



# National Security Law Report

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## Shenefield Continues as Chairman Bruemmer and Heymann Named to Committee

ABA President George E. Bushnell, Jr., has appointed former CIA General Counsel Russell J. Bruemmer and former Deputy Attorney General Philip B. Heymann to three-year terms on the Standing Committee on Law and National Security, filling vacancies created by the departure of Yale Law School Professor Harold Koh and Deputy Assistant Attorney General (and former University of Chicago Law School Dean) Diane Wood. In addition, export controls practitioner Lucinda Low, CIA General Counsel Elizabeth Rindskopf, and former National Security Council Legal Adviser Paul Schott Stevens have been reappointed to second terms on the Committee and John Shenefield has been appointed to a third term as chairman.

Both of the new members have been involved with the Standing Committee in the past and both bring impressive professional credentials related to the Committee's work. Russ Bruemmer clerked for Judge (now Standing Committee Counselor) William Webster on the Eighth Circuit Court of Appeals after graduating from the University of Michigan Law School. He later accompanied Judge Webster to the FBI, where he rose to the position of Chief Counsel for Congressional Affairs. When Judge Webster became Director of Central Intelligence, Russ became a Special Counsel and subsequently was named CIA General Counsel. He is a member of the Council on Foreign Relations.

Professor Philip Heymann's most recent period of federal service was as Deputy Attorney General, in which capacity he keynoted the Standing Committee's Third Annual Morris I. Leibman "Review of the Field" Conference in October 1993. Since leav-

ing Justice he has returned to his position as the James Barr Ames Professor at Harvard Law School, where he is Director of the Center for Criminal Justice. He has also been a Professor at Harvard's Kennedy School of Government, where he directed the Program for Senior Managers in Government. His extensive and diverse experience in government began as a Supreme Court law clerk to Justice John Harlan, followed by several years in the Solicitor General's Office. He has also served as Assistant Attorney General for the Criminal Division, as Associate Watergate Special Prosecutor, as Deputy Assistant Secretary of State for International

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## Declassified "Top Secret" Revelations

### Truman Didn't "Ignore Congress" on Korean War

by Robert F. Turner

The national debate over war powers and Haiti raises important issues about whether the President needs congressional authorization to send American military forces into harms way to implement a decision of the UN Security Council. Some find the President's Commander in Chief power and his duty to see the nation's treaties "faithfully executed" to be in conflict with the power of Congress "to declare War." For a variety of reasons, it is instructive to reexamine the role of Congress in the first major UN peacekeeping operation, the Korean conflict.

To begin with, many advocates of broad congressional war powers attribute the growth of "presidential wars" to President Truman's alleged decision to "bypass" or "ignore" Congress following the June 1950 North Korean invasion of South Korea. As Yale Law Professor (and former Standing Committee member) Harold Koh put it: "President Truman responded to the Korean invasion by committing American troops to combat without consulting Congress . . . ." Stanford Law School Dean John

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## Truman Didn't Ignore Congress . . .

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Hart Ely, in his 1993 study *War and Responsibility*, contends that Truman's actions "shattered" a "long-standing legislative-executive consensus" that Congress must approve decisions to commit US troops to hostilities.<sup>2</sup>

Such an inquiry is also useful because the leaders of Congress in mid-1950 had all taken part in the enactment of the UN Participation Act less than five years earlier; and—just as we look to the actions of the early congresses to find evidence of "original intent" behind the Constitution—the understandings of the Senators who consented to the ratification of the UN Charter, and the legislators who approved the implementing legislation, may provide insight into the meaning of those documents.

### "Declaring War" and the UN Charter

To put events in context, it should be recalled that the Constitution grants to Congress the power "to declare War" while giving the President the nation's "executive" power and making him "commander in chief." Much of the post-Vietnam war powers debate has sought to define the legislative role by focusing on the meaning of "war" rather than the narrower legal term of art, "declare war;" and it may be worth noting that there was a consensus in the treaties on the Law of Nations that were owned and read by the Founding Fathers that it was unnecessary to "declare war" when force was used defensively.<sup>3</sup> Thus, when Roger Sherman of Connecticut argued during the Philadelphia Convention that "[t]he Executive should be able to repel and not to commence war,"<sup>4</sup> he may have reflected this important distinction.

By this reasoning—and it should be emphasized that many reputable scholars disagree strongly on the point—when the United States, by ratifying such treaties as the 1928 Kellogg-Briand Pact and UN Charter, surrendered its once sovereign right to engage in aggressive war, it contributed to outlawing the kind of situations over which the Founding Fathers had given the Congress a veto through the "declare War" clause. It may be significant that formal declarations of war disappeared as instruments of international relations shortly after the UN Charter came into force.

When the Congress overwhelmingly approved the UN Participation Act of 1945,<sup>5</sup> the reports of the Senate Foreign Relations and House Foreign Affairs Committees included identical language on the issue of US military forces being ordered into

combat pursuant to a decision of the UN Security Council without specific congressional approval:

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 . . . 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. [Emphasis added.]<sup>6</sup>

Indeed, during the final debate on this statute, an amendment by Senator Burton Wheeler (D-Mont.) that would have required the President to obtain congressional approval before US armed forces could be used to implement a decision of the Security Council was defeated by a margin of greater than 7 to 1.<sup>7</sup>

### The Korean War Experience

The first major test of UN peacekeeping came on Saturday, 24 June 1950 (25 June Korean-time), when North Korean forces invaded South Korea. President Truman flew back to Washington the next day, and that evening he had dinner at Blair House (the White House was being renovated at the time) with Secretary of State Acheson, other cabinet members, and senior military officials. Thanks to a collection of largely ignored (and formerly top secret) State Department documents, reprinted in

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**John H. Shenefield**  
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**Holly Stewart McMahon**  
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**Robert F. Turner**  
*Editor*

**Jackson R. Sharman III**  
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## Tribute to Frank R. Barnett

# Fourth Leibman "Review of the Field" Conference Set for October 20-21

At one of his last Standing Committee meetings before his untimely passing, six-term Standing Committee chairman and counselor Morry Leibman proposed that we dedicate one conference each year to a "review of the field" of national security law. Like so many of Morry's off-the-cuff suggestions, this turned out to be a great idea. Under the cosponsorship of the Standing Committee and the University of Virginia's Center for National Security Law, the fourth annual "Morry Leibman" conference will take place on Thursday and Friday, October 20-21, 1994, at the International Club, 1800 K Street, NW, Washington, DC.

In addition to honoring Morry's memory, this year's conference will pay tribute to another legendary figure in the struggle for the rule of law—a long-time colleague of Morry's and the first staff director of the ABA group now known as the Standing Committee on Law and National Security—Dr. Frank R. Barnett. Frank, who had also served for many years as a Standing Committee Counselor, passed away in August of last year.

A distinguished group of national security legal scholars and practitioners has agreed to take part in the eight scheduled panels, which will address such issues as "The Scope and Significance of National Security Law," "New Developments in the Field," "Enhancing Efforts at Democracy Enlargement," "Military Programs in Enhancing the Rule of Law," "Assessing the Clinton Administration's New Peacekeeping Guidelines," and "Assessing Security Downsizing in the Light of Deterrence and United States Defense Commitments."

Deputy Attorney General Jamie S. Gorelick has agreed to address Thursday's luncheon, and National Defense University President Lt. Gen. Ervin J. Rokke (USAF) will address dinner that evening. Former UN Ambassador Jeane Kirkpatrick has agreed to take part in the peacekeeping guidelines assessment Friday morning.

One of the highlights of each of the past three Leibman Conferences has been the panel discussion on "Advising the Government on National Security Law," which has traditionally brought together the senior legal officers of all of the national security-related agencies. This year's program includes not only the Executive branch panel but also a panel of chief counsels to congressional commit-

tees dealing with national security issues.

For further information on this important Standing Committee program, contact staff director Holly Stewart McMahon (see box on page 5).

## New Committee Members ...

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Organizations, and as head of the State Department's Bureau of Security and Consular Affairs. Of particular relevance to his appointment to the Standing Committee, Professor Heymann has been intimately involved in efforts to improve criminal justice systems and strengthen democratic institutions in countries ranging from Russia and South Africa to Columbia and Guatemala; and he is the co-author of a forthcoming book on strategies for dealing with terrorism.

Four new members were named to the Advisory Committee: University of Tulsa Law Professor (and former National Security Council Legal Adviser) Nicholas Rostow, *National Security Law Report* Associate Editor Jackson Sharman, and Task Force on Weapons of Mass Destruction members T.J. Anthony and Lynne K. Zusman. Former CIA Director William E. Colby was appointed a Counselor to the Standing Committee. Air Force Captain Timothy A. Guiden will remain as liaison from the Young Lawyers Division, and Air Force Reserve Captain Ruben Gonzalez, from the Office of Intelligence, U.S. Strategic Command, will serve as the Law Student Division liaison. Howard Handelman will continue as liaison from the ABA Board of Governors.

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volume VII (Korea) in the series, *Foreign Relations of the United States since 1950*,<sup>8</sup> we have a clear record of this and other key meetings in the form of memoranda prepared by Ambassador at Large Philip C. Jessup (a distinguished international lawyer who would later serve as a judge on the International Court of Justice from 1960-69).

Jessup's notes from Sunday's dinner indicate that the President "wished the State Department to prepare a statement for a message for him to deliver in person to Congress on Tuesday [27 June] indicating exactly what steps had been taken. He wished the Department to put its best brains on it and said that there were plenty of them there." In a subsequent memorandum, Jessup gives this account of a Blair House meeting at 9 AM the following

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## Truman Didn't Ignore Congress . . .

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morning involving the same participants:

[Secretary of State] 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.

THE PRESIDENT said that he had a meeting scheduled for 10:00 tomorrow morning with the Big Four<sup>10</sup> and that he would get in any others that the Secretary thought should be added.<sup>11</sup>

Senator Tom Connally (D-Tex.), Chairman of the Foreign Relations Committee, records in his memoirs that President Truman called him later that Monday:

"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 UN Charter."<sup>12</sup>

As a result of Monday morning's cabinet meeting, fourteen congressional leaders were invited to meet with the President at 11:30 on the morning of Tuesday the 27th. Ambassador Jessup's top secret memorandum of the exchanges identifies eight leaders by name at the meeting, and—after reporting that the Senate Armed Forces Committee had voted unanimously that morning to extend the draft—most of their comments pertained to the need to strengthen the Navy, to beef up US forces in Europe, and similar issues. Typical of their remarks was that of Senator Alexander Wiley—ranking Republican on the Foreign Relations Committee during Arthur Vandenberg's illness—who Jessup records "said it was sufficient for him to know that we were in there with force and that the President considered this force adequate." There was no criticism of the President's handling of the crisis, and none of the congressional leaders voiced any interest in having the matter submitted to Congress.

The President and senior cabinet members briefed congressional leaders again on Friday (30 June),<sup>13</sup> and later that day both houses of Congress adjourned for a Fourth of July recess until 10 July. Secretary of State Acheson carried out the President's instructions to prepare a draft Message to Congress—and also prepared a draft Joint Resolution for Congress to use in endorsing the Presi-

dent's actions—and coordinated both documents with the Pentagon.<sup>14</sup>

Another meeting occurred the following Monday (3 July), when the President, key cabinet members, and the Chairman of the Joint Chiefs of Staff met at Blair House with Senate Majority Leader Scott Lucas—the only congressional leader still in Washington. The following excerpts are from the once top secret Memorandum of Conversation<sup>15</sup> made by Ambassador Jessup of the meeting:

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 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 itself 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. . . . [President Truman] 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 our 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 consult-

## Calendar of Events

**October 20-21—Fourth Annual Morris I. Leibman Review of the Field Conference (International Club)**

**November 9—Breakfast Meeting, International Club (Speaker: Dr. Edward Teller)**

**December 1-2—Conference (to be announced)**

ed. Many members of Congress had suggested to ... and avoid debate. ...

The President said ... he 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.

On Wednesday, 19 July, the President submitted a lengthy written message to Congress.<sup>16</sup> At 10:30 P.M. that same evening, he delivered a radio and television address to the nation.<sup>17</sup>

Thus, the historical record appears to refute the conventional wisdom that President Truman unilaterally (or, upon the advice of Secretary Acheson) elected to ignore the Congress. On the contrary, keeping Congress informed was a priority objective identified from the first day of the invasion; and the decision not to go before a joint session of Congress immediately and seek a joint resolution of support was made after lengthy consultations with congressional leaders and following the advice received from the Chairman of the Senate Foreign Relations Committee and the Senate Majority Leader.

The lack of significant congressional protest to President Truman's deployment of combat forces under UN authorization to defend South Korea in 1950—less than five years after the enactment of the UN Participation Act—would seem consistent with his view that such a deployment was not viewed by many legislators as infringing upon the independent constitutional powers of Congress.

Even isolationist conservative Senator Robert Taft (R-Ohio) acknowledged that the Congress would easily approve a resolution supporting President Truman's Korea policy (and said he would support such a resolution); and Taft's legal criticism of President Truman's commitment of troops to hostilities without the approval of Congress was strongly attacked by such prominent historians as Arthur Schlesinger, Jr.,<sup>18</sup> and Henry Steele Commager.<sup>19</sup>

As the Korean War dragged on, American boys came home in body bags, and the public perceived the US as following a "no win" policy, the conflict became increasingly unpopular in the polls. Truman's approval rating fell from 81 percent shortly after the conflict began to 20 percent two years later. Republicans found it expedient to call it "Truman's War" and to emphasize that Congress had not given it formal legislative sanction. The critics did not mention that both political parties had given the commitment overwhelming support in the beginning—the biggest complaint voiced was that a firm stand should have been taken earlier—or that Congress had voted time and again to fund the conflict.

A conventional wisdom emerged that Truman had erred—if not legally, then as a matter of sound political judgment—in not getting Congress "on board at the takeoff" in Korea. Having been unaware of the details set forth above until recently, the present writer has echoed that view more than once in testimony before Congress.

It was such a perception that led a former Senate Majority Leader, President Lyndon Baines Johnson, to ask Congress for formal legislative authorization in August 1964 to send combat units to defend South Vietnam.<sup>20</sup> The House authorized the use of armed force in Indochina by a vote of 416-0, the Senate approved it 88-2 (with both dissenters being "retired" at their next election), and LBJ's accompany-

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## **Standing Committee on Law and National Security**

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*Advisory Committee Chair:* Kathleen Buck

*Staff Director:* Holly Stewart McMahon  
1800 M Street, N.W. • Suite 200  
Washington, D.C. 20036  
(202) 466-8463  
fax (202) 331-2220

## Johnson Didn't Ignore Congress

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ing appropriations request was more than doubled by the Congress. Public support for LBJ's initial stand in Vietnam led to a 30 point increase in his approval ratings in the Gallup polls, but in less than five years both public and congressional support had decreased dramatically. Looking back years later, as legislators who had formally voted to authorize the Vietnam conflict "bailed out" and denounced "Johnson's War" in large numbers, President Johnson observed to a friend: "I forgot about parachutes." But Vietnam is another story.

The writer is the editor of the Report and is spending a year as the Charles H. Stockton Professor of International Law at the US Naval War College in Rhode Island. The views expressed are entirely his own. Alternative viewpoints are invited.

### Notes

<sup>1</sup> Harold Hongju Koh, *The National Security Constitution* 196 (1990).

<sup>2</sup> John Hart Ely, *War and Responsibility* 10 (1993). Professor Ely's book will be reviewed in an upcoming issue of the Report.

<sup>3</sup> See, e.g., Hugo Grotius, *De Jure Belli ac Pacis*; Alberico Gentili, *De Jure Belli*; Emmerich de Vattel, *Le Droit des Gens*.

<sup>4</sup> See, e.g., *4 Writings of James Madison* 227 (Gaillard Hunt, ed. 1903). Madison and Elbridge Gerry, who authored the "declare War" language, also drew a distinction between the power to "declare War" and the executive's "power to repel sudden attacks." *Id.*

<sup>5</sup> Pub. L. 79-264, 59 Stat. 619 (1945).

<sup>6</sup> See, e.g., House Rep't 1383. While this language discussed a situation in which the Security Council directly ordered US troops made available under an Article 43 agreement into combat, the underlying constitutional issue would seem to be the same when the troops are provided on an *ad hoc* basis or when the President acts pursuant to the

authority of the Security Council.

<sup>7</sup> *Cong. Rec.* 11,405 (Dec. 4, 1945). (Like many other isolationists, Senator Wheeler was "retired" by the voters at the first opportunity (1946 in his case) following the outbreak of World War II. Indeed, he failed to receive the nomination of his own party.)

<sup>8</sup> Department of State Publication 8859, 82nd Cong., 1st Sess., House Doc. No. 82-264 (Vol. VII), Washington: U.S. Gov't Printing Office, 1976).

<sup>9</sup> *Id.* at 160.

<sup>10</sup> A note to the Jessup memorandum states that the "Big Four" were Vice President Alben W. Barkley, Senate Majority Leader Scott Lucas, House Speaker Sam Rayburn, and House Majority Leader John McCormack. *Id.* at 182 n.

<sup>11</sup> *Id.* at 182.

<sup>12</sup> Tom Connally, *My Name is Tom Connally* 346 (1954).

<sup>13</sup> *Foreign Relations of the United States*, *supra* note 8 at 200.

<sup>14</sup> *Id.* at 257. No documentation concerning this meeting is provided beyond a brief White House Press Release, which makes no reference to any congressional feedback.

<sup>15</sup> *Id.* at 282-83. Neither draft is printed in this volume.

<sup>16</sup> *Id.* at 286-91.

<sup>17</sup> *Id.* at 430. H. Doc. No. 646, reprinted in 96 *Cong. Rec.* 10628-30 (19 July 1950).

<sup>18</sup> *Foreign Relations of the United States*, *supra* note 8 at 430.

<sup>19</sup> Calling Taft's position "demonstrably irresponsible," Schlesinger wrote in a letter to the editor of the *New York Times* (9 Jan. 1951): "From 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. . . . Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities." A little more than two decades later, Schlesinger took a quite different approach to executive power in *The Imperial Presidency*.

<sup>20</sup> Denouncing the "Republican high command" for its "attack upon the President's conduct of foreign relations" in an article in the *New York Times Magazine* (14 Jan. 1951, pp. 23-24), Professor Commager concluded: "Whatever may be said of the expediency of the Taft-Coudert program, this at least can be said of the principles involved—that they have no support in law or in history."

<sup>21</sup> Lyndon B. Johnson, *The Vantage Point* 115 (1971).

## CNSL/CLENS Humanitarian Law Conference Set for November 3-4 in Charlottesville

The University of Virginia's Center for National Security Law and the newly-established Center on Law, Ethics and National Security at Duke University School of Law will cosponsor a conference on "Deterring Humanitarian Law Violations: Strengthening Enforcement" in Charlottesville, VA, on November 4-5. Special emphasis will be given to the problems of the former Yugoslavia (including presentations by the prosecutor and chief investigator of the UN-sponsored war crimes tribunal) and the debate over establishing an International Criminal Court (featuring Professor Michael Reisman of Yale Law School). In addition, panels will address problems of enforcing the Third Geneva Convention (featuring Professor Howard Levie) and the role of national tribunals and military commissions (with Judge Robinson O. Everett). Prominent experts will also examine compliance problems in Korea, Vietnam, the Gulf, and Rwanda. Saturday's closing luncheon will be addressed by Maj. Gen. Kenneth D. Gray, Assistant Judge Advocate General of the Army. For further information, contact Ms. Pat Humphrey at 804 924-7442.