tie the hands of the United States and the President of the United States," *id.* at 11,408, and Senator Millard Tydings (D-Md.) argued, "Suppose this amendment were adopted, and suppose the Parliaments of Great Britain and of France, and of all the other countries in the United Nations Organization, passed similar provisions restricting their members on the Security Council, and their Prime Ministers. What kind of action could we get if 30 or 40 or 51 parliaments had to debate a question before there could be any action?" *Id.*

Wheeler).[97] Appeals to Senator Wheeler's views as evidence of the attitude of Congress toward vesting authority in the President to execute the obligations of the Charter are thus highly unpersuasive.

Two weeks later, the House took up the bill. Much of the House debate focused upon charges that "the measure will involve us in every war hereafter,"[98] and that the statute violated the Constitution by giving the President the power to initiate war. For example, Representative John Robsion argued that the act would give the Security Council representative the power to decide "the extent to which the United States shall participate in policing the world," adding:

> In such proceedings the Congress does not have any say. Conditions will have developed so that we will be in the war without the consent of Congress and if this measure is adopted, Congress will not be called upon in the future to declare war as provided in the Constitution. We shall have indirectly delegated that power to our representative on the Security Council.[99]

In response, other members asserted that such a commitment had already been made through ratification of the Charter,[100] and argued that America's failure to join the League of Nations, and the subsequent policy of "isolation," contributed to the start of World War II.[101] Representative James Richards (D-S.C.) responded with a "rule of law" metaphor:

> There are some here who object to the use of United States troops under the direction of the President as a contribution to the police force of this world body. . . .
>
> Mr. Chairman, in consideration of this bill we should remember that no chief of police in any town in the United States could effectively preserve law and order if he has to go for approval to his town council before he can use his police force to prevent a breach of the peace. Neither can the President of the United States effectively cooperate with the United Nations to preserve the peace, if his hands are tied.[102]

97. *See id.* at 11,409. The final vote was 65-7, or greater than a nine-to-one margin.

98. *Id.* at 12,281 (statement of Rep. Sumner (R-Ill.)).

99. *Id.* at 12,274.

100. *See, e.g.*, 91 CONG. REC. at 12,275 (statement of Rep. Vorys (R-Ohio)).

101. *See id.* at 12,286 (statement of Rep. Kopplemann).

102. *Id.* at 12,284.

Shortly thereafter, following but two hours of debate, the House approved the bill by the overwhelming vote of 344-15.[103]

V. The 1949 U.N. Participation Act Amendments

At least a brief word needs to be added concerning the 1949 amendments to the U.N. Participation Act. Dr. Fisher writes that "[t]he 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 action.'"[104] Observing that the President was required to assure that the troops provided for in the amendments would not involve "the employment of armed forces contemplated by chapter VII of the United Nations Charter," Dr. Fisher concludes, "Clearly, there is no opportunity in the UN Participation Act or its amendments for unilateral military action by the President."[105]

I believe Dr. Fisher has erred seriously in interpreting the 1949 amendments as an effort to limit the President's authority under section 6 of the 1945 statute. Section 6 deals with the negotiation and approval of Article 43 agreements to designate in advance U.S. military units that may be deployed on the order of the Security Council in response to armed international aggression or other threats to the peace. That issue was not even mentioned during the 1949 floor debates in either the House or the Senate. Rather than addressing section 6, the 1949 amendments inserted a new section 7 to deal with the very different problem of providing military technical experts to the United Nations for noncombat duties. The amendments were totally uncontroversial, receiving unanimous committee approval and passing each house by voice vote following the most perfunctory discussion—during which not a single voice of opposition was raised.[106]

The amendments were portrayed as an effort to "strengthen the position of our Government in the United Nations," inter alia, by "affirming and clarifying the legal basis for the armed services to furnish *noncombatant* assistance to the United Nations

103. *See id.* at 12,288.

104. Fisher, *supra* note 9, at 31-32.

105. *Id.* at 32.

106. The House floor debate appears at 95 Cong. Rec. 9685-89 (1949). For the Senate debate, see *id.* at 13,982-84.

. . . ."[107] In addition to some "housekeeping" provisions, and the creation of a new Deputy U.S. Ambassador (a need which became apparent the previous fall, when both Americans authorized to represent the United States in the Security Council had become ill at the same time[108]), the amendments addressed a variety of problems associated with detailing U.S. military personnel to provide noncombat technical support, in such fields as transportation and communications, for U.N. peace commissions in the Balkans, India, and Pakistan, the Kashmir, Indonesia, Palestine, and Korea.[109]

This role had not been foreseen in 1945, and—although the President was recognized to have independent constitutional authority to detail such forces to assist *Americans* working with the various commissions[110]—without statutory authorization the U.S. forces were not permitted to accept certain United Nations payments (*per diem* and other allowances[111]), and the United States was being denied an estimated $200,000-300,000 in U.N. reimbursements.[112] The total number of such technicians had never exceeded 452 and was thought unlikely to ever reach 1000, so that figure was incorporated to provide a "liberal ceiling" on these noncombatant "observers, guards, and technicians . . . ."[113] The amendments simply did not address the issue of using U.S. combat forces in response to international aggression.

If Dr. Fisher's interpretation is accurate, and Congress intended by way of the 1949 amendments to prohibit the President from using U.S. combat troops to "faithfully execute" the Charter, one would have expected at least *someone* to have mentioned that rather significant consequence—and at least a single member to have spoken in opposition to pulling the Charter's teeth. Instead, Senator Connally described the amendments as "mak[ing] certain that our working relations with the United Na-

107. *Id.* at 9685 (statement of Rep. Lyle (D-Tex.)) (emphasis added). Representative Walter Judd (R-Minn.) asserted during the very brief debate that "so far as I know there is no opposition to this bill. . . . [It] does not do anything to or with the United Nations. It deals only with broadening, improving, and strengthening United States participation in the work of the United Nations." *Id.* at 9687. Senator Connally added, "There is, I think, nothing controversial about the measure." *Id.* at 13,982.

108. *See id.* at 13,983 (statement of Sen. Connally); 95 CONG. REC. APP. A4769 (1949) (statement of Rep. Chiperfield (R-Ill.)).

109. *See* 95 CONG. REC. at 13,982 (statement of Sen. Connally).

110. *See* 95 CONG. REC. APP. at A4769 (statement of Rep. Chiperfield).

111. *See* 95 CONG. REC. at 13,983 (statement of Sen. Connally).

112. *See id.*

113. *Id.* at 9687 (statement of Rep. Judd).

tions are as effective as possible;"[114] and his counterpart on the House Foreign Affairs Committee, Chairman John Kee (D-W. Va.), spoke of the strong support of the American people for the United Nations and of the importance that future U.S. support to the organization be "given to it unstintingly and without reservation."[115] This is hardly the kind of rhetoric one would expect to accompany legislation designed to weaken U.S. support for the United Nations.

Equally revealing was the congressional reaction when, less than a year later, the President sent thousands of American combat troops to fight in South Korea. Had Dr. Fisher's interpretation of the 1949 amendments been accepted by even a single member of the House or Senate, one could expect the issue to have at least been addressed during the debates immediately following that deployment. But as will be shown,[116] that did not happen—and it did not happen because the 1949 amendments simply did not address the issue of using U.S. forces in response to armed international aggression. As Senator Connally explained during the Senate floor debate, "I emphasize again that the bill relates to *noncombatant* activities . . . ."[117]

VI. The Significance of the Failure of Article 43 of the Charter

Sadly, the Cold War intervened and the Security Council was from the start hampered in its effectiveness by the Soviet Union's frequent use of its veto power.[118] At least in part as a consequence of Moscow's refusal to cooperate, despite the desires of the United States, no Article 43 agreements were ever negotiated. Dr. Fisher deals with this development by asserting that President Truman "ignored the special agreements,"[119] and concludes that "[i]n fact, Truman violated the unambiguous statutory language and legislative history of the UN Participation Act.

114. *Id.* at 13,983.
115. *Id.* at 9686.
116. *See infra* notes 153, 156-94 and accompanying text.
117. 95 Cong. Rec. at 9686 (emphasis added).
118. A 1949 Library of Congress study calculated that Moscow had exercised its Security Council veto 41 times between February 1946 and mid-October 1949, as compared to one French veto and none by [Nationalist] China, Great Britain, or the United States. *See* Memorandum from Mary Shepherd, of the Foreign Affairs Section, Library of Congress, to Rep. Clyde Doyle (D-Cal.), U.S. House of Representatives 1 (Oct. 19, 1949), *reprinted in* 95 Cong. Rec. App. A6584 (1949).
119. Fisher, *supra* note 9, at 32.

How could he pretend to act militarily in Korea under the UN umbrella without any congressional approval?"[120]

To be sure, there is considerable evidence that when Congress approved the U.N. Participation Act it was assumed almost universally that an Article 43 agreement would be negotiated and submitted to Congress for formal approval—and also that the President would not be able to assign additional American forces to this standing U.N. contingency force without returning to Congress to modify the agreement. It does not necessarily follow, however, that Congress intended for the President to sit idly by in the face of aggression if the Soviets blocked the implementation of Article 43, and it seems abundantly clear that the President had ample authority under the Charter to respond to armed international aggression in the absence of an Article 43 Security Council force.

Dr. Fisher cites no authority for the proposition that the drafters of the Charter or members of the United Nations intended for aggression to go unchallenged in the event that Article 43 agreements proved to be impossible because of a great power veto, nor for the view that Congress intended such a result. Although certainly not unimportant, Article 43 is not *essential* for the effective functioning of the U.N. peacekeeping regime. The basic undertaking to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace"[121] can also be carried out pursuant to a Security Council determination of "the existence of any threat to the peace, breach of the peace, or act of aggression,"[122] and a "recommendation" of "what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[123]

In addition, Article 51 recognizes the "inherent right of . . . collective self-defence" as another means of international cooperation in maintaining the peace.[124] Indeed, Senator Vandenberg (who chaired Committee III at San Francisco that drafted Article 51) said in a 1949 address to the Inter-American Bar Association that Article 51 was included in the treaty in part to guard against the consequences of a Security Council veto: "[I]f the Security

120. *Id.*
121. U.N. CHARTER art. I, para. 1.
122. U.N. CHARTER art. 39.
123. U.N. CHARTER art. 39.
124. U.N. CHARTER art. 51.

Council fails to act—or is stopped from acting, for example, by a veto—article 51 continues to confound aggression. The United Nations is thus saved from final impotence. So is righteous peace."[125] John Foster Dulles, another delegate to the San Francisco Conference, made a similar statement to the Senate in connection with its consideration of the Charter.[126]

Trying to ascertain congressional intent about unexpected contingencies is at best a difficult process, but in this instance, as already explained, the possibility that Article 43 agreements would never be concluded actually was discussed on the Senate floor—at which time Senator Lucas contended that "when we ratify this Charter . . . we are legally and morally bound to furnish forces of some kind or character to help keep the peace of the world."[127] Dr. Fisher apparently seeks to counter this view by quoting House Foreign Affairs Committee Chairman Sol Bloom (D-N.Y.), "one of the delegates to the San Francisco Conference,"[128] who told the House that "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."[129]

Three observations may be made in response. First of all, a distinction can be made between the obligation pursuant to Article 43 of the Charter "to make available to the Security Council, on its call . . . armed forces, assistance, and facilities," on the one hand, and the more general undertaking through the Charter "to take effective collective measures for the prevention and removal of threats to the peace . . . ."[130] Indeed, this distinction is apparent from the Senate debates on the Charter. For example, on July 26, Senator Pepper stated:

> Undoubtedly there are instances in which the Executive might, if he willed to do so, use our forces extraterritorially in collaboration with those of other nations, as was done in the Boxer Rebellion, for example. But he could not make a binding commitment of this country to do so, one that would be

125. 91 CONG. REC. APP. 3347 (1949).

126. "At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that that doctrine of self-defense, enlarged at Chapultepec to be a doctrine of collective self-defense, could stand unimpaired and could function without the approval of the Security Council." *Charter Hearings, supra* note 44, at 650.

127. 91 CONG. REC. 8024 (1949).

128. Fisher, *supra* note 9, at 31.

129. *Id.*

130. U.N. CHARTER art. I, para. 1.

> binding on the full faith and credit of Congress. . . . I think it is clear in the mind of every Senator that the agreement by which we commit ourselves to hold available certain . . . armed forces, is one which must have the sanction of the Congress.[131]

Just two days later, in the final moments of the Senate debate on the Charter, Senator Lucas also appeared to draw this same distinction between a decision by the President to use force in response to a specific incident of international aggression, and the Article 43 "military agreements for troop contingents *to be used in the future*"—which he assured his colleagues would not be implemented "by executive agreement."[132]

Secondly, even if there is no binding legal "obligation" to provide forces to the Security Council, it does not follow that the President lacks authority to cooperate with the Security Council to promote the clear objectives of the Charter. Indeed, Article 51 affirms that the United States can assist victims of armed international aggression even when the Security Council is prevented from acting because of a great power veto.

Finally, Dr. Fisher totally ignores the fact that the text of the Charter itself envisions the possible need for collective action "[p]ending the coming into force of such special agreements referred to in Article 43," and expressly provides that the permanent members shall "consult with one another and as occasion requires with other members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security."[133] Dr. Fisher's specialty is the separation of powers under the U.S. Constitution, and thus there is no reason to assume that

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131. 91 CONG. REC. at 8076.

132. *Id.* at 8188 (emphasis added). This distinction is also reinforced by the focus upon having the House involved in approving these special agreements pursuant to its power to "raise and support armies," *see supra* note 50 and accompanying text, as any "armies" used by the President directly—even if pursuant to a decision by the Security Council—already would have been "raised" by Congress.

133. U.N. CHARTER art. 106; *see also* U.N. CHARTER art. 25 (providing that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"). It is worth noting that the formal *Report to the President on the Results of the San Francisco Conference* by the Chairman of the U.S. delegation (Secretary of State Edward R. Stettinius, Jr.)—a document that was submitted to the Senate and reprinted in the Foreign Relations Committee hearings on the treaty—envisioned that "considerable time may elapse before the conclusion of these [Article 43] agreements," and emphasized the importance of the "transitional security arrangements" such as Article 106, which it said would be in effect for an "indefinite time" period. The report explained that "[f]or the United States, Article 106 will mean a greater responsibility for world security than is accorded by the main body of the Charter." E. R. STETTINIUS,

he was aware of this provision—or to criticize him if he was not so aware—but it nevertheless undercuts his theory that the Charter limited the response to international aggression to the use of armed forces previously made available to the Security Council by Article 43 agreements.

VII. The Korean Conflict

Less than five years after its ratification, the Charter regime was put to its first major test when Kim Il Sung's Democratic People's Republic of [North] Korea invaded the Republic of [South] Korea across the 38th parallel. Dr. Fisher probably reflects the majority perception among constitutional scholars today in saying that "[i]n June 1950, President Truman ordered U.S. troops to Korea without first requesting congressional authority,"[134] and in concluding that "President Truman's unilateral use of armed force in Korea violated the U.S. Constitution and the UN Participation Act of 1945."[135] Other highly respected constitutional scholars in recent years have taken similar views.[136]

Before turning to the core of Dr. Fisher's assertion, and a review of what actually occurred in connection with the commitment of U.S. troops to Korea in 1950, it may be useful to dispose of a peripheral argument—Dr. Fisher's assertion that the Truman administration acted illegally under the Charter by moving too quickly. He writes:

> [Secretary of State Dean] 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." Yet Truman had committed U.S. forces before the Council called for military action. . . . In his memoirs, Acheson admitted that "some American action, said to be in support of the resolution of

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JR., REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE (1945), *reprinted in Charter Hearings*, *supra* note 44, at 93, 137, 140.

134. Fisher, *supra* note 9, at 21.

135. *Id.* at 37.

136. For example, Professor Harold Koh, of Yale Law School, wrote that "President Truman responded to the Korean invasion by committing American troops to combat without consulting Congress, relying not on a declaration of war, but on his constitutional powers as president and commander-in-chief." KOH, *supra* note 10; and Stanford Law Professor John Hart Ely asserted that Truman "shattered" a "long-standing legislative-executive consensus" on the use of armed force, and "even went so far as to suggest that Congress lacked authority to stop it!" ELY, *supra* note 7, at 10.

> June 27, was in fact ordered, and possibly taken, prior to the resolution." 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."[137]

The short and complete answer to all of this is "so what?" There is no case of wrongdoing here. Again, Dr. Fisher is not an international lawyer, but the Charter clearly recognizes the right of states to respond with force "if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[138] North Korea's action was a flagrant violation of Article 2(4) of the Charter, and had President Truman's entire response been taken without any Security Council authorization—as might have occurred had the Soviet Union exercised its veto—it still would have been action to uphold "the sanctity of the Charter of the United Nations and the rule of law . . . ."[139] Dr. Fisher's criticism of Secretary Acheson is, on this point,[140] simply unfounded as a matter of international law.

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137. Fisher, *supra* note 9, at 33.

138. U.N. CHARTER art. 51. To be sure, South Korea was not a "member" of the United Nations, but the "inherent right of . . . collective self-defence" was not predicated upon such a status. Both the obligation to refrain from the aggressive use of force embodied in Article 2(4) and the right of self-defense affirmed in Article 51 clearly apply irrespective of U.N. membership.

139. Fisher, *supra* note 9, at 137.

140. This is not to say that everything the United States did in connection with Korea was clearly consistent with the Charter. In the past I have argued that the decision to pass nonprocedural Security Council resolutions while the Soviets were absent (boycotting the meetings over the failure to seat the representative of the People's Republic of China) was difficult to reconcile with the rather clear language of Article 27(3) of the Charter, which provided, "Decisions of the Security Council on . . . [nonprocedural] matters shall be made by an affirmative vote of seven [now nine] members *including the concurring votes of the permanent members* . . . ." U.N. CHARTER art. 27, para. 4 (emphasis added). Although a full discussion of that issue is beyond the scope of this Article, let me say that on the basis of comments expressed by Professors Inis Claude and John Norton Moore, and subsequently a more thorough review of the historical record on my part, I believe the Security Council's action was defensible. While the clear understanding in San Francisco was that abstention constituted a veto, *see* 1 FOREIGN REL. U.S. 1945, at 1256-60, the Soviets actually initiated a consensus departure from this practice, and "nearly four-fifths of the substantive decisions taken by the Security Council in the 458 meetings between January 17, 1946 and December 29, 1949" were made with at least one permanent member abstaining. Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter*, 60 YALE L.J. 258, 278 (1951). Article 31 of the Vienna Convention on the Law of Treaties provides that, in interpreting treaties, "[t]here shall be taken into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ." U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679 (1969). Although one might argue that not even a unanimous Security Council ought to have the power essentially to "amend" the Charter on a point that otherwise, in my view, seems unambiguous, having initiated the process the Soviet Union was hardly on strong equitable grounds to complain.

The real problem with Dr. Fisher's analysis of the decision to commit troops to Korea, however, is far more basic: although most of what he says is technically true, he fails to mention key facts that might support a very different assessment of President Truman's behavior. A few examples should illustrate the problem. Consider this excerpt from Dr. Fisher's article:

> 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." Truman met with congressional leaders at 11:30 a.m. on June 27, after the administration's policy was established and implementing orders issued. He later met with congressional leaders to give them briefings on developments in Korea but never asked for authority. 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.[141]

The facts—as contained in declassified diplomatic cables, formerly top secret memoranda summarizing various presidential meetings (prepared by Ambassador at Large Philip C. Jessup, who later served as a Judge on the International Court of Justice), the official transcript of debates in the *Congressional Record*, and the autobiographies of key congressional leaders—establish that Dr. Fisher has provided a very misleading characterization of what actually occurred.

The invasion of South Korea began at about 4 a.m. on Sunday, June 25, 1950 (South Korean time), and was reported to Washington six hours later— at 9:26 p.m. on Saturday, June 24 (Washington time).[142] Secretary of State Dean Acheson was notified by

141. Fisher, *supra* note 9, at 33.

142. *See* 7 FOREIGN REL. U.S. 125 (1976) [hereinafter FRUS]. Seven hours after the invasion occurred, a Pyongyang radio broadcast asserted that South Korea had invaded the North and warned of "decisive countermeasures" if the alleged "aggression" continued. *Id.* at 132. Fortunately, the issue is no longer in dispute, as documents found in Soviet archives establish clearly that Kim Il Sung had planned the invasion for June 25 months in advance and had communicated extensively with Stalin on the issue. Thus, Florida State University Professor Kathryn Weathersby concluded after extensive research in the Soviet Foreign Ministry archive, "It is clear . . . that the assertion maintained to this day by the DPRK, and by the Soviet government until its demise, that the military action by North Korea on June 25 was a defensive response to provocation by the South, is simply false. The DPRK planned a full-scale attack on South Korea to begin June 25, with the goal of unifying the country through military force. Stalin approved the North Korean plan, provided sufficient arms and equipment to give the DPRK a significant military superiority by the time of the attack, and sent Soviet military advisers to North Korea to assist in planning the campaign." Kathryn Weathersby, *New Findings on the Korean War, in* COLD WAR INTERNATIONAL HISTORY PROJECT BULLETIN, *quoted in Stalin Approved Korean Attack, Urged Chinese Intervention*, AM. BAR ASS'N NAT'L SECURITY L. REP., Nov. 1993, at 1, 6.

telephone of the contents of the telegram, and at 11:20 that night he telephoned President Truman in Independence, Missouri, who agreed that the attack should be reported immediately to the U.N. Security Council. Ten minutes later, Secretary General Trygve Lie was notified that the United States intended to bring the case before the Council,[143] and the following afternoon the Security Council adopted a resolution determining "the armed attack upon the Republic of Korea by forces from North Korea" to be "a breach of the peace," calling for the withdrawal of North Korean forces, and calling upon "all Members to render every assistance to the United Nations in the execution of this resolution . . . ."[144] In the meantime, the State Department contacted key members of Congress to advise them of events in Korea,[145] and a special phone number was soon provided so members could call the Department for updated information.[146]

President Truman flew back to Washington on Sunday afternoon and at 7:45 that evening met for dinner at Blair House with Secretary of State Acheson, Secretary of Defense Louis Johnson, and eleven other Pentagon officials and military leaders. During that meeting, according to Ambassador Jessup's once highly classified summary, Truman asked the State Department "to prepare a statement for a message for him to deliver in person to Congress on Tuesday [June 27] indicating exactly what steps had been taken."[147] Early Monday morning the United States received a formal request for assistance from the South Korean National Assembly,[148] and shortly after 10 a.m. Secretary of State Acheson made a series of personal calls to Senator Tom Connally and other members of the Senate Foreign Relations and House Foreign Affairs Committees to update them on the crisis.[149]

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143. *See* FRUS, *supra* note 142, at 127.

144. U.N. Doc. S/1501, *reprinted in* FRUS, *supra* note 142, at 155-56.

145. "When the first reports came of the attack of North Korea, representatives of the State Department were good enough to confer with some members of the Foreign Relations Committee." 96 CONG. REC. 9332 (1950) (statement of Sen. Smith (R-N.J.)).

146. When asked on June 28 whether the country was being kept "fully and accurately informed" about events in Korea, Senator Howard Smith, the second-ranking Republican on the Foreign Relations Committee, replied, "I feel that if all of us are not informed, at least those of us on the Committee on Foreign Relations certainly should be called to account, because we have been given a telephone number which we can call at the State Department where all the bulletins will be available, and I suppose they would be made available also to every Member of the Senate." *Id.* at 9333.

147. FRUS, *supra* note 142, at 160.

148. *See id.* at 167.

149. *See id.* at 170-71.

At 9:00 p.m. Monday night, President Truman again met with Acheson, Johnson, and senior military leaders, at which time he authorized limited naval and air support in defense of South Korea.[150] During this meeting, Secretary Acheson "suggested that the President might wish to get in Senator Connally and other members of the Senate and House and tell them what had been decided," and the President responded that he already had a meeting scheduled for 10:00 a.m. Tuesday with the "Big Four,"[151] but proposed that additional congressional leaders be included and that the Secretaries of State and Defense also take part.[152]

At some point between his return to Washington on Sunday and the meeting with congressional leaders Tuesday morning, the President also telephoned Senate Foreign Relations Committee Chairman Tom Connally, who provides this account of the conversation in his autobiography:

> He [Truman] hadn't as yet made up his mind what to do.
>
> . . . .
>
> "Do you think I'll have to ask Congress for a declaration of war if I decide to send American forces into Korea?" the President asked.
>
> "If a burglar breaks into your house," I said, "you can shoot at him without going down to the police station and getting permission. You might run into a long debate by Congress, which would tie your hands completely. You have the right to do it as commander-in-chief and under the U.N. Charter."[153]

This account clearly refutes the conventional wisdom that Truman "ignored Congress" or merely "informed" Congress of a *fait accompli.* It may be worth mentioning that, in referring to a housebreaking burglar, Senator Connally was repeating a metaphor invoked by President Franklin D. Roosevelt in describing his vision of a United Nations and later repeated during Senate debate on ratification of the Charter.[154] The same basic analogy

150. *See id.* at 179. No actions were permitted north of the 38th parallel.

151. *Id.* at 182 n.8. The "Big Four" referred to Vice President (and ex officio President of the Senate) Alben Barkley, Senate Majority Leader Scott Lucas, House Speaker Sam Rayburn (D-Tex.), and House Majority Leader John McCormack (D-Mass.).

152. *See* FRUS, *supra* note 142, at 182.

153. TOM CONNALLY, MY NAME IS TOM CONNALLY 346 (1954).

154. "The opponents of the Charter say that the United States has no constitutional authority to delegate to any representative of the United States the right to take action without congressional authority in each case. President Roosevelt made the suggestion that a provision of this sort would be comparable to a policeman who saw a burglar entering the second-story window having to go back to consult the town council before arresting the intruder." 91 CONG. REC. 8099 (1945) (statement of Sen. Tunnell).

was also made in the House debate over approving the U.N. Participation Act.[155]

When the President met personally with the top congressional leaders at 11:30 a.m. on Tuesday, June 27, he began by having Secretary Acheson summarize the developments in Korea; the President then read the statement he was considering releasing to the press following the meeting and "asked for any expression of views."[156] The congressional leaders *unanimously* supported the President's actions, and typical of their comments were an inquiry by House Majority Leader John McCormack about whether the Navy "should not now be strengthened,"[157] and a suggestion by Representative Mike Mansfield (D-Mont.) that "we should stiffen Western Europe as well."[158] Senator Connally added that Korea was "a clear-cut case for the UN," and an "opportunity to test its methods."[159] Senator Alexander Wiley (R-Wis.), the ranking Republican on the Foreign Relations Committee during the illness of Senator Arthur Vandenberg (who praised the President's actions from his hospital bed[160]), asked the President "whether we had adequate forces,"[161] and shortly thereafter the meeting came to a close.

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155. "Mr. Chairman, in consideration of this bill we should remember that no chief of police in any town of the United States could effectively preserve law and order if he has to go for approval to his town council before he can use his police force to prevent a breach of the peace. Neither can the President of the United States effectively cooperate with the United Nations to preserve the peace, if his hands are tied." *Id.* at 12,284 (statement of Rep. Richards (D-S.C.)).

156. FRUS, *supra* note 142, at 200. Truman's memoirs support this account, asserting that "I asked for the views of the congressional leaders," and that "[t]he congressional leaders approved of my action." 2 MEMOIRS BY HARRY S. TRUMAN: YEARS OF TRIAL AND HOPE 338 (1956). However, Senator Howard Smith asserted on the Senate floor the day following the meeting that the decision had already been made prior to the meeting. He added, "There might have been opportunity for criticism, but there was no criticism. . . . I do not think there was anyone present at the meeting who did not feel that he was enthusiastically behind everything that was presented, although our advice had not been asked on what was presented to us. Nevertheless, it was something that we were all wholeheartedly in favor of." 96 CONG. REC. 9332 (1950).

157. FRUS, *supra* note 142, at 201.

158. *Id.*

159. *Id.*

160. In a letter to Truman on July 3, 1950, Senator Vandenberg wrote, "I think you have done a courageous and indispensable thing in Korea. As you know, I have heretofore disagreed with our official attitude toward many phases of the Far Eastern situation. . . . In any event, when the time came for you to act in behalf of free men and a free world you did so with a spectacular courage which has revived the relentless support of all peaceful nations to deny aggression." THE PRIVATE PAPERS OF SENATOR VANDENBERG 543 (Arthur H. Vandenberg, Jr. ed., 1952).

161. FRUS, *supra* note 142, at 202.

This account from Ambassador Jessup's once top secret memorandum generally is supported by other sources. Senator Connally, for example, wrote in his autobiography that, after reading his proposed press release, "[t]he President then asked each man present what he thought we should do. There was no disagreement that the United States had to help the South Koreans. Nor did anyone object to Truman's remark about the U.N."[162] Historian David McCullough provides this account: "The congressional leaders had given the President their undivided support. No one had said a word against what he had decided. Further, he had been advised to proceed on the basis of presidential authority alone and not bother to call on Congress for a war resolution."[163] McCullough adds:

> Cheers broke out in the House and Senate when the [President's] statement was read aloud. By a vote of 315 to 4, the House promptly voted a one-year extension of the draft law. . . .
>
> The response of the American people—by mail, telegrams, phone calls to the White House and Congress—the response of the press, of nearly everyone whose opinion carried weight in Washington and in the country, was immediate, resounding approval—a point that would soon be forgotten.[164]

The *Congressional Record* supports this account. To be sure, there were a very few exceptions, such as Senator Taft's erroneous allegation on Wednesday, June 28 that "there has been no pretense of consulting the Congress,"[165] and that "there is no legal authority for what he has done"—this being the same Senator Taft who, in 1945, had argued that the U.N. Participation Act would give the U.S. representative on the Security Council "unlimited power to act against any nation in any case where that one man thinks that the use of force against some nation will promote peace and security."[166] However, even Senator Taft admitted that "if a joint resolution were introduced asking for ap-

162. CONNALLY, *supra* note 153, at 348. Senator Connally added, "No one present raised even minor criticism to any of the four points, although a few wondered if Congress should approve them." *Id.* Senator Howard Smith discussed the White House meeting on the Senate floor the following morning and remarked, "I do not think there was anyone present at the meeting who did not feel that he was enthusiastically behind everything that was presented . . . . [I]t was something that we were all wholeheartedly in favor of." 96 CONG. REC. 9332 (1950).

163. DAVID MCCULLOUGH, TRUMAN 780 (1992).

164. *Id.* at 781.

165. 96 CONG. REC. at 9320.

166. 91 CONG. REC. 11,084 (1945).

proval of the use of our Armed Forces . . . I would vote in favor of it."[167]

Taft and some other Republicans did make use of the occasion to denounce *prior* foreign policy behavior of the Truman Administration—such as Secretary of State Acheson's January 12, 1950, announcement to the National Press Club that South Korea was outside the U.S. "defensive perimeter" in Asia[168]—and some Republicans even called for Acheson's resignation;[169] but the President's response in Korea received overwhelming support in the early days of the crisis, and Taft's constitutional arguments were sharply challenged by Majority Leader Lucas,[170] Senator Paul Douglas (D-Ill.),[171] and other members.

One of the most interesting Senate debates on the scope of the President's authority to use force in Korea without specific legislative sanction occurred over a period of days, commencing on June 28 with remarks by Senator Ralph Flanders, a Vermont Republican with no formal legal training. Although praising the President's actions, he asked rhetorically "whether we have here a declaration of war without consent of Congress."[172] After some discussion of the post-World War II American commitment to South Korea, he concluded:

> So Mr. President, it seems to me that this is in no sense [a] declaration of war, but the carrying out of an existing obligation. While I do not wish to labor the point and perhaps lack the skill to do so, I would feel that any invasion of the territory north of the thirty-eighth parallel, whether in pursuit of fleeing forces, in retaliation, or for any other purpose, would constitute action of a very different sort and should be undertaken

167. 96 CONG. REC. at 9320.

168. *See, e.g., id.* In fairness to Secretary Acheson, the view he presented represented a broad consensus of expert opinion—and, indeed, the same basic "perimeter" had been drawn by General Douglas MacArthur in a Tokyo press conference in March of 1949. *M'Arthur Pledges Defense of Japan*, N.Y. TIMES, Mar. 2, 1949, at 22.

169. *See, e.g.*, 96 CONG. REC. at 9322 (statement of Sen. Taft); *id.* at 9537 (statement of Senate Minority Leader Kenneth S. Wherry (R-Neb.)).

170. After summarizing a long history of unilateral executive military action, including a detailed discussion of Jefferson's actions against the Barbary pirates, Lucas challenged the "audacity" of those who "seriously contend that President Truman is devoid of such powers." *Id.* at 9328.

171. After a lengthy floor statement supporting executive power in this area, Senator Douglas concluded that "the acts of the President in helping to protect southern Korea from Communist aggression were in thorough harmony with the legislative intent of the framers of the Constitution, in line with sound historical precedent, in conformity with international law and the rules of the United Nations, and in the best interests of our own ultimate security and the peace of the world." *Id.* at 9647-49.

172. *Id.* at 9315.

> only as an act of war legally authorized by the Congress of the United States.[173]

Shortly thereafter, Senator Taft made his attack on the constitutionality of the President's decision, followed by a sharp rebuttal from Senator Lucas. Senator Flanders then made reference to his own earlier distinction between defensive actions taken in South Korea—which he described as a "police action"—and acts taken north of the thirty-eighth parallel, which he said would require congressional authorization.[174] Senator Lucas responded that he "wholeheartedly agree[d]" with Flanders's point, and that the key was that "in no circumstances can the United States of America be charged with being the aggressor so long as we stay within the boundaries the Senator . . . has just outlined."[175]

However, later that afternoon, Senator William Knowland (R-Cal.)—a strong conservative and anticommunist who had earlier been among the first to endorse the President's action in Korea[176]—took the floor to express his "concern" about "some discussion on the floor of the Senate today and some statements issued by the executive branch yesterday, with particular reference to the proposal that our support of the Republic of Korea should be limited to the area south of the thirty-eighth parallel."[177] He argued:

> The action this Government is taking is a police action against a violator of the law of nations and the Charter of the United Nations. It seems to me to be absurd to suggest that all air bombardment should be in the territory of the victim of this overt aggression.[178]

The debate resumed the following day, after the President had announced that he was committing ground forces to the fight, with Senator Knowland arguing:

> Mr. President, I am not one of those who dispute the powers of the President of the United States to take the necessary police action. I believe that he has been authorized to do it under the terms of our obligations to the United Nations Charter. I believe he has the authority to do it under his constitutional power as Commander in Chief of the Armed Forces of the United States.

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173. *Id.*
174. 96 CONG. REC. at 9328.
175. *Id.*
176. *See id.* at 9156-58.
177. *Id.* at 9346-47.
178. *Id.* at 9347.

> Certainly the action which has been taken to date is not one which would have required . . . a declaration of war, as such, by the Congress of the United States. What is being done is more in the nature of police action.[179]

Senator John Stennis (D-Miss.) then took the floor to declare the President's stand in South Korea "the single most encouraging development in world affairs since World War I;"[180] and he was followed by Senator Flanders, who—after quoting his own June 28 floor statement at length—remarked:

> I wish at this time to say that I am now doubtful as to the wisdom of the question which I asked or of the reply to it which was given by the distinguished Senator from Illinois. I do not want the Record to leave him committed to the answer which he gave.
>
> Further thought has convinced me that we have the right and probably the necessity for action north of the thirty-eighth parallel . . . . [T]his is an operation undertaken in behalf and under the authority of the United Nations . . . .[181]

When Senator Flanders subsequently referred to the Korean situation as a "war," he was interrupted by Senator Eugene Millikin (R-Colo.), who suggested that it was "a police operation," to which Senator Flanders replied, "I accept the suggestion; this is a police operation, not a war."[182]

Majority Leader Lucas then obtained the floor to recant his own earlier statement and to agree with Senator Flanders's new position,[183] after which Senator Millikin added:

> I wish to express my satisfaction with the remarks the Senator from Vermont has been making today, and also with the remarks just made by the distinguished majority leader. I think we would be unduly clipping our wings if we were to establish any particular geographical parallel or line as the boundary of our action. The Constitution of the United States does not limit the President's powers . . . to any particular place in the world. . . . I thought the Senator was a little frugal in his remarks the other day as to the proper limits of our action.

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179. 96 CONG. REC. at 9540. Senator Knowland added, "We must always keep in mind that in this age of the atom and the airplane minutes and hours count in a situation of this kind. I believe, Mr. President, that had not the President of the United States acted forthwith as he did after bringing the matter quite properly to the attention of the United Nations, which adopted its first resolution, the entire resistance in South Korea might have collapsed . . . ." *Id.*

180. *Id.* He was presumably referring to the end of the war, not the war itself!

181. *Id.*

182. *Id.* at 9541.

183. *See id.*

> I am glad that now he has expanded our permissible field of action.[184]

There is at least some evidence that, had the President remained silent on the issue of North Korean aggression, awaiting a "declaration of war" or other formal authorization from Congress—which might itself have involved hearings and opportunities for delay[185]—the conquest of South Korea might have been completed before any U.S. response could occur. Indeed, the American Ambassador in Seoul reported that President Truman's press release of June 27, announcing that he had "ordered United States air and sea forces to give the Korean Government troops cover and support,"[186] was critical in shoring up South Korean morale and keeping resistance to North Korean aggression from collapsing immediately.[187]

The military situation in Korea continued to deteriorate, and by Friday, June 30, it had become clear that U.S. ground forces would be needed if North Korea was to be stopped. The President met with congressional leaders at 11:00 that morning, and Senator Connally provided this account:

> At that meeting, Truman bluntly announced his decision to use American ground forces in the defense of South Korea. After that there was a long silence, and on almost every face I could read agreement with his decision. Only Wherry argued that the President should have consulted with the House and Senate before deciding to use ground forces. Representative Dewey Short [R-Mo.] reprimanded Wherry.[188]

Later that day, both houses of Congress adjourned for a ten-day Fourth-of-July recess.

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184. 96 CONG. REC. at 9541.

185. The risk of delay was greatest in the Senate, in which the tradition of open debate might have permitted a small number of the Administration's critics to hold up passage of legislation for several days while conducting a partisan critique of "who lost China?" and related issues. Over the years Congress has from time to time demonstrated an ability to move very quickly during periods of crisis—for example, declaring war following Pearl Harbor with only minimal debate. Although such "rubber stamp" approval may produce psychological benefits for the nation, when the give-and-take of the full legislative process is circumvented the substantive benefits of legislative participation are largely lost.

186. FRUS, *supra* note 142, at 202.

187. *See id.* at 210-11; *see also* 96 CONG. REC. 9540 (1949) (statement of Sen. Knowland) ("We must always keep in mind that in this age of the atom and the airplane minutes and hours count in a situation of this kind. I believe, Mr. President, that had not the President of the United States acted forthwith as he did after bringing the matter quite properly to the attention of the United Nations, which adopted its first resolution, the entire resistance in South Korea might have collapsed . . . .").

188. CONNALLY, *supra* note 153, at 349.

There are some gaps in the official records, but it is clear that on Sunday, June 25, President Truman had instructed Secretary Acheson to put the State Department's "best brains" on preparing a message to Congress on Korea.[189] A confidential memorandum prepared by Acheson's personal secretary confirms that on July 3, Acheson spoke with Secretary of Defense Johnson seeking comments both on the draft message and on a "Joint Resolution" on Korea (the text of which is not reprinted in the State Department collection of documents).[190] The memorandum states that Secretary Acheson "felt that such a resolution would be helpful during the time ahead."[191]

Later in the day, the President held a meeting with Secretaries Acheson and Johnson, several other cabinet members and military leaders, and the only member of the congressional leadership still in Washington during the recess, Senate Majority Leader Scott Lucas (who served on the Foreign Relations Committee and had played an active role during the 1945 debates on the U.N. Charter and U.N. Participation Act[192]).[193] Ambassador Jessup's top secret memorandum on that meeting reports in part:

> The President asked Mr. Acheson to lead off.
>
> Mr. Acheson said the purpose of the meeting was to lay before the President and his advisors a recommendation by the Department of State that the President go before Congress some time in the near future to make a full report to a Joint Session of the Congress on the Korean situation. It was proposed that this report to the Congress would be followed by the introduction of a Joint Resolution expressing approval of the action taken in Korea. . . .
>
> The President asked Senator Lucas what was his reaction to this suggestion. He [President Truman] indicated that Congress would not reassemble until a week from today but that he wanted to consider whether he should deliver such a message when Congress reassembled.
>
> . . . .
>
> Senator Lucas said that he frankly questioned the desirability of this. He said that things were now going along well . . . . He said that the President had very properly done what he had to without consulting the Congress. He said the resolution it-

189. *See* FRUS, *supra* note 142, at 160.
190. *See id.* at 282-83.
191. *Id.* at 283.
192. *See* 91 CONG. REC. 11,305 (1945).
193. *See* FRUS, *supra* note 142, at 286.

self was satisfactory and that it could pass. He suggested as an alternative that the President might deliver this message as a fireside chat with the people of the country. . . . [He] said that most of the members of Congress were sick of the attitude taken by Senators Taft and Wherry. . . . [T]o go up and give such a message to Congress might sound as if the President were asking for a declaration of war. . . .

The President said that it was necessary to be very careful that he would not appear to be trying to get around Congress and use extra-Constitutional powers. . . .

Senator Lucas stated that Senator Wherry was complaining because the President didn't go to Congress before he acted. . . .

The President said that it was up to Congress whether such a resolution should be introduced, that he would not suggest it. He said it was not necessary to make a decision today and that he too was just thinking out loud. . . .

Senator Lucas said that he felt he knew the reactions of Congress. He thought that only Senator Wherry had voiced the view that Congress should be consulted. Many members of Congress had suggested to him that the President should keep away from Congress and avoid debate. . . .

The President said he certainly must make a report some time but he did not want to call Congress back [from recess] now. He said it was always difficult to keep 541 men informed even about legislative business. Even though he did explain matters to the leaders there were many in Congress who did not know and eventually he must report. He said . . . . [h]e would have further consultations with the Big Four next Monday. He said he was still just thinking out loud and if there were any better suggestion he would be glad to listen to it.

Senator Lucas commented that Senator Taft was merely following his same old line. Senator Jenner's statement in Indiana was unbelievable. Senator Lucas said if there should be a row in Congress that would not help abroad. He did not think that Congress was going to stir things up.

The President said this depends on events in Korea. He said that if this view met with the approval of those present he would wait until he had his talks with the leaders next Monday.

This was agreed.[194]

194. *Id.* at 286-91. Presumably unaware of this document—which had not yet been declassified—Professor Arthur Schlesinger wrote in 1973 that, "[o]n July 3 Acheson recommended that Truman *not* ask for a resolution but instead rely on his constitutional powers as President and Commander in Chief." ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 132 (1973).

Consistent with the advice of the Senate Majority Leader, on Wednesday, July 19, 1950, the President submitted a lengthy written message to Congress.[195] Later that same evening, he delivered a radio and television address to the nation.[196]

Many modern scholars[197] criticize President Truman for agreeing that the conflict in Korea could properly be described as a United Nations "police action." Dr. Fisher, for example, argues that "the United Nations exercised no real authority over the conduct of the war" and that "[m]easured by troops, money, casualties and deaths, it remained an American war."[198] Obviously, it was above all else a "Korean" war;[199] but, accepting Dr. Fisher's point that most of the foreign troops under the U.N. flag were Americans, one is tempted to ask again—so what? The United States clearly gave more than its "fair share," but that did not affect the legality of the U.N.-sanctioned action.

Nor, for that matter, is the criticism of President Truman for accepting the "police action" characterization of the operation warranted. That description was used *repeatedly* in both the House and Senate during the 1945 debates,[200] and had been in general use in the congressional floor debates for several days[201] prior to Truman's agreement—in response to a reporter's question—that the operation could correctly be termed "a police action under the United Nations . . . ."[202]

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195. *See* H.R. DOC. NO. 646, 81st Cong., 2d Sess. (1950), *reprinted in* 96 CONG. REC. 10,626-30 (1950); FRUS, *supra* note 142, at 430.

196. *See* FRUS, *supra* note 142, at 430.

197. Professor John Hart Ely, for example, recently wrote of "the recurrent assertions of the Truman Administration—now a part of our national treasury of graveyard humor—that Korea wasn't really a war but rather a 'police action,' . . . ." ELY, *supra* note 7, at 11.

198. Fisher, *supra* note 9, at 34. In a review of Dr. Fisher's most recent book, Theodore Draper asserts, "Then, in 1950, President Harry Truman sent troops to Korea without even requesting Congressional authority. . . . He also called the war in Korea a 'police action,' using the term that way for the first time in history." Theodore Draper, *Capturing the Constitution*, N.Y. TIMES BOOK REV., May 7, 1995, at 3, 38 (reviewing LOUIS FISHER, PRESIDENTIAL WAR POWER (1995)).

199. If I did not know and respect Dr. Fisher as well as I do, I would be inclined to characterize this comment as a bit chauvinistic, at best. In reality, slightly more than one-quarter of the combat fatalities and less than one-third of the total noncommunist military casualties were Americans. The Republic of Korea armed forces suffered far greater, and injured South Korean civilians outnumbered U.N. military casualties by more than two-to-one. KOREAN WAR ALMANAC 75-77 (Harry G. Summers, Jr. ed., 1990).

200. *See, e.g.*, *supra* notes 83-86, 102 and accompanying text.

201. *See, e.g.*, *supra* notes 174-82 and accompanying text; *see also supra* notes 153-55 and accompanying text (using the term "police action").

202. 1950 PUBLIC PAPERS OF THE PRESIDENT 504, *quoted in* Fisher, *supra* note 9, at 33-34.

Perhaps the most inexplicable comment in Dr. Fisher's *American Journal of International Law* article is his assertion that "[a]lmost a year after the war began, several senators participated in a lengthy debate that thoroughly shredded the administration's legal pretenses."[203] His citation directs the reader to a four-hour diatribe by a group of angry Republicans including Joe McCarthy (R-Wis.), John Bricker (R-Ohio), William Knowland, Karl Mundt, Styles Bridges (R-N.H.), Richard Nixon (R-Cal.), and Homer Ferguson, that occurred on May 7, 1951. Most of the comments were devoted to such nonlegal matters as asserting that "the Democratic Party . . . since 1900 has never failed to get us into every war that was around,"[204] denouncing Great Britain and other U.N. members for selling rubber and other strategic materials to "Red China"[205] (which, it was charged, would further "the international conspiracy of communism"[206]), and criticizing the Russian "stooges"[207] at the United Nations for, among other sins, rejecting the offer of "Generalissimo Chiang Kai-shek" to supply 30,000 troops to fight in Korea.[208] Considerable attention was also given to criticizing President Truman's decision to replace General Douglas MacArthur in Korea;[209] and Senator McCarthy added that "what we are doing is preparing for another planned Pearl Harbor, this time in Korea."[210] Mundt also repeatedly denounced as a Pentagon "censor" a Navy Vice Admiral whose job, apparently, was to insure that classified information was not inadvertently published in public documents.[211]

Only a relatively small portion of the highly partisan tirade was focused upon legal issues, and much of that came from freshman Senator Karl Mundt—a nonlawyer with a background as an high school administrator and insurance salesman. A good part of what he said was factually misleading or simply inaccurate.

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203. Fisher, *supra* note 9, at 35.

204. 97 CONG. REC. 5089 (1951) (statement of Sen. Mundt).

205. *See, e.g., id.* at 5090, 5098, 5101.

206. *Id.* at 5091 (statement of Sen. Knowland).

207. *See id.* at 5093 (statement of Sen. Wiley). Although Senator Wiley had been a participant in the early consultations at Blair House, *see supra* note 161 and accompanying text, he made no effort to correct the record when his fellow Republicans accused President Truman of having ignored the Congress.

208. 97 CONG. REC. at 5092 (statement of Sen. Knowland).

209. "The President . . . has recently removed Gen. Douglas MacArthur from his command in Korea. The President told the country that he did this because he did not agree with General MacArthur's strategy for bringing the war to an early and victorious conclusion." *Id.* at 5088 (statement of Sen. Mundt).

210. *Id.* at 5093.

211. *See id.* at 5095.

Mundt asserted that the Senate learned of President Truman's actions in Korea "by reading about it in the morning newspapers,"[212] and charged that Congress had not been consulted in the matter.[213] Because Senator Mundt was such a junior member at the time, it is very possible that when he denounced the President for not having seen fit "formally to advise the Senate or the House of the action he had taken" in Korea he was simply unaware of the fact that President Truman had consulted *personally* time and again with the bipartisan congressional leadership—and that he had planned to address a joint session of Congress about Korea, but had been advised against doing so by senior congressional leaders. However, other participants in the colloquy had taken part in the consultations, and two of them had been among the first three speakers on the Senate floor following the invasion to address the issue of Korea (both strongly supporting the President's conduct at the time).[214]

Perhaps typical of the level of discussion during this highly-partisan colloquy was a lengthy exchange between Senators Mundt and Ferguson, which Senator Ferguson began by asking, "Is it not true that when the present war in Korea started, the President did not call it a war, but called it a police action?" After Mundt agreed that the President had used the term, Senator Ferguson reasoned, "According to the ordinary and, I think, universal definition, a police action is one in which a force is used to execute a judgment of a court in the application of established law. It [sic] that not what a police action ordinarily is?" Senator Mundt, as if on cue, responded, "That is correct."[215] For some reason, Senator Mundt neglected to mention that he had personally and repeatedly characterized the envisioned Security Council military force as "an international police force" during the House debate on the U.N. Participation Act five years earlier,[216] or that the term "police action" was in general use on the Senate floor to describe the Korean conflict well before it was embraced by President Truman.[217]

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212. *Id.* at 5081.

213. *See* 97 CONG. REC. at 5088.

214. *See id.* at 5081; 91 CONG. REC. 9154-55 (1945) (statement of Sen. Bridges); *id.* at 9156-58 (statement of Sen. Knowland).

215. 97 CONG. REC. at 5081-82.

216. 91 CONG. REC. at 12,280.

217. *See supra* notes 174-82 and accompanying text. One of the first senators to use the "police action" metaphor (and one of the most outspoken supporters of Truman's initial commitment of U.S. troops among conservative Republicans) was California's Senator

Mundt's apparent underlying message—delivered in a paragraph that began with strong praise for General MacArthur (at the time viewed as a potential 1952 Republican presidential candidate)—was that America needed to "realize how important it is that there spring up from somewhere in America leadership which can do more than appease, more than surrender . . . ."[218] Whatever the explanation for Dr. Fisher's reference to this partisan effort to distance Congress from the by-then unpopular conflict in Korea,[219] to suggest that the few legal arguments presented "shredded the administration's legal pretenses" strains credulity.

Finally, perhaps a brief word should be said about Dr. Fisher's criticism of Professor Arthur Schlesinger's strong defense of President Truman's actions, voiced in a January 9, 1951 letter to the *New York Times*, in which Schlesinger asserted that "[f]rom the day that President Jefferson ordered Commodore Dale and two-thirds of the American Navy into the Mediterranean to repel the Barbary pirates American Presidents have repeatedly committed American armed forces abroad without prior Congressional consultation or approval."[220] Dr. Fisher complains, "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.' "[221] The simple response is that Jefferson misled Congress in this famous excerpt from his first state of the union message; in reality, his cabinet had agreed that he had authority as commander-in-chief to order

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Knowland. *See, e.g., supra* notes 176-79 and accompanying text. However, that did not stop the senator from denouncing Truman for involving the nation in "a war which has resulted in 65,000 casualties without a declaration by the Congress" when the conflict became unpopular with the American people. *Hearings on the Military Situation in the Far East Before the House Comm. on Armed Services and Foreign Relations*, 82d Cong., 1st Sess., pt. 2, at 765, 933 (1951), *quoted in* ELY, *supra* note 7, at 141 n.17.

218. 97 CONG. REC. at 5096.

219. Senator Mundt argued early in his remarks that, "whatever the legal basis may be for our involvement in that conflict, it was not by any action whatsoever of the American Congress." *Id.* at 5078. The entry of Chinese "volunteers" into the conflict had a dramatic effect on public support for Truman's policy in Korea. A January 1951 Gallup poll reported that, by a margin of 66% to 25%, the American people favored a policy of "pull[ing] our troops out of Korea as fast as possible." *The Quarter's Polls*, 15 PUB. OPINION Q., 381, 386 (1951). For a detailed discussion of public opinion and the conflicts in Korea and Vietnam, see JOHN E. MUELLER, WAR, PRESIDENTS AND PUBLIC OPINION (1973). Mueller observes that public support for U.S. involvement in Korea was "extremely high at the beginning of the war," with 77% approval in early July. However, by the end of 1950 "support for the war had dropped some 25 percentage points." *Id.* at 51.

220. Arthur M. Schlesinger, Jr., *Presidential Powers: Taft Statement on Troops Opposed, Actions of Past Presidents Cited*, N.Y. TIMES, Jan. 9, 1951, at 28.

221. Fisher, *supra* note 9, at 36.

the Navy to search for and destroy enemy ships "wherever they can find them" if the Barbary States already had declared war upon the United States, and the official naval records establish that Dale was ordered to do exactly that. The incident that Jefferson made reference to in his report to Congress—in which the Schooner *Enterprise*, commanded by Lieutenant Andrew Sterret, had simply "disabled" and "liberated" a Tripolitan cruiser, resulted entirely from the fact that the *Enterprise* was sailing *to* Malta to obtain water for the squadron at the time the encounter occurred. His clear instructions from Captain Dale were to avoid being delayed by taking enemy ships as prize on the voyage to Malta (for "you have not much water on board"), but "if coming back you will bring her with you . . . ."[222] Whatever President Jefferson's motive for misrepresenting the incident to Congress, Dr. Fisher may take some comfort in the fact that he is hardly alone among respected constitutional scholars to be misled by the account.[223]

VIII. CONCLUSIONS

Contrary to the conventional wisdom, President Truman's commitment of U.S. armed forces to defend South Korea follow-

222. 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WAR WITH THE BARBARY POWERS 534-35 (Claude A. Swanson ed., 1939). This incident is discussed in greater detail in Turner, *supra* note 18, at 910-15.

223. Indeed, this is one of the most frequently cited "precedents" used by advocates of broad congressional war powers. Professor William van Alstyne, of Duke University School of Law, apparently found it so powerful that he quoted the same paragraph *twice* within the same law review article. *See* William Van Alstyne, *Congress, the President, and the Power to Declare War*, 121 U. PA. L. REV. 1, 8, 10 (1972). It is worth noting that Jefferson's remarks were sharply challenged at the time by Alexander Hamilton (who had helped draft Article II of the Constitution at the Philadelphia Convention in 1787 and was unaware of the May 15 cabinet discussions), who wrote on December 17, 1801, "[I]t is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war . . . . But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary." 25 THE PAPERS OF ALEXANDER HAMILTON 455-56 (Harold C. Syrett & Jacob E. Cooke eds., 1977). According to Dr. Fisher's own organization, following this exchange, "Congress apparently accept[ed] Hamilton's view." CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 327 (1973), S. DOC. NO. 82, 92d Cong., 2d Sess. (1973). Hamilton's view also clearly carried the day in Congress during debate on the U.N. Participation Act; indeed, even Senator Wheeler asserted that "everyone" recognized that no declaration of war was necessary when a country was "attacked." Noting Jefferson's deferential 1801 report to Congress, Senator Wheeler observed, "[I]t was Hamilton who criticized him and stated that he did not need an act of Congress when we were attacked, because when someone else attacked us, that fact, in and of itself, was an act of war and we had the right, as a matter of sovereignty, to resist it. I think it is perfectly plain." 91 CONG. REC. 11,396 (1945).

ing the June 1950 invasion of South Korea violated neither the U.N. Charter[224] nor the U.N. Participation Act—at least as those instruments were explained by the legislators who overwhelmingly supported passage. Speaker after speaker expressed the view that the President had the authority to use military force faithfully to execute the Nation's treaty commitments, and speakers on both sides of the debate affirmed that the basic obligation to use force in response to future international aggression was created by the 1945 ratification of the Charter with the advice and consent of the Senate.

To be sure, there was a widespread expectation that an agreement subsequently would be made pursuant to Article 43 of the Charter to earmark certain specific U.S. units for possible future use at the discretion of the Security Council, and pursuant to its Article I, Section 8 constitutional power to "raise and support Armies"[225] it was understood that any such agreements would receive approval by Congress before taking effect. But the absence of such an agreement—which, it should be mentioned, was through no fault of President Truman or the U.S. Government—did not affect the President's constitutional power to use U.S. military forces placed under *his* command to carry out the purposes of the Charter. This issue expressly was addressed during the debate over Charter ratification, and that conclusion was unchallenged.[226] Those few who opposed vesting such authority in the President agreed that the Charter would have that effect, but they were subsequently unsuccessful in efforts to amend the U.N. Participation Act to provide a congressional role in approving individual deployments to enforce the Charter.

Although a full discussion of the relationship between the President's "executive" and "commander-in-chief" powers, and the power of Congress to "declare war," is beyond the scope of this Article (and recently has been addressed by the writer elsewhere[227]), the President's actions in committing forces to Korea also was consistent with the Constitution. Although this conclusion is not beyond reasonable debate, it is at least clear that the

224. Because the actions could have been carried out under Article 51 as an act of "collective self-defence," this statement is not inconsistent with any doubts that might exist about the legitimacy of making Security Council decisions in the absence of a Permanent Member. *See supra* note 140.

225. U.S. CONST. art. I, § 8, cl. 12.

226. *See supra* note 69 and accompanying text.

227. *See* Turner, *supra* note 18, at 906-49.

President's behavior was well within the majority view embraced by both houses of Congress on this issue in 1945.[228] That conclusion is reaffirmed by the overwhelming support shown initially in Congress for the President's commitment of troops to Korea, and by the advice given to the President by such key figures as Foreign Relations Committee Chairman Tom Connally,[229] ranking Republican Arthur Vandenberg,[230] and Senate Majority Leader Scott Lucas.[231]

Is seems somewhat disingenuous for Dr. Fisher to write that President Truman "never asked for authority,"[232] and that the draft resolution the State Department had prepared "never left the executive branch,"[233] without telling the reader why. A reading of the relevant declassified executive branch documents, supported by strong statements from the autobiographies of key Senate leaders and the writings of prominent historians, shows that President Truman gave very high priority, immediately upon his return to Washington following the North Korean invasion, to keeping Congress fully and accurately informed; and that both President Truman and Secretary of State Acheson were inclined to seek a formal congressional joint resolution of support on Korea until they were dissuaded by contrary advice during consultation with congressional leaders. For example, when the President asked Senator Connally—who, in addition to chairing the Foreign Relations Committee, had helped write the U.N. Charter and had shepherded both it and the U.N. Participation Act through the Senate—whether he should seek a "declaration of war" or other formal authorization, he was told that seeking formal approval was both unnecessary and unwise.[234] When Truman told Senate Majority Leader Scott Lucas that he wished to address a joint session of Congress on Korea, he was informed that Congress would prefer for him to make a "fireside chat" with the American people.[235] There is absolutely no question that such a resolution would have been overwhelmingly approved; even Senator Taft—one of the handful of public critics of the

228. *See, e.g., supra* note 82 and accompanying text.
229. *See supra* note 153 and accompanying text.
230. *See supra* note 160 and accompanying text.
231. *See supra* note 194 and accompanying text.
232. Fisher, *supra* note 9, at 33.
233. *Id.*
234. *See supra* note 153 and accompanying text.
235. *See supra* note 194 and accompanying text.

President's failure to seek such authority—acknowledged that he would have voted for such a resolution.[236]

In summary, President Truman's behavior toward Congress in the period immediately following the outbreak of hostilities in Korea was admirable and fully consistent with the understanding by the congressional leadership, and by an overwhelming majority of legislators, of his rights and obligations under the Constitution and other relevant legal instruments. That congressional Republicans ultimately turned against Truman, accused him of exceeding his authority, and branded the increasingly unpopular conflict "Truman's War," perhaps says more about Congress than it does about President Truman.

To be sure, irrespective of the constitutional requirements, there are tremendous *political* benefits for the President—and the nation—in keeping Congress fully informed about important foreign policy initiatives; and seeking a formal statement of congressional approval, in retrospect, probably would have been a more astute political move for the Truman Administration. However, in June 1950, the advice President Truman received from key congressional leaders was to the contrary—and the potential risk they identified of a small number of dissenters tying up the process, and sending a signal of disunity to the world during a period of major international crisis, was not insubstantial. Such a signal could have emboldened Kim Il Sung and other Communist leaders, it could have undermined the will of South Koreans to continue resisting the aggression, and it might also have had serious undesirable consequences *vis-à-vis* the behavior of potential allies and neutrals in the Security Council decisionmaking process.

Among the legitimate "lessons" to be drawn from the Korean experience are that the President and Congress ought to cooperate in a nonpartisan manner during periods of crisis, and that both sides should act in good faith—even if things get tough. There is a temptation to conclude—indeed, this may now have risen to the level of a "conventional wisdom"—that had President Truman asked Congress for a joint resolution authorizing him to "take all necessary steps, including the use of force,"[237] to defend South Korea, it would have solved his "Korea problem" and perhaps even led to his reelection in 1952. As attractive as

236. *See supra* note 167 and accompanying text.
237. This is the language used in the 1964 Gulf of Tonkin Resolution. *See supra* note 2.

that conclusion may seem, it is refuted by the realities of Vietnam a little more than a decade later. President Johnson—who believed that one of Truman's great mistakes was in not getting formal authorization for Korea, and vowed as President not to repeat the error[238]—obtained precisely such authority for Vietnam by a combined vote of 504-2; and, in a direct parallel with Korea, when the conflict became unpopular legislators bailed out quickly and some Republicans branded it "Johnson's War." In the end, of course, the Democrats got revenge, as after the 1968 election the conflict quickly became "Nixon's War" and Congress disclaimed all responsibility. But that is another story.[239]

One final caveat, of a policy nature, is perhaps in order. The fact that the President may be free as a matter of constitutional law to "ignore" Congress in sending U.S. troops into harm's way does not inevitably lead to the conclusion that it is *wise* to do so as a policy matter. To be sure, there may be occasions where the need for an immediate response or operational security are such that not even consultation[240] with Congress is possible before action must be taken. But a wise President will seek to keep Congress informed about potential national security problems on a regular basis, will consult prior to embarking upon major new initiatives, and will seek the formal approval of Congress for significant military operations—in advance, when practical, retro-

238. "I believed that President Truman's one mistake in courageously going to the defense of South Korea in 1950 had been his failure to ask Congress for an expression of its backing. He could have had it easily, and it would have strengthened his hand. I had made up my mind not to repeat that error." LYNDON B. JOHNSON, THE VANTAGE POINT: PERSPECTIVES ON THE PRESIDENCY 115 (1971).

239. Several months ago, I had an exchange of letters with my old friend Pat Holt, who served on the staff of the Senate Foreign Relations Committee for three decades and was its staff director during my five years as a Senate staff member. In response to a very truncated version of my conclusions embodied in this article, Pat responded, "Quite right. I was there at the time. With the conspicuous exception of Robert A. Taft, most of Congress didn't want to touch that issue with a ten-foot pole." Letter from Pat Holt to Robert F. Turner (Oct. 20, 1994) (on file with author).

240. It is imperative to distinguish between the process of "consultation," through which the President or his agents discuss potential problems with leaders and interested members of Congress and then consider their responses in formulating policy, and the more common practice of simply "informing" or "notifying" Congress of a *fait accompli.* Although advanced notification is preferable to ignoring Congress, the President has much to gain—in terms of acquiring new perspectives and understanding his options, and not unimportantly also in terms of good will—from engaging in genuine consultations.

spectively when the need for speed or secrecy precludes prior legislative participation.[241]

The rationale for such a policy should be as obvious as it is powerful: (1) even if the President has existing resources to begin a foreign military operation, he may well need additional funding to sustain the operation or to replenish resources used therein to be able to deal effectively with other contingencies; (2) having Congress formally "on board" has a positive effect both on future congressional attitudes and on public opinion; and (3) confronting an international aggressor—actual or potential—with Congress standing united behind him greatly enhances the President's ability to deter further aggressive actions. This third point cannot be overemphasized, as the perception that the United States lacks the "will" to meet its commitments—and that, if sufficient American casualties can be imposed, the Congress will likely "pull the plug" on continued U.S. involvement—is perhaps the greatest impediment to a positive American role in promoting world peace. The great Chinese military strategist Sun Tzu advised that "to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."[242] After 2,500 years, the message remains valid.

If the United Nations Charter is to contribute in the future to preventing aggression and promoting world peace, the United States must be prepared to play a strong leadership role. Under the Constitution and the Charter, the President has considerable legal authority to act without involving Congress. Political considerations strongly support not only consulting with and keeping Congress fully informed about such operations, but seeking formal congressional endorsement of peacekeeping efforts as a signal of national unity and resolve. Above all, it is time for the two political branches to stop turning every international crisis into a constitutional confrontation, and to work together, in a spirit of comity and mutual respect, to promote world peace and fulfill the potential of the Charter.

241. The option of obtaining congressional approval after an emergency deployment is handled quite well by Dr. Fisher. *See* Fisher, *supra* note 9, at 34.

242. SUN TZU, THE ART OF WAR 77 (Samuel B. Griffith ed., 1963).