THE GLOSS OF WAR: REVISITING THE KOREAN WAR’S LEGACY

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In war powers analysis, reliance on the interpretive method of historical practice, also called the “gloss of history,” has made history a technology of the forever war. This approach draws upon the history of U.S. military conflict to interpret the scope of presidential war power and embeds past actions into the separation of powers. There is a crucial flaw in this methodology, however. The understanding of history in historical gloss is not informed by the changing historiography of war. This has led to a divergence between the “history” in legal authority and the revised historical understanding in scholarly works of history. Whereas lessons of history in other contexts often serve as levers for reexamination of government action, in gloss-of-history analysis the past instead serves to legitimate settled practices. The consequence is that presidential overreach is not recognized and corrected, but instead built into the doctrine of expanding unilateral power.

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This Article is the first to examine how static ideas about history in legal analysis have aggrandized presidential war power. It analyzes the most important example of this: President Harry S. Truman’s unilateral actions in the Korean War and subsequent reliance on his example in executive branch legal opinions. The war is a principal precedent supporting the idea that presidents may use substantial military force without congressional authorization. This has legitimated unilateralism in less massive wars, and since that time all U.S. uses of military force have been in conflicts smaller than Korea, with the exception of the war in Vietnam. Decades of historical scholarship, however, have shown that Truman misunderstood the nature of the conflict and disregarded Congress’s role, and that his advisors failed to seriously consider Congress’s war authorization power until after force was deployed. Historians have also shown the devastating costs of war for Koreans, whose experience is not centered in the U.S. war powers literature. Historical revision did not prompt legal reconsideration, however. Instead, the Korean War is calcified as a significant precedent supporting executive unilateralism, undermining democratic limits, and enabling ongoing war. The Article argues that gloss of history analysis must be dynamic, attentive to the way understandings of the past change over time. An approach to gloss informed by historical revision could reassert history’s role as a critical perspective on law.

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What must be regarded as the high water mark of executive action without express congressional approval is, of course, the Korean War.
—William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel (1970)

INTRODUCTION

The use of history as a consequential feature of legal analysis has become especially significant as the Supreme Court has relied on originalism to overturn Roe v. Wade. Another form of historical analysis is also deeply consequential but has received less attention: reliance on the “gloss of history” in the war powers context. Whereas originalism has fueled radical constitutional change, historical gloss can cement errors of historical understanding as precedent. Each war’s history becomes a narrow data point, rather than a contested event subject to reinterpretation over time. The idea of history then serves to legitimate unilateral presidential military action, yet a failure to incorporate historiographic change allows precedent to depart from the “history” decisionmakers seek to replicate. In this way, a static version of history enables war without restraint.

3. The “gloss of history,” also called “historical practice,” is the idea articulated by Justice Felix Frankfurter that interpretations of the Constitution should attend not only to its words but also to “the gloss which life has written upon them.” Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). It is an important methodology in separation of powers analysis, but as Curtis A. Bradley has written, “[t]here is substantial uncertainty . . . about the proper methodology for determining . . . ‘historical gloss.’” Curtis A. Bradley, Doing Gloss, 84 U. CHI. L. REV. 59, 59 (2017). The most extensive scholarly treatment is Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 HARV. L. REV. 411, 412 (2012). The terminology of “historical gloss” and “historical practice” is used interchangeably by Bradley, Morrison, and other scholars. See id.; Joseph Blocher & Margaret H. Lemos, Practice and Precedent in Historical Gloss Games, 105 GEO. L.J. ONLINE 1 (2016); Ryan D. Doerfler, High-Stakes Interpretation, 116 MICH. L. REV. 523, 537–41 (2018). In contrast, Alison L. LaCroix argues that the use of both terms undermines precision about the meaning and the legal authority of the use of historical gloss. See Alison L. LaCroix, Historical Gloss: A Primer, 126 HARV. L. REV. F. 75, 77–79 (2013). Notwithstanding LaCroix’s important critique, this Article adheres to Bradley and Morrison’s use of the terminology because their usage is dominant in the literature.
The classic expression of the “gloss of history” comes from Justice Felix Frankfurter’s concurrence in the 1952 Steel Seizure Case. \(^4\) He explained that “[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”\(^5\) Instead,

a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.\(^6\)

In gloss-of-history analysis, the historical workings of the federal government are evidence of the proper division of powers between Congress and the executive.\(^7\) Executive branch legal opinions rely extensively on this interpretive method in opinions about the scope of presidential power.\(^8\) As used, however, the history informing historical gloss becomes fixed precedent, even when our understanding of the underlying historical events changes based on new archival evidence and new approaches to historical scholarship. In the war powers context, presidential actions in past conflicts become historical gloss, and serve as building blocks of presidential war power, but become disassociated from historians’ understanding of the conflicts.\(^9\) This can lead to two divergent understandings of historical events: one in historical scholarship, and a different one in a gloss-of-history legal analysis.

This Article is the first to reveal this fracture in historical understanding, illustrating it through a focus on one consequential example: the Korean War and its uses as precedent in the opinions of the U.S. Department of Justice’s Office of Legal Counsel (OLC) and U.S. Department of State. The first large-scale, post-WWII U.S. foreign conflict that was not declared by Congress,\(^10\) it is a central precedent for presidential authority to commit substantial military force without congressional authorization, thereby legitimizing unilateralism in deadly, though less massive, conflicts in later years.\(^11\) Reliance on the Korean War as an aspect of the gloss of history is not informed by subsequent decades of historical scholarship or by analysis of the archival record itself.\(^12\)

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4. See Steel Seizure Case, 343 U.S. at 610–11 (Frankfurter, J., concurring).
5. Id. at 610.
6. Id. at 610–11.
7. See infra text accompanying notes 45–52.
8. See infra Section III.B.
9. See infra Section III.B through to the end of Section III.B.1.
10. See Bradley & Morrison, supra note 3, at 463.
11. See infra Section III.B.
12. See infra Section III.C. The historical record now shows, for example, that Truman misunderstood the Soviet Union’s role in the invasion—a principal reason behind U.S. military action. See Donald W. Boose, Jr. & James I. Matray, Introduction, in THE ASHGATE RESEARCH
This example demonstrates that when history becomes “gloss” in legal opinions, it can become disconnected from historiography—from the way understandings of the past change over time.

The Korean War example shows that the disconnect between the gloss in legal precedents and the historiography has important consequences. As this Article demonstrates, the historical record of the war reveals a deeply flawed and antidemocratic decisionmaking process in 1950, with President Harry S. Truman treating Congress as a political problem, not a source of constitutional authority for war. He insisted that the conflict was not a “war,” which would have invoked Congress’s declaration power, even as U.S. troops were on the ground in Korea and under fire, and after the potential use of atomic weapons had been discussed in a presidential meeting with key advisors. He also ordered the use of force before the United Nations Security Council (UNSC) authorized it, so that his most significant act rested on presidential power alone. Finally, the president’s central justification for urgent action in Korea turned out to be wrong. Truman believed that the attack was part of a larger Soviet plan to extend its power, even though some members of Congress saw it as a conflict principally between Koreans. Archival evidence released decades later showed Soviet reluctance to act and North Korean agency, and illuminated the peninsula’s origins of the war.

Once turned into gloss, however, Truman’s disregard of constitutional requirements ossified into precedent. The fact that he acted unilaterally became evidence that presidents, in fact, have power to go to war on their own.

COMPANION TO THE KOREAN WAR 1–4 (James I. Matray & Donald W. Boose, Jr. eds., 2014). The costs and consequences of the war, including its devastating impact on civilians, have also been extensively documented in recent years. See SU-KYOUNG HWANG, KOREA’S GRIEVOUS WAR (2016).

13. See infra paragraph accompanying note 245. Some scholars argue that Congress supported or acquiesced in the president’s decision after it was made, so that there was sufficient coproduction of constitutional authority for war. Most important is MARIAH ZEISELBerg, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY (2013). The record reveals significant congressional pushback before U.S. forces were committed, however. See infra Section II.A.2. Once Truman announced that he had taken the nation to war, the reaction of members of Congress was consistent with what political scientists call the “rally-round-the-flag effect.” See Marc J. Hetherington & Michael Nelson, Anatomy of a Rally Effect: George W. Bush and the War on Terrorism, 36 PS: POL. SCI. & POL. 37, 37 (2003). Because of this, the crucial time for Congress to have a voice was before force was deployed.

14. See infra Section II.A.4.

15. See infra Section II.A.3. The timing of Truman’s actions and the UNSC force resolution is rarely acknowledged in legal sources, and the scope of authority under an initial UNSC resolution is also misinterpreted. See infra notes 307–310 and accompanying text. An important exception, finding that Truman’s actions were not supported by legal authority, is Jane E. Stromseth, Rethinking War Powers: Congress, the President, and the United Nations, 81 GEO. L.J. 597, 621 (1993).

16. See infra notes 83–84 and accompanying text (discussing changes in historical analysis of the Korean War based on releases of Russian and Chinese archival records).

17. See infra second paragraph of Section III.B.
The Korean War example reveals an important flaw in historical gloss analysis. When executive branch lawyers and others rely on historical examples, the underlying history should not be fossilized. When history serves as a gloss on constitutional power, it must be subject to critical analysis and informed by the evidence and methods employed by historians.

Part I of this Article examines the significance and the methodology of historical practice, highlighting the scholarship of its leading proponent, Curtis A. Bradley. It also takes up the surprisingly limited scholarly criticism of this consequential methodology, particularly the lack of previous scholarship on the way historical practice uses history.

Part II illustrates the importance of subjecting the history in historical gloss to reinterpretation through a close examination of the Korean War. The war was a critical historical moment when U.S. war powers were reshaped, ushering in the legal order of the contemporary “forever war.” For the first time, the United States entered a major overseas war without congressional authorization, setting a troublesome precedent.

Section II.A focuses more closely than other historical works on the question of the legal authority President Truman had to order military action at the time he made the decision to go to war. Based on archival research and

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20. See LARRY BLOMSTEEDT, TRUMAN, CONGRESS, AND KOREA: THE POLITICS OF AMERICA’S FIRST UNDECLARED WAR (2016); JOHN HART ELY, WAR AND RESPONSIBILITY 10 (1993) (noting that the Truman Administration “claimed unprecedented unilateral authority to commit our troops to combat”); David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 HARV. L. REV. 941, 1056 (2008) (“Truman took a dramatic step forward in a history of unilateral presidential use of military power . . . .”); Robert Bejesky, War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,” 44 ST. MARY’S L.J. 1, 93 (2012) (arguing that the Korean War was the “one major confrontation” for which Congress did not authorize the use of military force). Scholars often focus on the U.S. war in Vietnam and its aftermath as the era when Congress’s declaration power began to atrophy. See, e.g., ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM 5–6 (2d ed. 2013). A common argument is that the end of the military draft after that war undermined political restraints on U.S. military engagements. See, e.g., ANDREW J. BACEVICH, BREACH OF TRUST: HOW AMERICANS FAILED THEIR SOLDIERS AND THEIR COUNTY 7–17 (2013). Without diminishing the importance of the draft, other works argue that significant conditions enabling ongoing conflict began earlier. See, e.g., Marilyn Young, The Big Sleep, in RED BADGES OF COURAGE (Biancamaria Pisapia, Ugo Rubeo & Anna Scacchi eds., 1998), reprinted in MAKING THE FOREVER WAR: MARILYN B. YOUNG ON THE CULTURE AND POLITICS OF AMERICAN MILITARISM 123 (Mark Philip Bradley & Mary L. Dudziak eds., 2021). In the context of a longer forever war timeline, this Article sees the Korean War as an important pivot point.
scholarship in military and foreign relations history, this Section argues that Truman’s decision not to seek a war declaration or authorization for the Korean War was not carefully contemplated or well-reasoned, disregarded congressional concerns and constitutional objections at the time, and was a matter of political, not military, expediency. The Article closely follows the archival record on internal deliberations about whether to seek congressional authorization. The notes of a close Truman aide show that going to Congress was not contemplated during the crucial days when it would have been most important and, for Truman, most likely to be successful. The president also ordered force before the U.N. Security Council authorized it. This problem was obscured in the most cited contemporaneous legal authority on the war, a 1950 State Department legal memorandum. Hence, Truman’s unilateral decision to go to war was based on weaker legal grounds than is commonly understood.

To understand what Truman unilaterally authorized, Section II.B examines an important feature of the Korean War: atrocity. Civilian carnage was endemic in Korea and elsewhere in Asia during the Cold War, leading historian Paul Thomas Chamberlin to call the region “the Cold War’s killing fields.” Often called “collateral damage” in legal scholarship, the killing of civilians is better understood as a central feature of war, rather than an unintended side effect. A U.S. Department of Defense report on a Korean War

21. The quick pace of the North Korean invasion is often taken as evidence that the President had to decide to act quickly. Archival records show, however, that Truman’s failure to involve Congress was instead based on his dismissal of Congress’s constitutional authority. See infra Section II.A.4.

22. See infra notes 256–257 and accompanying paragraph. There is an extensive literature on the Truman Administration and the Korean War. See, e.g., THE ASHGATE RESEARCH COMPANION TO THE KOREAN WAR, supra note 12. This Article focuses more closely on the process by which the president failed to more deeply engage Congress at the very beginning of the war. Earlier works focusing on Truman’s decisionmaking process are limited in that they were written without access to archival records relied on in the Article. See GLENN D. PAIGE, THE KOREAN DECISION 82 (1968); GLENN PAIGE, 1950: TRUMAN’S DECISION 46–48 (1970).

23. See infra Section II.A.3.

24. See infra text accompanying notes 307–310. The version published in the Department of State Bulletin and usually cited is redacted to obscure the timing of the UNSC resolutions. The unredacted memo is published in the Congressional Record. Compare U.S. Dep’t of State, Authority of the President to Repel the Attack in Korea (July 3, 1950), in 23 DEPT ST. BULL. 173 (1950) [hereinafter Authority to Repel the Attack in Korea Bulletin], with U.S. Dep’t of State, Authority of the President to Repel the Attack in Korea (July 3, 1950), in H.R.REP. NO. 81-2495, at 61 (1950) [hereinafter Authority to Repel the Attack in Korea H.R.]. No other published works recognize this redaction and its importance.


massacre of civilians by American troops called it a tragedy “inherent to war,” rather than a war crime.\textsuperscript{27} The devastating human impact of the war, and therefore the concrete dimensions of the war power, are lost when the war is turned into a presidential power data point in historical practice analysis. This Section argues that if civilian massacre is inevitable and “inherent to war,” it must be understood, acknowledged, and considered in war powers analysis. Civilian losses underscore the fact that the Korean War was not a “police action,” as Truman claimed, but a brutal war that required authorization by Congress.

Part III shows what happens when history gets locked in as gloss. The war’s history became, in essence, a feature of the law of presidential power. If a large-scale war like the Korean War could lawfully proceed without congressional authorization, then smaller conflicts fit easily within the historical practice of American war powers.\textsuperscript{28} Over time, changes in technology enabled the United States to use military force with fewer “boots on the ground,” so that all U.S. conflicts were smaller than the catastrophic Korean War.\textsuperscript{29} Meanwhile, Truman’s mischaracterization of the war was criticized by historians, but not by executive branch lawyers.\textsuperscript{30} Instead, they used gloss-of-history analysis to argue that wars smaller than Korea fit easily within the scope of executive power.\textsuperscript{31} Because all U.S. wars now fall into that category, this reinforced presidential unilateralism and undermined democratic limits on the presidential war power.

Section III.A examines the Supreme Court’s skepticism about the Korean War as it was underway. Section III.B traces the way Truman’s unilateral decision for war became part of the gloss of history and a principal authority for the use of force without congressional authorization, as reflected in opinions of the OLC. Reliance on a flattened understanding of the war enabled two legal interpretations. First, the idea that Korea was not a war but a “police action” helped shrink the constitutional meaning of “war,” narrowing the kinds of military actions subject to the Declaration Clause.\textsuperscript{32} Second, the OLC relied on the Korean War as authority for the idea that a U.S. “interest” provides the president with authority to commit the nation to a substantial military engagement without congressional authorization.\textsuperscript{33} Section III.C argues that reliance

\begin{notes}
\begin{enumerate}
\item \textsuperscript{27} \textsc{Inspector Gen.}, U.S. Dep’t of the Army, No Gun Ri Review (2001) [hereinafter No Gun Ri Review], https://permanent.fdlp.gov/websites/armymil/www.army.mil/nogunri/complete_report.pdf [perma.cc/Q4V2-6MHF].
\item \textsuperscript{28} See \textit{infra} Section III.B.1.
\item \textsuperscript{29} See \textsc{Rosa Brooks}, \textit{How Everything Became War and the Military Became Everything} 8, 134–39 (2016).
\item \textsuperscript{30} See \textsc{Mary L. Dudziak}, \textit{War Time: An Idea, Its History, Its Consequences} 89–94 (2012).
\item \textsuperscript{31} See \textit{infra} Section III.B.
\item \textsuperscript{32} See \textit{infra} Section III.B.1.
\item \textsuperscript{33} See \textit{infra} Section III.B.2.
\end{enumerate}
\end{notes}
on history in legal interpretation must not leave evolving historical understandings behind. Instead, reliance on history must be dynamic, informed by newly available historical evidence and methods of historical analysis. This would enable the past to play a cautionary role in war powers analysis, instead of each conflict serving as a building block of expanding presidential power.34

The implications of these conclusions go beyond the war power. History has become a crucial legal technology, informing constitutional analysis across categories. Most familiar in recent years has been reliance on “originalism,” which conflicts with the way academic historians interpret the past.35 In *Dobbs v. Jackson Women’s Health Organization*,36 which overturned *Roe v. Wade*,37 the Supreme Court majority relied on this form of historical argument to justify eviscerating long-standing precedent on abortion rights. Invoking the idea of history in *Dobbs* serves to legitimate radical change.38 In the war powers context, in contrast, “historical practice” locks in past presidential action, shielding it from reexamination. The “history” in both contexts is unmoored from relevant bodies of historical scholarship. When this happens, the role of history is not enlightenment but legitimation of a legal position that is driven by other factors.

I. HISTORICAL PRACTICE AND CONSTITUTIONAL INTERPRETATION

History has long been important to constitutional interpretation.39 The Founding Era, and the idea of the “original public meaning” of the Constitution, has received broad scholarly attention in recent years40 and has been a matter of general public debate.41 Other uses of history exist alongside

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34. See infra Section III.C.
originalism. Historical practice, also known as “the gloss of history,” has been especially important in the area of the separation of powers. In spite of its significance, as the leading scholar of historical practice, Curtis A. Bradley, has noted, this method has not received substantial scholarly engagement and critique. This Part describes the origins and methodology of historical practice, as well as previous scholarly criticism. It then turns to a neglected topic taken up in this Article: the way historical gloss locks in errors in historical interpretation.

Historical gloss as an interpretive method derives from Justice Felix Frankfurter’s concurrence in Youngstown Sheet & Tube Co. v. Sawyer, also known as the Steel Seizure Case. In that case, the Court struck down President Truman’s 1952 seizure of private steel mills to block a threatened strike. Truman had argued that keeping the mills open was important to national security during the Korean War. In evaluating the separation of powers issue,
Justice Frankfurter wrote that “[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.” Instead, when there is “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution,” this made “such exercise of power part of the structure of our government,” so that it “may be treated as a gloss on ‘executive Power’ vested in the President.” Because the touchstone of this approach is the actual historical workings of the separation of powers, Justice Frankfurter centered history in a different way than does originalist interpretation. Rather than divining the original public meaning of the words of the text at the time they were written, Justice Frankfurter focused attention on how the Court’s coequal branches put the separation of powers into practice over time. Understanding the practice of the separation of powers requires decisionmakers to examine what the executive and legislative branches did, how they understood and conceptualized the context within which they were working, and how they apportioned power between themselves over time.

Curtis A. Bradley and Trevor W. Morrison focused scholarly attention on historical practice in a 2012 *Harvard Law Review* article, *Historical Gloss and the Separation of Powers*. They argue that traditional analytical methods are inadequate to properly analyze the interactions between Congress and the president. Instead, there is a need for reassessment of the role history plays in constitutional analysis. For Bradley and Morrison, the idea of historical gloss enables assessment of the role that legislative acquiescence and deference to the president has played in shaping the commonly understood boundaries

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48. *Steel Seizure Case*, 343 U.S. at 610 (Frankfurter, J., concurring).
49. *Id.* at 610–11.
50. *See Solum, supra* note 35 (describing the methodologies of contemporary originalism).
51. *Steel Seizure Case*, 343 U.S. at 595–610.
55. *Id.* at 412–13.
of presidential power.\textsuperscript{56} Their article generated broader engagement with the method of historical practice.\textsuperscript{57}

Bradley expands on historical practice in subsequent articles.\textsuperscript{58} He clarifies the methodology in a 2017 article, \textit{Doing Gloss},\textsuperscript{59} which identifies four justifications for reliance on gloss: deference to the constitutional views of nonjudicial actors,\textsuperscript{60} limits on judicial capacity,\textsuperscript{61} Burkean consequentialism,\textsuperscript{62} and reliance interests.\textsuperscript{63} When courts rely on this methodology, he suggests that these justifications allow them to be less demanding in requiring evidence of institutional acquiescence than scholars tend to believe.\textsuperscript{64} For Bradley, there is a value in not disrupting well-established constitutional practices, and he suggests that the use of historical gloss allows courts to interpret the law with these traditions in mind.\textsuperscript{65}

Legal interpretation that draws upon historical change over time has important advantages, enabling constitutional interpretation to be informed by

\begin{itemize}
\item \textsuperscript{56} Id. at 447. Bradley and Morrison apply historical gloss analysis in three areas: war powers, congressional-executive agreements, and the removal of executive officers. Id. at 461–84.
\item \textsuperscript{57} See, e.g., LaCroix, \textit{supra} note 3; Blocher & Lemos, \textit{supra} note 3; Aziz Z. Huq, \textit{Fourth Amendment Gloss}, 113 NW. U. L. REV. 701 (2019).
\item \textsuperscript{59} Bradley, \textit{supra} note 3.
\item \textsuperscript{60} Id. at 64. Bradley argues that “courts do not have a monopoly on constitutional interpretation” and that other, nonjudicial government officials sworn to uphold the Constitution must necessarily engage in constitutional interpretation as part of their jobs. These nonjudicial actors are also “likely to have a better understanding than courts of the practical consequences of particular constitutional interpretations” and thus the courts are inclined to give deference to the interpretation of nonjudicial actors when a consensus seemingly exists. Id. at 64–65.
\item \textsuperscript{61} Id. at 65. Bradley argues that often courts will look to historical gloss for guidance simply due to a perceived lack of guidance from other sources. Courts have limited resources and they are not able to assess every issue as thoroughly as they would perhaps like to. Thus, when there is a perceived lack of guidance, and historical gloss provides a seemingly reasonable answer, courts will often rely on that answer to guide their opinions. Id.
\item \textsuperscript{62} Id. at 66. “Burkean consequentialism” refers to the philosophy of Irish statesman Edmund Burke, who favored individual experience and gradual improvement in government over steeper, more radical change. \textit{See generally} Roger Paden, \textit{Reason and Tradition in Burke’s Political Philosophy}, 5 HIST. PHIL. Q. 63 (1988). Under the Burkean view, long-standing practices are suggestive of practices that either work well or work better than any alternatives. \textit{See id.} at 68–69. Thus, according to Bradley, courts that invoke historical gloss often do so with this justification in mind. Bradley, \textit{supra} note 3, at 74.
\item \textsuperscript{63} Bradley, \textit{supra} note 3, at 67. Bradley argues that the longer a practice has been historically accepted, the more likely that practice is to be deeply entrenched in other areas of the law. In his view, it is prudent for courts to uphold long-standing traditions lest they inadvertently disrupt seemingly unrelated matters. Id. at 67.
\item \textsuperscript{64} Id. at 75–77.
\item \textsuperscript{65} Id. at 67.
\end{itemize}
the evolution of the separation of powers, as the United States transitioned from a fledgling state to a world power. Although historical gloss methodology relies upon history, it has not received ample critical attention from legal historians, with one important exception. Alison LaCroix argues that Bradley and Morrison’s *Historical Gloss and the Separation of Powers* did not answer the question of how historical practice acquires its authority. Bradley and his coauthors have since elaborated on justifications for the use of historical gloss, and they explain when it might be relied on. Nevertheless, legal scholar Stephen M. Griffin argues that current use of historical practice in constitutional law is fundamentally flawed, and that practice-based legal interpretations are better understood as “rather thin theories of informal constitutional change.”

A more basic feature of historical practice has gone unexamined. In spite of the fact that this interpretive method requires an examination of the past, its proponents do not address the historical methodology questions of how the past can be known and what kinds of historical evidence should be relied on. Also important is the need to reassess interpretations of history. Although legal precedents are sometimes qualified or overruled, the historical understandings embedded in gloss remain static and are not subject to historiographic change. This means that over time the gloss of history in legal opinions can diverge from the way the underlying history itself is understood. Absence of attention to historiographic change allows an outdated understanding of history to live on, disconnected from reinterpretations of the past by historians based on new archival evidence and revised methods. Rather than melting away, a static form of history is built in as precedent, generating more gloss that justifies future actions. This is especially true in OLC opinions, which are not subject to the kind of review and revision common for Article


67. LaCroix, supra note 3, at 80. LaCroix also argues that treating the terms “historical gloss” and “historical practice” interchangeably obscures the meaning of “gloss,” undermining its utility. Id. at 77.


70. See, e.g., MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS (2001).

71. See infra Section III.B.
III court decisions. This problem is amplified by the fact that, in spite of the prominence of historical gloss as an interpretive methodology, as Curtis Bradley writes, the methodology of historical gloss has not been the subject of broad scholarly examination and critique as have other uses of history, such as originalism.

As Part II of this Article will illustrate, the reified character of historical gloss is especially consequential in the area of war powers. An important example is the use of the Korean War as precedent for unilateral presidential war power. The first major U.S. overseas armed conflict that was not authorized by Congress, it is the principal historical authority for the proposition that the president has unilateral power to use substantial force. In an important article on the idea of an executive branch anticanon, Deborah Pearlstein suggests that Korea is an outlier, and that later presidents and their OLCs have not relied on it for the proposition that a president could engage in a conflict rising to the level of a “war.” Pearlstein is correct about this; the Korean War’s importance is manifested in a different way, however. It helped shrink the concept of war itself, serving as an example of how far a president had gone without seeking congressional authorization, thereby legitimating smaller unauthorized conflicts. The war is also an important authority for the idea that presidents can use substantial force unilaterally to protect American “interests.” As the nature of U.S. war changed over time, with “light footprint” actions involving the use of force with few troops in harm’s way, more conflicts without congressional authorization could be justified under this framework. Changes in the way the United States goes to war also enabled the

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73. See Bradley, supra note 3, at 63.
74. See infra text accompanying notes 212–214.
76. See infra Section III.B.1.
77. See infra Section III.B.2.
78. FERNANDO M. LUJÁN, CTR. FOR NEW AM. SEC., LIGHT FOOTPRINTS: THE FUTURE OF AMERICAN MILITARY INTERVENTION 5 (2013), https://www.jstor.org/stable/resrep06176 [perma.cc/8D4H-K9W6]. It is not surprising that, as Pearlstein notes, presidents have not invoked the Korean War as a positive example in public speeches. Pearlstein, supra note 75, at 637. The war has often been called “the forgotten war,” and diplomatic historian Marilyn Young has argued that it was forgotten even when it was ongoing, MARILYN B. YOUNG, “I Was Thinking, as I Often Do These Days, of War”: The United States in the Twenty-First Century, in MAKING THE FOREVER WAR, supra note 20, at 192. The public was never mobilized to support it, as it was in World War II. It damaged President Truman politically. See STEVEN CASEY, SELLING THE KOREAN WAR (2008). Because of this, it is hard to imagine presidents invoking it as a means of justifying their own unilateral action. See also Stromseth, supra note 15, at 600 (arguing that the history of the Korean War merits examination because “it illuminates past understandings of the division of war powers . . . and because it is often invoked today, at times uncritically, to support conflicting positions regarding the respective war powers of Congress and the President”).
American public to tolerate ongoing war, which helped entrench executive unilateralism.  

II. THE MAKING OF UNILATERAL WAR POWER

This Part uses a “thick description” of the decision to use force in the Korean War to illuminate the disconnect between the way historians understand the past and the “history” that gets locked in as precedent in historical practice analysis. It shows that this disconnect has important consequences. The war established a precedent for presidential power to commit U.S. forces to a large-scale war without congressional authorization. A State Department legal opinion supporting the legality of the war, the most important contemporaneous authority that is cited in later precedent, was written in 1950, the year the war began, and became a cornerstone in gloss-of-history analysis in legal opinions. In the aftermath, historians’ understanding of the war changed substantially, informed by the release of new archival records and new approaches to writing military history. Historiographic revision has revealed that the Truman Administration misinterpreted the Soviet role, and that the North Korean government was the principal actor as the war began. This misinterpretation informed the Truman Administration’s assumption that the war was a Soviet initiative and therefore a major Cold War battle, making urgent action seem imperative. Newer accounts also illuminate the devastating impact of the war for Koreans, making the idea that the conflict was less than “all-out war” untenable. Reinterpretation of the war did not lead to a reexamination of historical gloss, which made the legal precedent dependent on a rejected understanding of the war. Once an episode enters the

79. On the American public’s toleration of ongoing war, see YOUNG, supra note 78, and Mary L. Dudziak, Death and the War Power, 30 YALE J.L. & HUMANS. 25 (2018).


82. Kathryn Weathersby, The Soviet Union, in THE ASHGATE RESEARCH COMPANION TO THE KOREAN WAR supra note 12, at 85, 89 (detailing North Korean leader Kim Il Sung’s efforts to overcome Stalin’s reluctance to support an invasion of the South).

83. A generation of revisionist scholarship on Cold War history, informed by the release of U.S., Chinese, and Russian archival records, has deepened our understanding of the conflict in Korea and the U.S. response. See Boose & Matray, supra note 12. The outdated narrative is still prevalent in some legal accounts, however. See, e.g., JOHN YOO, CRISIS AND COMMAND 336 (2009) (stressing the role of Soviet aggression). There continue to be significant debates among historians about the international aspects of the Korean War, but the archival evidence showing initial Soviet and Chinese reluctance to support North Korean leadership’s desire to invade the South is widely accepted. See generally THE KOREAN WAR AT FIFTY (Mark F. Wilkinson ed., 2004) (reassessing the war in light of new archival releases); see also Michael Sheng, Chinese Intervention, in THE ASHGATE RESEARCH COMPANION TO THE KOREAN WAR, supra note 12, at 359–60.

84. See, e.g., HWANG, supra note 12; CHAMBERLIN, supra note 25, at 104–30.
gloss of history, however, it is relied on without regard for significant changes in historical assessment. The historical gloss that informs presidential power has remained static in spite of historiographic change.

American war is most often an abstract concept in legal scholarship on war powers, in contrast to contemporary work in military history that reveals the experience and brutality of war. This Article includes the experience of Korean civilians, American soldiers, and others directly affected by the war. This inclusion helps illuminate what war powers do and should inform our understanding of their constitutional limits.

A. A Thick Description of the Decision to Go to War in Korea

Very early in the morning of June 25, 1950, near the 38th parallel that divides Korea, a teenager named Kim Yeh Soon heard the sounds of war. Tanks advanced over the hillside, and people in her village ran and cried “a monster is coming!” Kim thought the earth was going to fall apart. Conflict was not new on the peninsula, but the events that morning would soon lead to a cataclysm of violence. Democratic People’s Republic of Korea (DPRK) forces crossed a border between the North and South created only five years earlier. They came “like a swarm of bees,” Kim Tae-hee remembered, as an endless line of soldiers and military equipment passed her home. Terrified, Kim’s family and neighbors scrambled to pack and flee, and she became one of tens of thousands of Koreans on the move.

The Korean War would be most consequential for Korean civilians. It also set the course for a world superpower: the United States. In a few days, without deliberation about whether to involve Congress, President Truman put the

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86. *See, e.g.*, CHAMBERLIN, supra note 25.
87. Jeonjaeng-gwa hyujeon-euro gohyang-eul ilhda [*I Lost My Hometown Because of the War and Armistice*], in 3 HANGUGJEONJAENGYIBSEONG [A COLLECTION OF KOREAN WAR STORIES] 29 (Shin Dong Hoon et al. eds., 2017) (title and quotations translated from Korean) [hereinafter *I Lost My Hometown*]. Born in 1936, Kim Yeh Soon would have been thirteen or fourteen years old. This oral history interview, and others cited in this Article, recount the experience of Korean civilians. The interviews were conducted in Korea by Korean scholars in the Korean language. As oral histories taken decades after the events, they are subject to the vagaries of memory. Nevertheless, the interviews capture the experience on the ground for the most vulnerable population in this war. I am grateful to political scientist Professor Juman Kim, Towson University, for informing me about this oral history collection and to a group of bilingual former Emory University School of Law students who read and translated passages for me: Stacy Jeewon Lee, Jacqueline L. Rhee, Wanji Seong, Diana Dahye Shin, and Christina Yu.
88. *Id.* at 36, 67–68.
90. *I Lost My Hometown*, supra note 87, at 72.
91. *Id.* at 69.
country on a path of projecting U.S. military power in Asia. This Section takes up the consequential early days of the war, detailing just how President Truman went to war without seriously engaging Congress until after the fact, and showing the impact on the ground for Korean civilians as well as American soldiers.

Japan occupied the Korean Peninsula from 1910 to 1945. At the end of World War II, the Soviet Union occupied the North, and the United States the South, as a temporary arrangement with the goal of reunification following elections. Rising Cold War tensions impeded these plans. Instead, when U.S. and USSR troops largely withdrew in 1948, they left power in the hands of the United-Nations- (U.N.) and U.S.-supported Republic of Korea (ROK) in the South, and the Soviet-supported DPRK in the North, but Koreans hoped for eventual reunification. This resolution did not bring peace to Korea, however. Border skirmishes persisted, along with violent political purges in the North and South. Larger-scale conflict seemed inevitable. Still, American and South Korean leadership were shocked by the North’s swift and effective June 25 invasion.

Expecting Soviet aggression, the Truman Administration thought that Joseph Stalin was behind the North Korean attack, an assumption questioned by some at the time and corrected by historians in later years. Essentially, Truman’s advisors read the available evidence through a Cold War lens, and underestimated the agency and abilities of Koreans themselves. This dynamic began with an initial intelligence report that emphasized the idea that the USSR was the controlling influence over the North Korean regime. The

94. Cumings, supra note 89, at 108–12.
95. James I. Matray, KOREANS INVade KOREA, in THE ASHTGATE RESEARCH COMPANION TO THE KOREAN WAR, supra note 12, at 311.
96. Id.; Hwang, supra note 12, at 11.
97. Hwang, supra note 12, at 8–11, 60–68; War in Korea Shock for America, SYDNEY MORNING HERALD, June 27, 1950, at 1.
98. See supra note 83 and accompanying text.
report explained that “there is no possibility that the North Koreans acted without prior instruction from Moscow.” 101 Invading South Korea was therefore assumed to be part of Soviet global strategy, and a template for further action elsewhere. 102 American officials also believed that, if the United States failed to strongly support the ROK, it would undermine the confidence of Japanese and Southeast Asians in the value of an alliance with the United States, and would undermine U.S. prestige elsewhere in the world. 103

The threat of Soviet military aggression was frightening to American leaders in 1950. In August 1949, the Soviets successfully tested an atomic bomb, ending an era when only the United States had nuclear weapons. 104 That same year, Mao Zedong defeated the Nationalists in China, and the People’s Republic of China allied itself with the Soviet Union. 105 Global communism appeared ascendant to American leaders. In April 1950, the U.S. National Security Council issued a classified report, NSC 68, arguing that the Soviet Union was an aggressive power that could only be restrained through a strong, global U.S. military presence. 106 It provided the driving logic behind U.S. national security thinking for decades, and helped fuel American military expansion. 107 American leaders viewed developments in Korea through this lens, and missed what foreign archives have later shown: even though the North Koreans invaded in Soviet tanks, and would continue to receive Soviet support, the initiative for the invasion came from North Korean leaders. Stalin thought the timing wasn’t right and that the USSR was not ready for all-out confrontation with the United States. Mao preferred to consolidate his power at home. Both leaders ultimately gave their approval, however. 108

With North Korea as the principal aggressor in the summer of 1950, what looked to the Truman Administration to be a great Cold War battle instead had the character of a civil war, though each side had powerful patrons. It appeared that the ROK would not survive without American and U.N. support. 109 A preliminary intelligence report painted a dark picture, predicting that the DPRK intended to achieve “outright control over the Korean peninsula,” starting with the capture of Seoul within seven days. 110 Because South Koreans had

101. Id. at 149.
102. If the Soviets succeeded in Korea, the report suggested, the same tactics could be repeated in Germany and elsewhere. See id. at 150–51.
103. Id. at 148–54.
104. See HOGAN, supra note 92, at 292.
105. Id.
107. See id.
108. See Boose & Matray, supra note 12, at 311–17.
109. Korea Intelligence Estimate, supra note 100, at 149.
110. Id.
inferior equipment and lacked ammunition, Seoul was sure to fall, leading to the ultimate collapse of resistance.111

1. The Fractured Process of Truman’s War Powers Unilateralism

News about Korea began to reach the U.S. State Department on the evening of Saturday, June 24.112 Assistant Secretary of State for the Far East Dean Rusk, Secretary of the Army Frank Pace, Jr., and a small team worked through the night. They quickly decided that the United Nations should be involved.113 It “was just automatic,” John D. Hickerson, Assistant Secretary for U.N. Affairs, remembered, not something they debated, though they of course knew that the ultimate decision rested with the president.114

Secretary of State Dean Acheson called President Truman at his home in Independence, Missouri, and recommended that the United Nations Security Council meet at once to declare that an act of aggression had been committed against the ROK.115 Truman agreed. The decision to involve the Security Council was made on the basis of just one brief document: an initial telegram sent by John J. Muccio, U.S. Ambassador to the Republic of Korea, during the confusing early hours after the invasion began.116 He reported that the North Koreans were attacking by air, and had strafed airports in Kimpo and Seoul.117

111. Id. at 148–54.
112. The United States and Korea are on opposite sides of the International Date Line. The time on the U.S. East Coast was thirteen hours earlier. Because of this, the offensive began on June 25, at 4:00 a.m. Korean daylight savings time, and June 24, at 3:00 p.m. U.S. Eastern Daylight Savings Time. United Press reporter Jack James appears to have been the first to report news of the invasion to the United States. His message went out at 9:50 a.m. Korea time, which was 8:50 p.m. U.S. Eastern Daylight Savings Time. PAIGE, THE KOREAN DECISION, supra note 22, at 81–84; PAIGE, 1950: TRUMAN’S DECISION, supra note 22.
113. PAIGE, KOREAN DECISION, supra note 22, at 88–100.
114. Albert L. Warner, How the Korea Decision Was Made, HARPER’S MAG., June 1951, at 101; Richard D. McKinzie, Third Oral History Interview with John D. Hickerson, HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/library/oralhistories/hickerson[perma.cc/6NSN-TMBQ]; see PAIGE, KOREAN DECISION, supra note 22, at 93; Doc No. 59 (Telegram from the Ambassador in Korea (Muccio) to the Secretary of State (June 25, 1950—10 a.m.)), in 7 FRUS 1950, supra note 100, at 125 [hereinafter Telegram from Muccio (10 a.m.).]
115. 2 HARRY S. TRUMAN, MEMOIRS BY HARRY S. TRUMAN 332 (1956); G. Bernard Noble’s Memorandum to G.M. Elsey on Page Entitled June 24, 1950—Subject: Acheson’s Phone Call to the President (June 29, 1951), Box 71, Folder: Korea – June 24, 1950, Harry S. Truman Administration, Subject File, George M. Elsey Papers, Harry S. Truman Presidential Library & Museum.
116. Telegram from Muccio (10 a.m.), supra note 114; Doc. No. 64 (Editorial Note), in 7 FRUS 1950, supra note 100, at 128 [hereinafter FRUS Doc. 64 (Editorial Note)]; Muccio, Muccio’s First Telegram (June 24, 1950), Box 71, Folder: Korea – June 24, 1950, Subject File, Harry S. Truman Administration, Harry S. Truman Presidential Library & Museum.
117. Doc. No. 68 (Telegram from the Ambassador in Korea (Muccio) to the Secretary of State (June 25, 1950—3:55 p.m.)), in 7 FRUS 1950, supra note 100, at 132 [hereinafter Telegram from Muccio (3:55 p.m.)].
Efforts to learn more about developing conditions in Korea were stymied because of communications difficulties. Rusk insisted on acting quickly, however, in part to affect public perception of the administration’s actions. It was of “utmost importance” that news of the decision to involve the Security Council be in the morning newspapers alongside news of the North Korean attack.\footnote{FRUS Doc. 64 (Editorial Note), supra note 116.} By midnight in Washington, D.C., State Department officials began drafting a Security Council resolution.\footnote{Telegram from Muccio (3:55 p.m.), supra note 117. Drafters included David Winhouse, deputy director of the Office of United Nations Political and Security Affairs, and Ruth Bacon of the Bureau of Far Eastern Affairs. Doc. No. 61 (Editorial Note), in 7 FRUS 1950, supra note 100, at 126.}

A later telegram for Acheson and Rusk from John Foster Dulles and John M. Allison, director of the Office of North Asian Affairs, urged the possibility of sending U.S. troops to Korea. Allowing South Korea to be “overrun . . . would start disastrous chain of events leading most probably to world war,” they warned.\footnote{Doc. No. 73 (Telegram from Sebald, Acting Political Advisor in Japan, to the Secretary of State (June 25, 1950)), in 7 FRUS 1950, supra note 100, at 140; PAIGE, KOREAN DECISION, supra note 22, at 136 n.107.} The alarmed tone to administration communications may seem understandable because of the rush of events. Only five months earlier, however, the secretary of state gave a prominent speech putting South Korea outside the American “defensive perimeter” in Asia.\footnote{Remarks by Dean Acheson Before the National Press Club, HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/library/research-files/remarks-dean-acheson-national-press-club [perma.cc/98VJ-P4QP]. Historians have questioned the impact of Acheson’s address on the invasion. James I. Matray, Dean Acheson’s Press Club Speech Reexamined, J. CONFLICT STUD., Spring 2002, at 28 (reassessing the impact of Acheson’s speech on the North Korean invasion). When I visited the War Memorial of Korea in Seoul in June 2019, however, I observed that Acheson’s speech is recounted at the beginning of a display about the origins of the war.} This led Senator Robert Taft to argue that American action “itself invited attack.”\footnote{96 CONG. REC. 9320–21 (1950).} He believed that the crisis in Korea was due both to Soviet aggression and “the bungling and inconsistent policies of the administration.”\footnote{Id.}

Trygve Lie, the first U.N. secretary general, feared that the conflict threatened the United Nations itself. The U.N. took responsibility for Korea after the World War II defeat of its Japanese occupiers and sought elections that would create a unified Korean government. When the Soviets objected to U.N. plans, a U.N. supervised election went forward in the South only in May 1948, with Syngman Rhee elected president of the new Republic of Korea. The People’s Democratic Republic of Korea, allied with the Soviet Union, was also formed after elections in the North that same month. The U.N. only recognized the legitimacy of the Republic of Korea. This is why Lie thought of the
North Korean invasion as an “aggression against a ‘creation’ of the United Nations.” He believed that a United Nations response would safeguard not only the ROK, but the very legitimacy of the U.N.

At its inception following World War II, the United Nations was heralded as the world’s best hope for preserving peace. The enforcer of peace was the U.N. Security Council, which had the power to investigate disputes that endangered international peace and security, and to take steps, including calling for the use of military force, to respond to a breach of the peace. When Truman and his advisors concluded that the appropriate course was to bring the crisis before the U.N Security Council, “[t]here [was] no evidence that they considered any other alternative,” political scientist Glenn Paige writes, “including that of doing nothing.”

Military options in Korea were at the top of Secretary of State Acheson’s agenda when he arrived at the State Department before noon on Sunday, June 25 and met with State and Defense Department officials. Meanwhile, President Truman decided to return to Washington and asked Acheson to assemble key members of his administration for an evening meeting on Korea. If the president considered Congress’s role in authorizing the use of force, he left no record of it. He did not contact congressional leaders that day, nor did he invite them to that evening’s dinner meeting. To the degree that Congress was consulted, it was only after plans had been laid.

2. Both Skepticism and Support in the U.N. Security Council and Congress

As the Truman Administration began to plan a response to the North Korean invasion, two legal questions loomed before it: Was military action in Korea lawful under international law, and did the president have the power

125. Id.
126. Stromseth, supra note 15, at 598. The Security Council had five permanent members with the power to veto substantive decisions: the Republic of China (now Taiwan), France, the United Kingdom, the United States, and the USSR. There were also six nonpermanent members, serving two-year terms: Cuba, Ecuador, Egypt, India, Norway, and Yugoslavia. UN Membership: Security Council Membership, UNITED NATIONS, https://research.un.org/en/unmembers/scmembers [perma.cc/SA6W-QRPE]; DAVID L. BOSCO, FIVE TO RULE THEM ALL 21–38 (2009).
127. PAIGE, KOREAN DECISION, supra note 22, at 98–99. While Paige’s account was written in 1968, archival records released in later years confirm his assessment.
128. See id. at 110.
129. Id. at 113.
130. See id. at 113–41, 217. On the importance of presidential leadership in decisions to intervene militarily, see ELIZABETH N. SAUNDERS, LEADERS AT WAR: HOW PRESIDENTS SHAPE MILITARY INTERVENTIONS (2011).
under the U.S. Constitution to commit American forces to war? They addressed the first question through convening the U.N. Security Council. The second question was initially forgotten.

At 2:00 p.m. Eastern Daylight Time on Sunday, June 25, approximately sixteen hours after news of the invasion reached the State Department, the U.N. Security Council met for an extraordinary emergency session at temporary U.N. headquarters in Lake Success, New York. All members were present except the Soviet Union, which was boycotting due to the U.N.’s refusal to recognize the legitimacy of the People’s Republic of China. Disagreement surfaced before the meeting began. The United States submitted a draft resolution stating that the invasion was an “unprovoked act of aggression.” Due to opposition, the language was modified to characterize it as a “breach of the peace.”

The draft resolution called upon North Korea to end hostilities and withdraw to the 38th parallel. It ended with a broad and amorphous call to action, urging that the UNSC call upon U.N. member states “to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities.”

UNSC President Sir Benegal N. Rau of India and representatives of the United Kingdom, France, Egypt, and Norway objected to use of the words “act of aggression,” and were hesitant to blame North Korea. The pushback was in part because UNSC delegates were unable to reach their foreign offices for instructions on taking a position, but also because of their view that “this was a fight between Koreans” and therefore “in the nature of a civil war.”

U.S. Representative Ernest Gross emphasized that because the conflict was “an invasion upon a State which the United Nations itself... has brought into being,” North Korea had openly defied the United Nations itself. But U.K. Representative Sir Terence Shone cautioned that the Security Council

131. Id. at 116.
132. U.N. SCOR, 5th Sess., 473d mtg. at 1, U.N. Doc. S/PV.473 (June 25, 1950); see Stromseth, supra note 15, at 622–23 n.124. A representative of the Republic of Korea also attended, at the invitation of UNSC President Sir Benegal N. Rau of India. U.N. Doc. S/PV.473, supra, at 4. Although the meeting was initially called in response to an American request, Rau ensured that the record also reflected a second request from the U.N. Commission on Korea, which had been established in 1948 to monitor the withdrawal of occupation forces from Korea and to enable U.N. support for the expected unification. Id. at 2. The Commission warned that conditions in Korea were “assuming character of full-scale war,” and urged UNSC attention. Id. at 2 n.2.
136. Id. at 8.
137. Doc. No. 78 (Memorandum of Conversations, by Mr. Charles P. Noyes, Adviser on Security Council Affairs, United States Mission at the U.N. (June 25, 1950)), in 7 FRUS 1950, supra note 100, at 144, 145.
should not “go beyond the bounds of the evidence” before it. The U.S. draft was then modified to seek recommendations from the U.N. Commission on Korea, and to call for a general cessation of hostilities, rather than only calling for North Korea to do so. It called North Korea’s action an “armed attack” instead of an “armed invasion.” The operative section calling upon members to render assistance remained unchanged. The result of the meeting was strong, but not unqualified, support for the American position. With the Security Council resolution, the United Nations formally opposed the North Korean invasion. It did not call for military action, however. To interpret it as authorizing force (as Truman and Acheson later would) ignores the British warning that the UNSC should not “go beyond the bounds of the evidence.”

The reluctance to blame North Korea, the caution about going beyond the evidence, and the circumstances of a later UNSC resolution authorizing force show that the June 25 resolution was not intended to authorize full-scale war.

Members of Congress raised concerns about the administration’s actions within the first twenty-four hours after news of the invasion reached Washington. While the U.N. Security Council was meeting, two senators who served as liaisons between the assistant secretary for East Asian Affairs and the Senate met for two hours with Livingston T. Merchant, deputy assistant secretary for the Far East. Senators Elbert D. Thomas, Democrat from Utah, and H. Alexander Smith, Republican from New Jersey, were “extremely interested and disturbed” by the news from Korea, and they were “anxious to have copies” of the draft UNSC resolution. It appears, however, that no members of Congress were able to review the resolution until after the UNSC passed it. Thomas wanted clarity on “the exact legal status of Korea and the nature of our rights, responsibilities and obligations, legal and moral.” The conflict was legally a civil war, not an act of aggression, he suggested, and he was also “inclined to

139. Id. at 9.
140. Id. at 14.
141. Id. at 7–8, 14. Djura Nincic, Yugoslavian deputy representative to the U.N. Security Council, supported the need for action, but agreed with the U.K.’s concern about not “exceeding the bounds of the evidence.” Id. at 15. He believed that a representative of the North Korean government should be heard before North Korea was blamed as an aggressor. Nincic ultimately supported only one clause stating that the UNSC “[c]alls for the immediate cessation of hostilities.” Id. at 17. He abstained on the rest and on approval of the resolution as a whole. Id. at 16–18.
142. See id. at 9.
143. See infra Section II.A.3.
144. S. Doc. No. 247 (1950); Memorandum from Livingston T. Merchant, Deputy Assistant Sec’y for Far E. Affs. to Dean Rusk, Assistant Sec’y of State for Far E. Affs. (June 25, 1950) (on file with the U.S. National Archives, at 795.00/6-2550, 1950-54 Central Decimal File, RG 59).
146. Memorandum from Livingston T. Merchant, supra note 144, at 2.
think that there is widespread Communist sympathy in South Korea.”  

There had, in fact, been opposition to the Rhee government in South Korea, which the U.S.-backed regime brutally suppressed. Thomas also thought that the Senate Foreign Relations Committee should have been consulted before ammunition was provided or an evacuation plan put into effect. Senator Smith appeared to support the administration’s actions; however, both senators said, in effect: “Of course you are not thinking of putting U.S. troops in Korea.” The historical record does not reflect Merchant’s reply.

That evening, Truman gathered key advisors, including military leaders, together for a solemn dinner and meeting at Blair House, the president’s temporary residence during White House repairs. No members of Congress were present. In keeping with administration assumptions that the attack was a Soviet Cold War tactic, attention turned to whether Russia was ready for war, whether it wanted war, and the strength of Soviet forces. The group agreed on the need to “draw the line somewhere,” as General Omar N. Bradley, chairman of the Joint Chiefs of Staff, put it, and it favored reliance on air and naval power. Bradley questioned whether ground troops, especially in large numbers, would be wise. Secretary of Defense Louis A. Johnson opposed using ground troops, and some others agreed that ground troops were inadvisable. Truman wondered whether Soviet bases in the Far East could be knocked out. “[T]his might take some time,” replied General Hoyt S. Vandenberg, U.S. Air Force chief of staff, but “it could be done if we used A-Bombs.”

Truman approved multiple actions: sending arms, equipment, and a survey group to Korea, and a fleet to Japan. He also requested an assessment of where the Soviets might hit next, and he directed the Air Force to develop plans to eliminate Soviet Far East air bases. “[W]e are working entirely for the United Nations,” he emphasized, even though the U.N. itself had not called for military force.

In U.S. newspapers the next morning, the news was not yet alarming. “U.N. Calls for Cease Fire in Korea,” was the top New York Times headline. This validated Rusk’s idea that early Security Council action could aid the way Korea news was reported. At the State Department, however, the picture was

147. Id.

148. See HWANG, supra note 12, at 26–117.

149. Memorandum from Livingston T. Merchant, supra note 144 (emphasis added).

150. ROBERT J. DONOVAN, TUMULTUOUS YEARS 21 (1982).


152. Id. at 2.

153. Id. at 4.

154. Id. at 5.


156. See supra note 116 and accompanying text.
grim. A telegram from Mucci reported “rapid deterioration and disintegration.”

He was “immediately starting evacuation of all females toward south.” Acheson reached out to key members of Congress whose support would be helpful. In spite of troubling news, he told them that the situation in Korea was under control. Senator Alexander Wiley asked whether U.S. policy remained sending aid only, and not U.S. forces. This matter was before the president, Acheson told him, though no American troops had yet been committed.

President Truman explained the crisis to the American people that morning, noting that the U.N. Security Council had acted speedily to order North Korea to withdraw, and that he had consulted with the secretaries of State and Defense, and the Joint Chiefs of Staff. Truman emphasized: “Those responsible for this act of aggression must realize how seriously the Government of the United States views such threats to the peace of the world. Willful disregard of the obligation to keep the peace cannot be tolerated by nations that support the United Nations Charter.”

Although the administration quickly conceptualized the conflict as a battle between Cold War superpowers, some members of Congress wondered whether the conflict was a civil war. Democratic Senator Tom Connally, chair of the Senate Committee on Foreign Relations, declared that “some Senators speak as if they wanted to declare war tomorrow.” Members of Congress “want to know what’s in the wind before we go popping off.” He urged the Senate to wait until the facts were in. Others, however, reflected the Cold War framing of the Truman Doctrine—the idea that U.S. domestic security was at stake in conflicts in distant regions. Republican Senator William F. Knowland of California thought that loss of the Republic of Korea would be

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157. Doc. No. 94 (Telegram from the Ambassador in Korea (Mucci) to the Secretary of State (June 26, 1950—11 p.m.), in 7 FRUS 1950, supra note 100, at 170.
158. Id.
160. Id.
162. 96 CONG. REC. 7, 9155–60 (1950).
164. Id.; 96 CONG. REC. 7, 9160 (1950).
165. See generally CRAIG & LOGEVALL, supra note 106 (describing the politics and culture of the Cold War era).
“catastrophic,” for “[i]f this nation is allowed to succumb to an overt invasion of this kind, there is little chance of stopping communism anywhere on the continent of Asia.” 166 Ranking member of the Senate Armed Services Committee, Georgia Senator Richard Russell, suggested that authority was already available under existing law to send South Korea whatever it needed.167 Others urged caution, however. With facts on the ground not yet clear, and little to go on other than newspapers and the president’s statement, senators loosely speculated about core issues that would affect their future role in powerful ways: whether what was happening in Korea was a “war” or something else; whether joining the U.N. committed the United States to use force when the Security Council called for it; and whether historical precedents already established a practice enabling presidents to order military action on their own.168 Members of Congress knew, of course, that declaring war was Congress’s job. For many it was not yet clear, however, whether a war declaration was constitutionally required.169

As the mood in Washington darkened, President Truman again gathered key advisors together at Blair House on the evening of June 26.170 An urgent focus was the need to protect Americans evacuating from Seoul, including using the military to protect airports and departing ships.171 This kind of action was within the president’s traditional commander-in-chief power.172 The meeting quickly went beyond these defensive measures, however. Acheson argued that it was time for the Navy and Air Force to have an “all-out order” that would “waive all restrictions on their operations in Korea and to offer the fullest possible support to the South Korean forces.”173 This would give the South Koreans, pummeled by tanks and columns of DPRK soldiers, a fighting chance. The president agreed to this broader U.S. military action.174 Secretary Pace and General Vandenberg asked whether U.S. action, including flights,

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166. 96 CONG. REC. 7, 9158 (1950).
167. Knowles, supra note 163.
168. 96 CONG. REC. 7, 9154–60 (1950).
169. Id.; BLOMSTEDT, supra note 20, at 27–35.
170. Doc. No. 105 (Memorandum of Conversation by the Ambassador at Large (Jessup) (June 26, 1950)), in 7 FRUS 1950, supra note 100, at 178 [hereinafter Memorandum of Conversation from Jessup (June 26, 1950)].
171. See id.
172. See Stromseth, supra note 15, at 597 (noting that most scholars agree on the president’s ability to “use force ‘to repel sudden attacks’ on the United States or its armed forces”) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., rev. ed. 1937)).
173. Memorandum of Conversation from Jessup (June 26, 1950), supra note 170, at 179 (emphasis added).
174. Id.
could cross above the 38th parallel.\textsuperscript{175} No, the president responded. “Not yet.”\textsuperscript{176}

Only after Truman agreed to U.S. military action did Acheson mention the idea of basing it on the U.N. Security Council resolution, “if it was considered useful.”\textsuperscript{177} But the Security Council, acting on the basis of very preliminary reports, had not authorized the use of force, and members had pressed the importance of not acting beyond the evidence.\textsuperscript{178} Acheson also proposed that Truman might want to talk to Senator Connally and other members of the House and Senate to “tell them what had been decided.”\textsuperscript{179} The president’s decision to go to war required more than consultation, however. An “all-out order” to commit the United States to join the ROK in battle against North Korean forces was an order to go to war. In keeping with the understanding of constitutional powers at the time, it required an affirmative vote in both houses of Congress.\textsuperscript{180}

The president raised the question of whether the National Guard should be mobilized.\textsuperscript{181} That would require asking Congress for funding. He proposed that the Joint Chiefs should take this up.\textsuperscript{182} “I don’t want to go to war,” Truman added, even as his actions set war in motion.\textsuperscript{183}

That night, following the meeting, Truman gave General MacArthur the go ahead to use the Navy and Air Force to “offer fullest possible support to South Korean forces.”\textsuperscript{184} This meant the use of U.S. military force: “All restrictions which have previously prevented the full utilization of the U.S. Far East Air Forces to support and assist the defense of the South Korean territory are lifted for operations below the 38th Parallel.”\textsuperscript{185} Military targets were

\begin{itemize}
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id. Truman did approve Acheson’s recommendations to send the Seventh Fleet to Formosa (now Taiwan), increase U.S. troops in the Philippines, and send a military mission to Indochina to prop up the French colonial regime. These broader actions were consistent with NSC 68, the administration’s framing of global security that provided a logic for global Cold War interventions. Id. at 179–80; HOGAN, supra note 92, at 291–312.
\item \textsuperscript{177} Memorandum of Conversation from Jessup (June 26, 1950), supra note 170, at 179.
\item \textsuperscript{178} See supra notes 131–142 and accompanying text; accord Stromseth, supra note 15, at 621.
\item \textsuperscript{179} Memorandum of Conversation from Jessup (June 26, 1950), supra note 170, at 182.
\item \textsuperscript{180} U.S. CONST. art. I, § 8, cl. 11. The broad understanding of the commander-in-chief power informing contemporary unilateral uses of force was not fully in place in 1950. Instead, Truman’s Korean War actions played a significant role in developing the legal basis for it. See infra text accompanying note 400 through the end of Section III.B.1.
\item \textsuperscript{181} Memorandum of Conversation from Jessup (June 26, 1950), supra note 170, at 183.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Teleconference with MacArthur, 270217Z (June 26, 1950), at 1, Box 71, Folder: Korea – June 26, 1950, Harry S. Truman Administration, Subject File, George M. Elsey Papers, Harry S. Truman Presidential Library & Museum.
\item \textsuperscript{185} Id.
\end{itemize}
“cleared for attack.” The goal was to eliminate the North Korean threat to the South. The justification was to support ROK forces in keeping with the Security Council resolution, even though the Security Council would not authorize the use of armed force until it passed a second resolution the following day.

When General MacArthur received his orders, he sought to publicize them in Korea, believing that if South Koreans knew that the United States was backing them with military force, it would boost morale. Under Secretary of State Webb objected that there should be no announcement until after the president notified members of Congress. They reached a compromise, however. The news was broadcast only in the Korean language. In this way, Koreans learned of the president’s decision to intervene militarily before Congress or the American people.

Truman’s decision to use force in Korea was thought at the time to be momentous. Under his authority, the United States had dropped atomic bombs on two Japanese cities in World War II. Despite this, Truman believed that Korea was the “toughest decision” of his presidency. Yet he went forward without deep consultation with Congress or even with his full Cabinet. Truman’s next task, as he saw it, was to inform members of Congress and the American people about what was in store. He met with a group of congressional leaders on Tuesday morning, June 27, emphasizing that, as his close aide George Elsey later recorded, “[i]f we were to let Asia go, the Near East would collapse and no telling what would happen in Europe.” His assessment rested on his erroneous assumption of Soviet principal initiative behind the Korean conflict. The president explained that he ordered U.S. military action in Korea for “as long as the Koreans put up a fight and gave us something we could support.”

186. Id.
187. Id.
188. See infra Section II.A.3.
189. PAIGE, THE KOREAN DECISION, supra note 22, at 184–85.
190. Id. at 185.
191. Id.
192. Id.
193. Id. at 186.
194. See Warner, supra note 114, at 99.
195. TRUMAN, supra note 115, at 463.
197. Id. at 1, 4. Truman also emphasized his broader military focus in Asia, arguing that “it was equally necessary for us to draw the line at Indo-China, the Philippines, and Formosa.” Id.
198. See id. at 4, 8.
199. Id. at 4 (emphasis removed).
Senator Wiley asked whether the action was intended to carry out the U.N. Security Council resolution, and Truman said yes. Senator Alexander Smith pressed the question again, asking whether it “was actually pursuant” to the resolution. Truman assured him that everything the United States was doing was “in support of the Security Council resolution.” Another Security Council meeting was scheduled for that afternoon. If the Russians were present and vetoed a second resolution, Acheson explained that “we would go right ahead—without interruption—and supply assistance to Korea under the terms of the Security Council resolution of Sunday.” In other words, for Acheson and the administration, the tentative and limited action the UNSC itself thought it had taken on June 25 could be read to extend to full military intervention. The language of that resolution called upon member states to “render every assistance” in executing the call for cessation of hostilities and North Korean withdrawal, but members had urged the need for caution and not acting ahead of the evidence before them. The context of both meetings, and the arguments over the June 25 resolution, contradict the argument that the resolution authorized substantial military force.

After this meeting with Congress members, Truman released a public statement emphasizing that North Korea had failed to heed the June 25 U.N. Security Council resolution, and that the U.N. members were pledged “to render every assistance” to see that the resolution was executed. “In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support.” He cast North Korean actions in a broad Cold War lens, arguing that “communism has passed beyond the use of subversion to conquer independent nations and will now use armed invasion and war.” Missing from this conceptualization was the fact that Korea had been divided by the superpowers, and Koreans on both sides of the border yearned for reunification. The local dimensions of the conflict were ignored.

When Truman’s statement was read aloud in both houses of Congress, members of the House of Representatives stood and cheered. The House later voted by an overwhelming majority (315-4) to extend the military draft and

200. Id. at 5.
201. Id. at 6.
202. Id.
203. Id.
204. Id.
205. S.C. Res. 82, ¶ 3 (June 25, 1950).
206. See supra text accompanying notes 136–137.
207. Statement by the President on the Situation in Korea, 1 PUB. PAPERS 492 (June 27, 1950).
208. Id.
209. Id. Truman also informed the American people about steps he had ordered regarding Formosa, the Philippines, and Indochina. Id.
210. See supra notes 94–97 and accompanying text.
allow Truman to call up members of the National Guard and the reserves. With American troops on their way into battle, the political context had shifted dramatically, helping to turn skepticism into patriotic support. Nevertheless, some senators were skeptical. When Senator Lucas read Truman’s statement, Senator James P. Kem, Republican from Missouri, interrupted. Had the president “arrogated to himself the authority of declaring war?” he asked. Lucas replied that Senator Kem could interpret the statement however he wanted, but presidents had previously deployed forces without authorization from Congress 126 times, essentially making a gloss-of-history argument that past presidential acts revealed the scope and nature of presidential power. The Korean War would solidify this argument, and it would be an important basis for unilateral presidential war power in later years. This is in spite of the fact that the 126 precedents paled in comparison with U.S. actions in Korea—some of the previous acts involved as little as sending a small contingent to guard a U.S. embassy. This shows the way historical gloss has been expanded uncritically. The leap from minor action to large-scale war in Korea would then be normalized as precedent.

3. The U.N. Security Council Authorizes Force After the Fact

All eyes were on the U.N. Security Council when it convened at 3:00 p.m. on June 27. The atmosphere reflected the historic nature of the meeting: the first time the UNSC would consider authorizing the use of force. 1,200 observers packed into the assembly room, and another 5,000 were turned away due to lack of space. The U.N. Commission on Korea had reported on June 26 of the “rapid deterioration” in South Korea, and recommended that the Council either invite the North and South Koreans to negotiate peace with a neutral mediator, or ask U.N. members to mediate it. The Yugoslavian delegate, Ales Bebler, agreed with this approach. “We must not and we cannot, after only two days of fighting, abandon all hope that the two parties involved will at last understand the interests of their own people and of international peace,” he argued. It was too early to know whether the DPRK would refuse to negotiate.

213. Id.
214. See infra Section III.B.1.
215. Authority to Repel the Attack in Korea H.R., supra note 24, at 67–73.
219. Id. at 6.
220. Id. at 7.
Warren R. Austin, U.S. Ambassador to the U.N., insisted that the United Nations was “confronted today with the gravest crisis in its existence.” To meet it, Austin offered an American draft resolution emphasizing that North Korea had defied the first UNSC resolution, had not ceased hostilities and withdrawn, and that the Republic of Korea had appealed to the U.N. for immediate assistance. The resolution recommended that U.N. members “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security.” This call for action was the “logical consequence” of the June 25 resolution, and its defiance by North Korea, Austin argued.

The President of the Council, Sir Benegal N. Rau of India, remarked that the issues before the Council that evening were “more momentous” than the night before. The Council had never approved an enforcement action before, and U.S. officials said that the resolution “would authorize the United Nations or any other member of the United Nations to send troops if it wished to do so.” Rau and other delegates were surprised that the Americans wanted to “proceed with a resolution of such vigor” especially since the voting was rushed. Rau did not receive the proposed resolution until 11:30 that morning, just thirty minutes before Truman publicly announced that he was committing U.S. forces to Korea. Some delegates received it when the meeting began.

In spite of its urgency, this crucial meeting was then suspended for five hours to give Rau and the Egyptian delegate time to receive voting instructions from their countries. Time differences and communication difficulties frustrated this effort. Truman’s decision to send U.S. military assets to Formosa and Indochina had also complicated the decision for Indian leaders. They wished to oppose aggression, but “[t]here seemed to be merging of problem resistance to aggression with that of extension of assistance to certain forces which millions of Asians including many Indians considered to be imperialistic, colonial or reactionary,” Loy W. Henderson, U.S. Ambassador to India, explained in a telegram. Very late that evening, Austin pressed for a vote, rather than waiting for the Indian and Egyptian governments to weigh in.

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221. Id. at 3; PAIGE, KOREAN DECISION, supra note 22, at 203.
223. Id. at 3–4.
224. Id. at 16.
226. Id.
227. See id.
228. Id.
229. Doc No. 138 (Telegram from the Ambassador in India (Henderson) to the Secretary of State (June 28, 1950—2 p.m.)), in 7 FRUS 1950, supra note 100, at 218, 218.
230. PAIGE, KOREAN DECISION, supra note 22, at 206.
strongly supported the American draft resolution. The Council passed it with seven votes in favor, one against (Yugoslavia), Egypt and India not voting, and the USSR absent.\textsuperscript{231} With this vote, about twenty-four hours after President Truman ordered the use of military force in Korea, the U.N. Security Council authorized it. Secretary General Lie would later say that the timing did not trouble him, and that Truman’s action “was fully within the spirit” of the June 25 resolution.\textsuperscript{232} The idea that the use of force in Korea was within the spirit of the first UNSC resolution is belied, however, by the reluctance of India and Egypt to sign on to a “momentous” change without consultation and by the sense of the meeting that it was a historic occasion. It also raises the question of whether Austin’s push to rush ahead, rather than wait even for the Security Council president to have a chance to potentially sign on, was driven in part by a need to keep the Council aligned with actions already underway.\textsuperscript{233}

By this time, American planes were already bombing and strafing targets in Korea. MacArthur established a “small advanced echelon” in the country. No American casualties had yet been reported. Seoul was quiet, as the city emptied.\textsuperscript{234}

4. “There is no legal authority for what he has done”

Although authorized after the fact by the United Nations, was Truman’s decision to use force in Korea constitutional?\textsuperscript{235} On Wednesday, June 28, Senator Robert Taft took up this question on the Senate floor.\textsuperscript{236} Truman had “no legal authority for what he has done,” the senator argued.\textsuperscript{237} He had “brought

\begin{itemize}
\item \textsuperscript{231} Id. at 202, 206.
\item \textsuperscript{232} Id. at 206.
\item \textsuperscript{233} The UNSC followed with a third resolution on July 7 indicating that nations contributing forces and other assistance should supply them to a unified command under the direction of the United States and authorizing the United States to name its commander. It essentially legitimized the command structure in place since Truman’s June 25 order. The Soviet Union was again absent. Egypt, India, and Yugoslavia abstained. S.C. Res. 84 (July 7, 1950); U.N. SCOR, 5th Sess., 476th mtg. at 8, U.N. Doc. S/PV.476 (July 7, 1950). Going forward, even though military action was in support of the United Nations, Secretary General Lie was intentionally “no more than a post office” in communications with U.N. members offering assistance. Doc. No. 141 (Memorandum of Conversation, by the Deputy United States Representative on the United Nations Security Council (Ross) (June 28, 1950)), in \textit{7 FRUS 1950, supra} note 100, at 221.
\item \textsuperscript{235} Scholars disagree on the question of whether Truman’s actions were unconstitutional. \textit{See, e.g.}, \textit{Louis Fisher, Presidential War Power} 95–99 (3d rev. ed. 2013) (arguing that Truman’s actions were unlawful); \textit{Zeisberg, supra} note 13, at 124, 134–35 (arguing that members of Congress were sufficiently supportive of the war through other legislative actions such that Congress and the president coproduced constitutional power in the Korean War). The most thorough account of the impact of the U.N. Security Council resolutions on Truman’s legal authority is Stromseth, \textit{supra} note 15, at 621–40, arguing that Truman’s action was unlawful.
\item \textsuperscript{236} 96 CONG. REC. 9319–23 (1950).
\item \textsuperscript{237} Id. at 9320.
\end{itemize}
about a de facto war . . . without consulting Congress and without congres-
sional approval.” The president’s action had profound implications. If Tru-
mans could unilaterally intervene in Korea, “he can go to war in Malaya or
Indonesia or Iran or South America.” Past presidents had used force to pro-
tect Americans and American interests, Taft noted, “but I do not think it has
been claimed that, apart from the United Nations Charter or other treaty ob-
ligations, the President has any right to precipitate any open warfare.” If the
Korean intervention went forward “without protest, at least from this body,
we would have finally terminated for all time the right of Congress to declare
war, which is granted to Congress alone by the Constitution of the United
States.”

Taft would have supported a joint resolution in support of intervention in
Korea if one had been introduced. His dispute was not about the use of force
but the question of presidential power. The fact that Taft would have sup-
ported military intervention might make his objection appear merely acade-
mic. History would bear out the senator’s concern, however, as Korea would
become a leading precedent for American presidents’ unilateral power to go
to war.

As American forces went into battle, most members of Congress closed
ranks with the president. The acquiescence to Truman’s action is interpreted
by some scholars as an example of the production of constitutional authority,
with both branches of government agreeing that Truman had lawful power to
act. But political scientists have shown that the public and lawmakers tend
to rally behind the president at the beginning of war, so that Truman’s actions
stacked the deck in his favor. There are also many reasons that members of
Congress have a tendency to soften their public differences once troops are
under fire: a desire to focus on supporting the troops, a wish not to aid the
enemy or undermine the military effort, the political calculus that voters might
think such action was unpatriotic, and more. In the context of the Korean
War, any patina of solidarity was deeply fractured when it came to the under-
lying question of whether the president’s actions were lawful. Truman’s aides
had to grapple with this problem.

Behind the scenes, Taft’s criticism was troubling enough to require more
thought. Truman Administration staff went to work, producing multiple

238. Id. at 9322.
239. Id. at 9322–23.
240. Id. at 9323.
241. Id. A focus of Taft’s ire was Acheson and his speech putting Korea outside of an Amer-
ican “defensive perimeter” in Asia. Id. at 9321–22; see Remarks by Dean Acheson Before the Na-
tional Press Club, supra note 121.
242. See infra Section III.B.
243. See, eg, ZEISEBERG, supra note 13, at 124, 134–35.
244. See generally ADAM J. BERINSKY, IN TIME OF WAR: UNDERSTANDING AMERICAN
PUBLIC OPINION FROM WORLD WAR II TO IRAQ (2009).
drafts of a memo on the legal basis for the president’s action. One version had “Anti-Taft” written across the top.245 This signaled both that some believed Taft’s criticism required a response and that political contestation continued to inform Truman’s reluctance to seek a congressional authorization that would have solidified the legal authority for his action.

When reporters questioned Truman on Korea at a Thursday, June 29, press conference, he declined to comment on whether ground troops would go to Korea and whether the atomic bomb would be used.246 “Mr. President,” a reporter asked, “everybody is asking in this country, are we or are we not at war?”247 Truman answered: “We are not at war.”248 Could they quote him that the country was “not at war . . . ?” someone asked.249 “Yes,” he answered.250 “We are not at war.”251 Instead it was a U.N. response to a “bandit raid.”252 A reporter pressed: “[W]ould it be correct . . . to call this a police action . . . ?” Truman agreed.253 He would later adhere to this label, refusing to call the conflict a “war.”254 The next day, June 30, Truman announced that he had authorized Air Force attacks on North Korea and a naval blockade of the entire coast, and that he had approved General MacArthur’s use of ground troops.255

During June 25–30, the crucial days at the start of the war, the president did not seriously discuss whether congressional authorization was needed, according to Truman aide George Elsey, who closely recorded the events. Elsey thought that “[t]he real time for a resolution would have been on June 27, but apparently nobody thought of it at that time.”256 Instead, “[t]he President and

245. Multiple drafts of this memo can be found in Box 73, Folder: Korea – Presidential Power to Send Troops Abroad, 1951, Harry S. Truman Administration, Subject File, George M. Elsey Papers, Harry S. Truman Presidential Library & Museum.


247. Id.

248. Id.

249. Id.

250. Id.

251. Id.

252. Id.

253. Id.


256. Memorandum from George M. Elsey, Admin. Assistant to the President, to Sen. Alexander H. Smith—Subject: Congressional Resolution (July 16, 1950), Box 71, Folder: Korea – July 1950, Harry S. Truman Administration, Subject File, George M. Elsey Papers, Harry S. Truman Presidential Library & Museum (emphasis added). There was robust discussion in early July by
his staff, and his other advisers, were too busy thinking of military action and United Nations action to try to cover up their tracks with Congressional resolutions. The President’s motivation was to stop the aggression, not to prepare for future political skirmishes.” Elsey’s recollections capture the attitude within the administration regarding Congress’s role. They treated Congress, the president’s constitutional partner charged with authority to declare war, as an adversary. The function of congressional action was to “cover up their tracks”—to legitimize the president’s course of action—not to debate and decide whether to commit U.S. forces to war.

5. The “Police Action”

What did the nonwar “police action” look like? In Yeongwol, southeast of Seoul, refugees with large bundles on their backs crowded the road as they fled from the mountainous area of Pyeongchang. Fifteen-year-old Shin Yeongyeo saw DPRK heavy tanks passing by, followed by military officers on horseback, and then troops on foot. Bullets flew past and she could have easily been killed. She became fatalistic. Some were destined to live, and others to die.

The day after Truman told the press that the Korean conflict was not a war, an unexpected phone call awakened Lieutenant Colonel Charles B. Smith, a thirty-four-year-old infantry officer, who was sleeping in his quarters near Kumamoto, Kyushu, Japan. General John H. Church ordered Smith and his battalion to South Korea. They would be the first American ground troops deployed in the Korean War. Their orders were to stop the North Koreans as far north of Busan, South Korea, as possible. “All we need is some

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Truman and his advisors on whether to seek congressional authorization, but the president was reluctant to do so. See BLOMSTEDT, supra note 20, at 35–37.
260. See A Story Where She Was Treated with Contempt Because She Was a Woman Even During War, supra note 258.
261. See id.
262. ROY E. APPLEMAN, SOUTH TO THE NAKTONG, NORTH TO THE YALU (JUNE–NOVEMBER 1950), at 60 (1960).
263. Id. at 60–61.
264. Id.
265. Id. at 60.
men up there who won’t run when they see tanks,” explained the general.266 But Smith’s troops were young and inexperienced and were ordered into service without antitank mines that would have been effective at stopping tanks.267 The U.S. military had none in Korea at the time.268

On July 5, Smith and his troops were dug in at Osan, about twenty-five miles south of Seoul.269 They saw a long line of armored tanks approach in the distance.270 When they were in range, U.S. artillery fired but the shells simply bounced off.271 The initial skirmish led to the first U.S. combat death of the war.272 After the tanks, a seemingly endless line of North Korean troops advanced.273 Air support was ruled out because of bad weather.274 The Americans were outnumbered, and General MacArthur would later call the action an “arrogant display of strength” that might fool the enemy.275 Forced to withdraw, they had to leave behind their dead and seriously wounded, and one medic who volunteered to stay behind.276 From Smith’s infantry battalion, 150 men were killed, wounded, or missing.277

As the casualty numbers climbed, soldiers and their families reached out to Robert Taft. “Why doesn’t someone tell the people what it’s really like over there[?]” a soldier asked.278 “Do you have a son in Korea, outnumbered 10 to 1?” asked a father.279 “No one knows what [it’s] all about and how hard it is unless you have one of your own among the missing or among the dead,”

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266. Id. at 61.
267. Id. at 61, 72.
268. Id.
269. Id. at 65.
270. Id. at 68.
271. Id. at 70.
272. See id. at 69.
273. See id. at 72.
274. Id. at 74.
275. Id. at 73; Richard H. Rovere & Arthur Schlesinger Jr., General MacArthur and President Truman 117 (1992).
277. Id. at 75; Janet G. Valentine, To the Pusan Perimeter, in The Ashgate Research Companion to the Korean War, supra note 12, at 321, 332.
wrote the mother of a soldier. In the end, 103,284 American service members were injured, and 54,246 lost their lives in the war. The number of civilian deaths was estimated to be over 1 million. Death is not the only human casualty of war, however, for the impact of war lives on in the bodies and minds of those who are injured.

6. The Afterthought of Legal Authority

The Korean War was well underway before the Truman Administration fully developed a theory of its legality. The State Department and the White House turned more attention to the legal basis for the president’s action in early July 1950, but the administration again failed to act. Some at State supported seeking a congressional resolution. Differences of opinion about how to proceed led the president to convene another Blair House meeting on the afternoon of July 3. Members of Congress wanted to weigh in, Acheson reported, and they were frustrated that the president had only informed selected leaders. Both the State Department and the Department of Defense had prepared draft resolutions. Both drafts condemned North Korea and stated that it was “the sense of the Congress that the United States continue to take all appropriate action.” They differed significantly in scope. The State Department draft supported action “with reference to the Korean situation to restore and maintain international peace and security,” in keeping with the U.N. Charter and the UNSC resolutions. The Department of Defense resolution


283. [Id.]


285. See Doc. No. 205 (Memorandum of Conversation, by the Ambassador at Large (Jessup) (July 3, 1950, 4:00 p.m.)), in 7 FRUS 1950, supra note 100. at 286 [hereinafter Memorandum of Conversation from Jessup (July 3, 1950)]. Present at the meeting were Acheson and selected members of the cabinet, Rusk and Jessup, Special Assistant W. Averell Harriman, the postmaster general, and Senator Lucas. Attorney General J. Howard McGrath was not at the meeting. [Id.]

286. [Id.]


288. Draft Resolution Proposed by Department of State, supra note 287.
was breathtakingly broad, supporting action to “restore and maintain international peace and security in the Pacific area.”  

289 This would have authorized the use of force in Formosa, the Philippines, and Indochina.

Acheson explained that in the State Department draft resolution they attempted to “avoid anything which would give rise to debate.”  

291 It would “condemn the action by the United States rather than the action by the President.”  

292 Acheson urged Truman to go before Congress, for members of Congress were restless over his unilateralism.  

293 In contrast, General Omar Bradley, chairman of the Joint Chiefs of Staff, preferred to avoid a long congressional debate.

294 Truman asked Senator Lucas, who seemed to have been invited for the purpose of serving as the voice of Congress, what he thought about the resolution.  

295 Lucas questioned its advisability. If Truman addressed Congress, it “might sound as if the President were asking for a declaration of [ ]war.”  

296 “This was exactly the point,” Truman replied, adding that his actions were based on his powers as commander in chief of U.S. forces in the Far East.  

297 He said that it was important “to be very careful” so that he “would not appear to be trying to get around Congress and use extra-Constitutional powers.”  

298 Previous presidents, including Presidents Woodrow Wilson and Franklin D. Roosevelt, had asked Congress to pass war resolutions, but Truman thought that “it was up to Congress,” not the president, to call for one.  

299 Rusk emphasized that support from Congress would help with foreign opinion, since critical remarks by Taft and Wherry had been reported abroad.  

300 As the meeting came to a close, however, it was clear that the president had found the support he was looking for against the need to seek congressional backing.  

301 See, e.g., Franklin Roosevelt, Joint Address to Congress Leading to a Declaration of War Against Japan (Dec. 8, 1941); Woodrow Wilson, Joint Address to Congress Leading to a Declaration of War Against Germany (Apr. 2, 1917); James K. Polk, War Message to Congress (May 11, 1846).

302 See id. at 290–91.
decided to postpone further consideration. Only Secretary Snyder emphasized that they were “going along a new road and making a historical record.” The historic Korean War shift in the war powers continued, more through indecision than action.

By early July, a new reason to avoid a vote was that “it was undoubtedly too late to get a resolution through by anything like a unanimous vote,” Elsey told Senator Alexander Smith. Congressional dissent had not stopped a vote in favor of the World War I war declaration, and even the declaration for World War II had one dissenter. Truman appears to have viewed congressional authorization as a display of political affirmation, not a grant of constitutional power.

This is why the contemporaneous statement of legal authority for presidential power in Korea was not a war declaration, a congressional resolution, or even a formal legal opinion by the attorney general. It was a 1950 State Department memo stressing the president’s commander-in-chief power to send U.S. armed forces abroad. Oddly, when published in the Department of State Bulletin, five paragraphs near the beginning were left out. The missing paragraphs traced events from the frantic days in late June, showing that the president first ordered the use of force, and subsequently the U.N. Security Council authorized it. Without the timeline, the fact that Truman acted without UNSC authorization to use force is obscured. Contemporary legal scholars and the OLC cite to the excerpted version of the memo without noting the excision.

303. Id. at 291.
304. Id. at 289.
305. Memorandum from George M. Elsey to Sen. Alexander H. Smith, supra note 256.
306. FISHER, supra note 235, at 67, 78.
307. See Authority to Repel the Attack in Korea Bulletin, supra note 24. A manuscript copy of the original appears in Box 71, Folder: Korea – July 1950, Harry S. Truman Administration, Subject File, George M. Elsey Papers, Harry S. Truman Presidential Library & Museum. The unexcerpted version was published as Authority to Repel the Attack in Korea H.R., supra note 24.
308. Compare Authority to Repel the Attack in Korea Bulletin, supra note 24, at 173, with Authority to Repel the Attack in Korea H.R., supra note 24.
309. See Authority to Repel the Attack in Korea H.R., supra note 24, at 61–62 (detailing the timing of Truman’s actions).
Although claiming that Truman sought to further the objectives of both Security Council resolutions, the memo argued that the actual source of authority was the president’s own constitutional power. It listed eighty-five instances when American forces were deployed largely without congressional authorization.\textsuperscript{311} They were identified as “peacetime” examples, however, and were minuscule compared to the Korean War. For example, U.S. troops were sent to Puerto Rico in 1824 “[t]o atone for insult to the flag and procure apology,” and to Haiti in 1888 to free a captured American merchant vessel.\textsuperscript{312} More significant, but still limited, actions included President Woodrow Wilson’s order sending 4,800 soldiers to Mexico for eleven months to pursue Pancho Villa in 1916,\textsuperscript{313} and the use of 1,300 U.S. Marines for eight years to suppress a revolution and establish a military government in the Dominican Republic that same year.\textsuperscript{314} Nearly two million American troops were deployed in the three years of the Korean War, and there were at least 27,607 fatal casualties.\textsuperscript{315} Notably left off the list was the most pertinent example: the Philippine-American War in 1899–1902, in which the United States fought a bloody undeclared war against the Philippine independence movement after the Spanish-American War.\textsuperscript{316}

Even though these limited deployments did not compare with the massive U.S. use of force in Korea, the excerpted memo, and its list of “peacetime” deployments, became a central authority when future presidents followed President Truman and bypassed Congress to take the country to war.\textsuperscript{317}

As the devastation in Korea mounted, Truman continued to call the conflict a “police action” or the “Korean Situation,” not a “war.”\textsuperscript{318} Truman Administration file folders about disabled soldiers were labeled “Korean

\begin{itemize}
  \item \textsuperscript{311} See Authority to Repel the Attack in Korea Bulletin, \textit{supra} note 24, at 177–78.
  \item \textsuperscript{312} \textit{Id.}
  \item \textsuperscript{313} \textit{Id.} at 178; JULIE IRENE PRIETO, THE MEXICAN EXPEDITION 1916-1917, at 7–8 (2016); JOHN J. PERSHING, PUNITIVE EXPEDITION REPORT (1916), https://www.paperlessarchives.com/FreeTitles/PanchoVillaCaptureExpeditionPershingReport.pdf [perma.cc/KRP3-WTGA].
  \item \textsuperscript{314} Authority to Repel the Attack in Korea Bulletin, \textit{supra} note 24, at 178; see MAX BOOT, THE SAVAGE WARS OF PEACE 169 (rev. ed. 2014).
  \item \textsuperscript{315} DAVID A. BLUM & NESE F. DEBRUYNE, CONG. RSCH. SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 8 (2020); DEF. MANPOWER DATA CTR., DEPT OF DEF., KOREAN WAR - CASUALTY SUMMARY (2008), http://www.koreanwar-educator.org/topics/casualties/pdfs/korea.pdf [perma.cc/7BH8-MJXJ] (indicating number of troops).
  \item \textsuperscript{316} Authority to Repel the Attack in Korea Bulletin, \textit{supra} note 24; see PAUL A. KRAMER, THE BLOOD OF GOVERNMENT (2006).
  \item \textsuperscript{317} See, e.g., Proposed Deployment of U.S. Armed Forces into Bosnia, \textit{supra} note 310.
  \item \textsuperscript{318} See, e.g., Statement by the President on the Situation in Korea, \textit{supra} note 207.
\end{itemize}
Emergency.” Meanwhile, the deadly character of the conflict was undeniable. The United States used napalm widely for the first time in the war. It sometimes missed the target and incinerated U.S. and U.N. troops. A disastrous winter invasion of North Korea led to many deaths and countless amputations of frozen limbs. The profound psychological impact of the war is captured in a well-known photograph of a soldier caressing a grieving soldier who had seen his friend killed in action.

In spite of the effort and the carnage, the war entered a stalemate near the place it had begun: the 38th parallel. Over time, American deaths did not reinforce a call to arms. Instead, public disenchantment ultimately weakened support for Truman’s actions. Still, the war dragged on.

B. What Happened in the “Police Action”: Civilian Carnage

A traditional restraint on the use of force is the risk to a belligerent’s own domestic population. When war is distant, as it was for Americans in the Korean War, that “cost” of war is not felt at home. Instead, Americans focus on the impact on U.S. combatants. When assessing the character of U.S. war powers, the impact on all human life in the warzone should matter. Yet the impact of the war on Korean civilians is not considered when the war serves as legal precedent.

This Section takes up the erasure of the humanitarian impact of the Korean War from American memory, at the same time that the war is embedded as historical gloss in U.S. war powers precedent. When President Truman refused to acknowledge the conflict was a “war,” his dismissal of the human impact informed his justification for ignoring Congress’s role. This erasure lives on in gloss-of-history analysis; forgetting the nature of the war helped

320. See Gertrude Samuels, Courage That Tears at the Heart, N.Y. TIMES, Apr. 29, 1951, at 5 (reporting on war casualties).
322. See id. at 101.
328. See generally HWANG, supra note 12 (describing the devastating impact of the conflict in Korea).
solidify its role as precedent. The United States was implicated in the war’s brutal character, however. Although the killing of civilians in the U.S. war in Vietnam is well-known,\textsuperscript{330} the massacre of Koreans by U.S. soldiers is largely forgotten by Americans.\textsuperscript{331} The U.S. military argued that such atrocities were “inherent to war,” however.\textsuperscript{332} This makes it imperative to acknowledge that brutality toward civilians is a feature of the power presidents can unilaterally unleash.

Although the Truman Administration defended its intervention in Korea as an effort to protect freedom and democracy, the Korean government had a history of using violence as a political tool. For example, an uprising on Cheju Island led to the death of around 28,000 civilians.\textsuperscript{333} The United States is no stranger to civilian casualties either; civilian death is often accepted as an unavoidable consequence—“collateral damage”—of lawful military action.\textsuperscript{334}

The killing of civilians is at times intentional, however.\textsuperscript{335} Many Americans are aware of the My Lai massacre during the war in Vietnam, but not of the Korean War massacre at No Gun Ri, which happened not long after the North Korean invasion.\textsuperscript{336} American military leaders hoped to block their advance down the peninsula. Out of concern that North Korean soldiers were thought to be dressing as civilians, the U.S. Army commander sought to ensure that “no movement of refugees [would] be permitted through the battle lines of our forward areas.”\textsuperscript{337} He requested that leaflets be dropped to assist this effort.\textsuperscript{338} Ambassador Muccio wrote to Dean Rusk on July 26, 1950, that the situation had become serious and taken on a “critical military nature.” Refugees north of U.N military lines would receive warning shots, and “if they then persist in advancing they will be shot.”\textsuperscript{339}

\begin{itemize}
\item \textsuperscript{330} See CHAMBERLIN, supra note 25, at 18.
\item \textsuperscript{331} See generally CHARLES J. HANLEY, SANG-HUN CHOE & MARTHA MENDOZA, THE BRIDGE AT NO GUN RI: A HIDDEN NIGHTMARE FROM THE KOREAN WAR 121 (2001) (reporting on the exposure of the massacre in 2000); see also HWANG, supra note 12.
\item \textsuperscript{332} NO GUN RI REVIEW, supra note 27, at 184.
\item \textsuperscript{333} CHAMBERLIN, supra note 25, at 109–11.
\item \textsuperscript{335} See HELEN M. KINSSELLA, THE IMAGE BEFORE THE WEAPON (2011).
\item \textsuperscript{336} See MICHAEL BILTON & KEVIN SIM, FOUR HOURS IN MY LAI 12 (1992); HANLEY ET AL., supra note 331, at 121; see also HWANG, supra note 12.
\item \textsuperscript{337} See HANLEY ET AL., supra note 331, at 121.
\item \textsuperscript{338} Id. at 120–21; Sahr Conway-Lanz, Beyond No Gun Ri: Refugees and the United States Military in the Korean War, 29 DIPLOMATIC HIST. 49, 56 (2005).
\end{itemize}
Meanwhile, Korean civilians were fleeing, some prodded to leave their homes by U.S. military personnel. On July 26, 1950, hundreds of refugees, many carrying small children, were ordered to leave their villages and were walking with their belongings to the vicinity of the village of No Gun Ri. U.S. soldiers told them to gather on a railroad track. But then, survivors remembered, they were strafed by U.S. planes. It was terrifying. One survivor, Chun Choon-ja, stated that “[i]t looked like heaven crashed on us.” Amid the mayhem, she found her mother among the dead. The attack was shocking even to some U.S. soldiers on the ground, but a Pulitzer-Prize-winning news report later found that it “fit the policy the Air Force was pursuing at the Army’s request, to ‘strafe all civilian refugee parties that are noted approaching our positions.’”

Soldiers forced surviving civilians to gather under a railroad bridge. Then American machine gunners fired at them. Children hid behind dead bodies in an effort to survive. “We just annihilated them,” Norman Tinkler remembered. It was “wholesale slaughter,” another former GI later recalled. By July 29th, after three nights under fire, at least 126 villagers were killed and 45 were wounded.

Investigative reporters exposed the No Gun Ri massacre in 1999, leading to U.S. and South Korean government inquiries. Ultimately, a U.S. Army investigation acknowledged the massacre, but concluded that “the deaths and injuries of civilians, wherever they occurred, were an unfortunate tragedy inherent to war and not a deliberate killing.” Although President Bill Clinton expressed American regret for the deaths, the United States has never acknowledged responsibility nor apologized for the massacre.


341. Id.

342. Hanley et al., supra note 331, at 121–22.

343. Id. at 122.

344. Id.


347. Id. at 136, 141.

348. Id. at 134.


350. Id. at 465.

351. No Gun Ri Review, supra note 27, at 185 (emphasis added).

Conway-Lanz argues that No Gun Ri was not an isolated event, but “part of a larger pattern” in Korea, an assessment confirmed by other scholars. If it is the case that atrocities are “inherent to war,” as the Pentagon report suggested, then it is important for the No Gun Ri massacre to be remembered. This is what war powers accomplish. This is what Truman unilaterally unleashed.

III. THE KOREAN WAR AND THE GLOSS OF HISTORY

The Korean War has never formally ended, but the era of large-scale military conflict ended with an armistice in 1953. U.S. and Korean troops still guard a militarized border dividing the North and South. For civilians in the warzone, the consequences of war persisted. The massive number of casualties had become, in essence, part of the terrain. Park Doosung, sixteen years old at the time, recalled that it was not possible to avoid stepping on them. “There were U.S. soldiers, North Korean People’s Army’s soldiers… Every village’s forest was piled up with bodies.” The war is largely forgotten by Americans but has a powerful afterlife in American law. It now serves as historical gloss on presidential power—a legal tool to justify expanding presidential war power.

The Korean War made its first important appearance in the Supreme Court, in the 1952 Steel Seizure Case. Ambiguity about whether the conflict was a “war” led to a divergent set of descriptions, and skepticism informed Justice Jackson’s legal analysis. The ambiguity persisted in later years in Office of Legal Counsel opinions. The Korean War’s role as precedent—a gloss on presidential power—nevertheless became a feature of war powers author-

354. See CHAMBERLIN, supra note 25 (arguing that Cold War conflicts, including the Korean War, led to widespread civilian carnage in Asia).
358. See infra Section III.B.
359. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 579 (1952).
360. See infra Section III.A.
361. See infra Section III.B.
ity. This happened in spite of the fact that presidents did not embrace Truman’s example and did not initiate conflicts of the length and size of the Korean War without engaging Congress.\(^{362}\) It happened largely in the background, as executive branch lawyers relied on the idea that Korea was a “police action” to narrowly define the kind of wars requiring congressional authorization. They also followed the State Department’s lead in 1950 of arguing that “national interests” can justify the unilateral use of force.\(^{363}\) This happened in spite of congressional efforts to restrain presidential power by enacting the War Powers Resolution after the war in Vietnam.\(^{364}\) The War Powers Resolution was Congress’s most important effort to reign in presidential power, but it was undermined by the way legal precedent relying on Korea interpreted most conflicts as the kind that allowed for action based on presidential power alone. Although the unilateral wars were smaller, at least for Americans at home, this was nevertheless consequential as the global reach of U.S. military power extended after the Cold War, and small war enabled endless war.\(^{365}\)

This Part turns first, in Section III.A, to the Supreme Court’s understanding of the nature of the war, detailing the skepticism of Supreme Court justices about the legal status of the Korean War during the conflict itself.\(^{366}\) Section III.B shows the way that this skepticism fell away in later years. The Korean War became a gloss of history in Office of Legal Counsel opinions on presidential war power and was relied on to justify the use of force by subsequent presidents without congressional authorization.\(^{367}\) The contemporaneous critique of Truman’s actions was forgotten, and in its place his mere action became evidence of what presidential power encompassed.


\(^{363}\) See infra Section III.B.

\(^{364}\) FISHER, \textit{supra} note 235, at 144–51.


\(^{366}\) See infra Section III.A.

\(^{367}\) See infra Section III.B.
A. The Supreme Court Interprets the Korean War

The U.S. Supreme Court considered the nature of the Korean War during the conflict itself in the Steel Seizure Case in 1952. Though most often cited for the influential tripartite analysis of presidential power in Justice Robert Jackson’s concurrence, the case also demonstrated the Court’s contemporaneous assessment of the conflict. In the Steel Seizure Case, the Court struck down an executive order issued by President Truman seizing private steel mills in order to stop a strike in the steel industry. Truman argued that a steel strike would undermine production of essential war materiel at a time when U.S. soldiers were in combat. The president relied on his Article II powers, including his power as commander in chief.

The Steel Seizure Case was decided on June 2, 1952, after the Korean War had taken a perilous turn. American bombing leveled North Korean cities and U.S. planes used napalm to incinerate the enemy. General Douglas MacArthur ordered an invasion of North Korea in the fall of 1950, which ultimately led China to enter the war. U.S. and U.N. troops were outnumbered and undersupplied, resulting in many casualties in the perilous winter Battle of Chosin in North Korea. In other words, the “police action” was a devastating war.

In spite of circumstances in Korea, the Court largely hewed to Truman’s euphemisms. His executive order calling for seizure of steel mills called the war an “emergency.” In six separate opinions, justices never called the conflict the “Korean War,” and most often lined up with Truman, referring to the war as an “emergency.” Justice Jackson, in contrast, took up the ambiguities.

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368. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952).
369. Id. at 635 (Jackson, J., concurring). Justice Jackson argued that the scope of presidential power is tied to the powers of Congress and whether Congress has acted. First, when Congress has expressly or impliedly authorized the President’s acts, the President’s authority is “at its maximum” and “includes all that he possesses in his own right plus all that Congress can delegate.” Id. Second, when Congress is silent, the President “can only rely upon his own independent powers” and may derive his authority through “congressional inertia, indifference or quiescence.” Id. at 637. Third, if the President’s actions are incompatible with Congress’s expressed or implied will, his power is “at its lowest ebb.” Id. In such a circumstance, “[c]ourts can sustain exclusive presidential control . . . only by disabling the Congress from acting upon the subject.” Id. at 637–38.
370. Id. at 582 (majority opinion).
371. Id. at 579.
372. TIRMAN, supra note 326, at 99–110.
373. SIDES, supra note 323.
375. See Steel Seizure Case, 343 U.S. at 582; id. at 629, 632 (Douglas, J., concurring); id. at 649 (Jackson, J., concurring); id. at 656, 659 (Burton, J., concurring); id. at 662, 664 (Clark, J., concurring); id. at 667, 700, 703 (Vinson, C.J., dissenting). Justices also referred to it as the “Korean conflict” or simply a “crisis.” Id. at 603 (Frankfurter, J., concurring) (calling it “the Korean
surrounding the undeclared nature of the conflict and its implications. He called it a “foreign venture,” “the Korean enterprise,” and not a de jure war, but perhaps a de facto war. Whatever the name for it, Jackson argued that a president cannot have the power to unilaterally define an era as a wartime, thereby triggering his own military power. In Korea, by acting without congressional authorization, Truman had “invested himself with ‘war powers.’”

Jackson warned:

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.

For Jackson, “[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.” He thought that the Nazi reliance on emergency power during World War II showed that such powers could only coexist with free government if “their control is lodged elsewhere than in the Executive who exercises them.”

The Steel Seizure Case is remembered for its limitation on the domestic power of a president, but Jackson’s opinion also directly rejects presidential war powers unilateralism. His most important critique was that the president had himself declared an era a wartime, and then argued that this self-declared wartime was the occasion for the expansion of his own powers. Jackson’s point would be lost as the case turned into precedent. In later years, the Court would call the conflict a “war,” and the Korean War was most often in the background in cases applying the Steel Seizure Case precedent. The war would be consequential, however, in the work of executive branch lawyers.

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376. Id. at 642–43 (Jackson, J., concurring).
377. Id. at 642.
378. Id. at 646.
379. Id. at 646.
380. Id. at 651–52. The historical context for Justice Jackson’s thinking about war and government power in the early 1950s is discussed in Mary L. Dudziak, Law, Power, and “Rumors of War”: Robert Jackson Confronts Law and Security After Nuremberg, 60 BUFF. L. REV. 367 (2012).
382. See Holtzman v. Schlesinger, 414 U.S. 1316, 1318 (1973) (citing to the Steel Seizure Case precedent through discussion of the Korean War); Bergera v. Ideal Nat’l Life Ins. Co., 524 P.2d 599, 601–03 (Utah 1974) (discussing the Korean War as background and applying the Steel Seizure Case precedent in analysis to determine whether the lower court properly held that the conflict in Vietnam was a “war”); see also Deshotel v. Thistlethwaite, 121 So. 2d 222, 223 (La. 1960) (referring to the Korean conflict as the “Korean War”); Gounares Bros. & Co. v. United
B. The Office of Legal Counsel Relies on the Korean War

In 1950, President Truman attempted to duck the question of whether the Korea conflict was a “war,” embracing a reporter’s suggestion that it was instead a “police action.” This descriptive dilemma mattered to Truman because if the conflict was a war, then his failure to directly engage Congress was more consequential. Whether out of political calculation or pure stubbornness, Truman’s insistence on the conflict’s nonwar status had downstream impacts. In later years, his actions informed the analysis of executive branch lawyers on two important questions: first, when exactly a conflict counted as a “war” that required congressional authorization, and second, if not a “war,” whether U.S. presidents could use force unilaterally because the nation had a sufficient “interest” at stake.

The opinions illustrate the way that, at least within the executive branch, past actions become building blocks—evidence that power exists—without reanalysis of whether new evidence undermines previous assumptions about the nature of a conflict and whether past presidential action was warranted. This reveals a weakness in gloss-of-history analysis, for understandings of history are not locked in at one time but deepen and evolve as scholars uncover new evidence.

This Section addresses two features of reliance on the Korean War as historical gloss. First, it shrank the concept of “war” so that much subsequent conflict fell outside the boundaries of war. This allowed presidents to argue that the conflicts did not trigger the need for Congress to act. Second, it was an important precedent for the nebulous idea of “American interests” that justify unilateral presidential military action.

1. The Shrinking Concept of “War”

After the Korean War, some Cold War U.S. military deployments resulted in small conflicts that could more easily fit on the “bandit raid” list of executive actions. This enabled the war’s “gloss” on presidential power to place conflicts of increasing scope outside Congress’s purview as the concept of “war” shrank in a series of OLC and State Department opinions. The changing

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383. See supra notes 246–255 and accompanying text.
384. Whether the conflict was a “war” also mattered in other contexts, such as insurance contracts. See Robert B. Billings, Of War Clauses, 1952 Ins. L.J. 793, 799 (noting that the “weight of authority” maintained “the Korean conflict is a war”).
385. See infra Sections III.B.1, III.B.2.
386. See JOHN PRADOS, PRESIDENTS’ SECRET WARS (rev. & expanded ed. 1996).
387. See infra notes 391–405 and accompanying text.
U.S. legal meaning of “war” was accompanied by war’s persistent lethality for civilians.388

In 1962, President John F. Kennedy ordered a blockade of Cuba during the Cuban Missile Crisis, raising the question of whether congressional authorization was required.389 A blockade is a mechanism of war, and the United States was not then at war with Cuba.390 The Office of Legal Counsel nevertheless concluded that the president had power to establish a blockade without a war declaration in part because the United Nations had express power to order one.391 The Korean War served as the illustrative example, for “the United Nations authorized a blockade in the Korean ‘police action’ and claimed all of the usual legal incidents of a blockade during a state of war. War, of course, was not declared by the United Nations or by nations participating.”392 Other presidents had used blockades without declarations of war in the Civil War and the Spanish-American War, but the Supreme Court recognized that a state of war existed in the Civil War, and the Spanish-American War was subsequently declared.393 This made Korea a tidier authority for the Cuba blockade because Korea was not a declared war.

The importance of the Korean War as precedent continued to inform understandings of the war power when, in 1966, the State Department relied on the U.S. intervention in Korea in a memorandum on the legality of U.S. military action in Vietnam.394 Although Congress had passed the Tonkin Gulf Resolution authorizing U.S. intervention in Vietnam in 1964, members of

388. See TIRMAN, supra note 326.
389. See generally THE KENNEDY TAPES 124–26 (Ernest May & Philip Zelikow eds., 2002) (discussing the Kennedy Administration’s decision to order a blockade against Cuba during the Cuban Missile Crisis).
390. See generally Wolff Heintschel von Heinegg, Naval Blockade, 75 INT’L L. STUD. 203, 204 (2000) (explaining that a blockade is “a method of naval warfare” that “is very often an integral part of a military operation”); LANCE E. DAVIS & STANLEY L. ENGERMAN, NAVAL BLOCKADES IN PEACE AND WAR 1 (2006) (stating that a blockade is “the most common form of economic warfare”).
392. Id.
393. See JENNIFER K. ELSEA, CONG. RSCH. SERV., IF10534, DEFENSE PRIMER: PRESIDENT’S CONSTITUTIONAL AUTHORITY WITH REGARD TO THE ARMED FORCES 1 (2020) (explaining that, at a time when Congress was not in session during the Civil War, “the Supreme Court sustained the blockade of southern ports instituted by President Lincoln in April 1861” in a 5-4 decision favoring the president’s authority to implement the blockade without congressional approval at a time when the nation was under attack); LELAND M. GOODRICH & ANNE P. SIMONS, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 481 (1955).
394. See Leonard C. Meeker, The Legality of United States Participation in the Defense of Viet-Nam, 54 DEPT’ ST. BULL. 474 (1966). Since Vietnam, like Korea, was divided before large-scale conflict began, Korea was also precedent for the idea that the right of individual and collective self-defense existed even in the temporarily divided section of a country. Id. at 477–78.
Congress and the American public questioned President Lyndon Johnson’s authority after he escalated American involvement in 1965. The example of the Korean intervention and others showed that presidents had expansive Article II powers, Leonard C. Meeker wrote in a State Department memorandum. The world had “grown much smaller” in the twentieth century, he argued, and “[t]he Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.” Therefore, in spite of the extensive and devastating character of the war, there was “no question” of the president’s authority to use force in Vietnam, both under Article II of the Constitution and the Southeast Asia Treaty Organization Treaty.

The American people ultimately responded and rejected this view through massive antiwar demonstrations, which helped curtail U.S. military action, but the legal precedent remained, and was put to use by later administrations.

There had been many previous small-scale operations, but the Korean War was an especially useful precedent because it showed that a president could use massive force without a war declaration. Meeker wrote: “In the Korean conflict, where large-scale hostilities were conducted with an American troop participation of a quarter of a million men, no declaration of war was made by the Congress. The President acted on the basis of his constitutional responsibilities.” The limited nature of the legal authority for the Korean War enhanced its usefulness as precedent. Meeker noted that, unlike Vietnam, there was no treaty at the time obligating the United States to defend the Republic of Korea. Therefore, “[i]f the President could act in Korea without a declaration of war, a fortiori he is empowered to do so now in Viet-Nam.”

In 1970, the Nixon Administration’s Office of Legal Counsel further narrowed the scope of military action requiring congressional authorization, relying in part on the Korean War. Assistant Attorney General William Rehnquist authored an OLC opinion on the president’s authority to order U.S. troops to invade Cambodia without congressional authorization. He distinguished between all-out war and more limited conflicts. This distinction was

396. See Meeker, supra note 394.
397. Id. at 484–85.
398. Id. at 484.
400. Meeker, supra note 394, at 488.
401. Id.
403. The President and the War Power: S. Viet. and the Cambodian Sanctuaries, supra note 1.
not new, but Rehnquist turned the concept of “limited” conflict upside down. All-out wars were declared wars like World War I and II, in contrast to Korea and Southeast Asia, he argued.⁴⁰⁴ In other words, the existence of “all-out war” turned on whether Congress had acted, not conditions in the warzone.

Congress had acquiesced in the Korean War, but, for Rehnquist, this did not function as constitutive of interbranch authority. Instead, congressional acquiescence furnished “strong evidence” that Truman had proper power as commander in chief. In this way, Truman’s example informed the way presidential power should be understood. Rehnquist emphasized: “Since judicial precedents are virtually non-existent on this point, the question is one which must of necessity be decided by historical practice.”⁴⁰⁵ Past actions would serve as authority for the present.

During the 1979–1980 Iran hostage crisis, President Jimmy Carter tasked the OLC with analyzing the impact of the War Powers Resolution on the president’s ability to use force without authorization. The Korean War was again evidence of the historical practice of broad unilateral power.⁴⁰⁶ In 2002, Congress authorized President George W. Bush’s decision to go to war in Iraq, but in the OLC’s opinion, statutory authority simply supplemented preexisting unilateral presidential authority. The Korean War and other examples showed that “to the extent that the President were to determine that military action against Iraq would protect our national interests, he could take such action based on his independent constitutional authority; no action by Congress would be necessary.”⁴⁰⁷

Through these opinions, the war-declaration power of Congress in the text of the Constitution was reduced to a supporting role as executive branch lawyers, relying on the Korean War as precedent, entrenched new rationales for presidential unilateralism, and historical practice became a source of authority for unilateral presidential power to go to war.

2. Enabling Substantial Force Based on “Interests”

Although the division of war powers in the text of the Constitution is ambiguous,⁴⁰⁸ defense of the nation from attack is a traditional justification for a

⁴⁰⁴. Id. at 323.
⁴⁰⁶. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185 (1980). Noting that substantial forces were committed in Korea without authorization, the memorandum emphasized that troops remained with Congress’s approval. Id. at 188.
president, as commander in chief, to use force to defend the country.\textsuperscript{409} In the Korean War, the United States itself was not directly militarily vulnerable from the North Korean action, so self-defense was not a justification for the president to act unilaterally. Instead, the State Department’s 1950 memorandum on the legal basis for the Korean War relied in part on the idea that the United States had an important “interest” at stake: protecting the new United Nations.\textsuperscript{410} The idea that an “interest” defined by the president could be the basis for unilateral presidential war power derives from a World War II opinion of Attorney General Robert Jackson finding that the training of British flying students by the U.S. Army Air Corps was within the commander-in-chief power.\textsuperscript{411} The Korean War memorandum expanded this idea to include actual warfare by American forces.\textsuperscript{412} After the Korean War, this idea broadened further. The shrinking concept of war and the idea of “interests” justifying the use of force worked together. Multiple OLC and State Department opinions argued that a conflict’s status as a nonwar, coupled with a U.S. “interest,” was sufficient to enable a president to use force unilaterally.\textsuperscript{413}

A variety of national interests have been used as justification for a president, as commander in chief, to take unilateral action in the defense of the United States.\textsuperscript{414} This idea is relied on in OLC opinions justifying unilateral presidential authority in a number of military actions thought to advance U.S.
interests.\footnote{See, e.g., Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 20, 34 (2011); Targeted Air-strikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82, 98 (2014).} When the United States intervened during the Bosnian humanitarian crisis in 1995, for example, the OLC identified the “security and stability of Europe” as a fundamental interest of the United States that justified the president’s decision to commit U.S. troops.\footnote{Proposed Deployment of U.S. Armed Forces into Bosnia, supra note 310, at 327.} President Clinton believed that a decision to disregard signed peace accords would injure American interests and plunge the region into a scale of violence that Europe had not experienced since World War II.\footnote{Id. at 329.} Because of this, the use of NATO forces would serve significant national interests for the United States, particularly European stability, by preserving peace in Europe and preventing the possibility of violence spreading throughout the region.\footnote{Id. at 332–33. The OLC also found that Clinton’s proposed deployment of U. S. and NATO forces to enforce the peace accords would be consistent with “the pattern of inter-allied cooperation and assistance that has been established over recent years.” Id. at 332.}

The OLC has continued to rely on similar reasoning in opinions on unilateral military interventions. In justifying President George W. Bush’s proposed deployment of American soldiers to Haiti in order to quell the political unrest following a coup d’état, the OLC emphasized the importance of the United Nations to U.S. foreign policy.\footnote{Deployment of U.S. Armed Forces to Haiti, supra note 414, at 33.} The U.N. Security Council had authorized the deployment of a multinational force to provide humanitarian relief and aid peaceful resolution of the conflict in Haiti.\footnote{See S.C. Res. 1529 (Feb. 29, 2004).} Referencing President Truman’s decision to aid the United Nations during the Korean War, the OLC quoted the State Department’s 1950 memorandum stating that “[t]he continued existence of the United Nations as an effective international organization is a paramount United States interest.”\footnote{Deployment of U.S. Armed Forces to Haiti, supra note 414, at 33 (quoting Authority to Repel the Attack in Korea Bulletin, supra note 24, at 177).}

The idea that a “national interest” could justify the use of military force without congressional authorization was invoked when President Barack Obama ordered airstrikes in Libya in 2011 and Iraq in 2014 in an effort to prevent civilian deaths at the hands of Muammar Gaddafi and the Islamic State of Iraq and the Levant (ISIL) respectively. In both instances, more than one “interest” was combined. The OLC suggested that in Libya there were at least two national interests at stake: “supporting the UNSC’s credibility and effectiveness,” based on the Korean War example, and “preserving regional stability.”\footnote{Auth. to Use Mil. Force in Libya, supra note 415, at 34, 36–37. But see Michael J. Glennon, Editorial Comment, The Executive’s Misplaced Reliance on War Powers “Custom,” 109 Am. J. Int’l L. 551 (2015) (criticizing the Obama Administration’s reliance on historical practice in its justification for the use of force without congressional authorization in Libya).}

Taken together, the OLC found that these interests “provided a
sufficient basis for the President’s exercise of his constitutional authority to order the use of military force.” In ordering airstrikes against ISIL in 2014, President Obama identified three relevant national interests: “protecting American lives and property; assisting an ally or strategic partner at its request; and protecting endangered populations against humanitarian atrocities, including possible genocide.” This combination of interests, coupled with the idea that the strikes were not a “war,” gave the president power to act unilaterally.

More recently, the Trump Administration built upon this precedent as authority for a series of airstrikes against chemical weapons facilities run by Bashar al-Assad’s Syrian government. The Trump OLC focused heavily on a president’s historical ability to act unilaterally in the defense of national interests, relying four times on the Korean War as authority for their argument that the president has the constitutional power to mobilize the military to protect national interests without seeking prior congressional authorization. The U.S. interests at stake in Syria were the need to promote regional stability and to prevent the spread of an ongoing conflict. The OLC emphasized that the United States was “not the world’s policeman,” but “as its power has grown, the breadth of its regional interests has expanded and threats to national interests posed by foreign disorder have increased.” Again, a combination of interests provided a justification for unilateral presidential action. One of the

423. Auth. to Use Mil. Force in Libya, supra note 415, at 34.
425. Id. at 82. Although the Trump Administration’s OLC would invoke the Korean War as part of a broad history of presidential unilateralism, April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 42 Op. O.L.C. 1, 6-7 (2018), the Obama Administration’s OLC qualified the scope of its reliance on that war with a footnote specifically taking no position on whether “the Korea deployment was sufficiently limited in nature, scope, and duration to be within the President’s constitutional authority to act without congressional authorization.” Targeted Airstrikes Against the Islamic State of Iraq and the Levant, supra note 415, at 101 n.6. Under historical practice methodology, the Korea War nevertheless remains as a historical example that can readily be invoked by future presidents seeking to engage in large-scale war without formal authority from Congress.
426. April 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, supra note 425, at 1, 6-7, 11, 12. The OLC also concluded that the operation was limited in its “nature, scope, and duration,” and so fell outside of the definition of “war” requiring congressional authorization. Id. at 22. Senator Tim Kaine, Democrat from Virginia, objected to this argument, calling it "nonsense," and asking, "[i]s there any doubt that America would view a foreign nation firing missiles at targets on American soil as an act of war?” Kaine argued that "[t]his is further proof that Congress must finally take back its authority when it comes to war.” Karen DeYoung, Justice Dept. Advised Trump that Syria Airstrikes Were Legal, WASH. POST (June 1, 2018, 6:43 PM), https://www.washingtonpost.com/world/national-security/justice-advised-trumps-order-for-syria-airstrikes-in-the-national-interest/2018/06/01/9126f3d6-65c9-11e8-a69c-b944de66d9e7_story.html [perma.cc/Q3KR-3LFK].
428. Id.
interests at stake in Syria ensuring that their use of chemical weapons would not be a model for others.429

While the specific circumstances continue to change, the 1950 State Department memorandum continues to inform the idea that presidents possess unilateral authority to use military force in support of various national “interests” around the world, supporting an ever-expanding view of presidential power. As legal scholars Curtis A. Bradley and Jack Goldsmith argue, however, an interests test “provides no meaningful legal check on the president.”430 Because the interests test does not constrain presidential power, they argue that the implication of the OLC argument is that there is, in fact, only one test: “whether the use of force, based on its anticipated nature, scope and duration, constitutes a ‘war.’”431 If not a “war,” congressional authorization would not be required.432 This leaves the consequential example of conceptualizing the Korean War as a “police action,” and the shrinking concept of war as an important driver of the atrophy of war-powers limits. What makes them stick is the inability to roll back the past, so that the Korean War missteps remain a part of the gloss of history informing the scope of presidential power.433

C. Toward a Dynamic Approach to Historical Gloss

This Article’s examination of Korean War history illuminates the difficulties in the way the past is deployed in historical practice methodology. As reliance on the war in executive branch legal opinions shows, a 1950s understanding of Truman’s actions serves as precedent in contemporary separation of powers analysis, even though the historical understanding of those events has changed over time.434 The historical record amply reveals that Truman’s effort to downplay the brutality of the war was deeply at odds with what was experienced in Korea—by civilians, U.S. and U.N. military personnel, and others on both sides in the conflict.435 This was evident at the time, and was downplayed in part to dampen political impacts in the United States436 and in part by the racism informing the U.S. approach to conflicts in Asia, which devalued the humanity of Asian civilians and enemy soldiers.437

429. Id. at 12–13.
430. Bradley & Goldsmith, supra note 411.
431. Id.
432. Id.
434. See supra notes 93–109, 161–216 and accompanying text.
435. See, e.g., Hanley, supra note 339; TIRMAN, supra note 326, at 116–17.
436. See, e.g., TIRMAN, supra note 326, at 114–19.
The historical understanding of the war has changed markedly over time as U.S., Chinese, and Soviet archival records have been released, undermining the Truman Administration’s assumptions about the conflict. Evidence at the time of urgent decisions is always limited, but the shift in understanding of the beginnings of the Korean War has important implications for how the war serves as contemporary precedent. It also illuminates another dimension: failures of historical understanding. It was a mistake at the time, for example, to downplay the war’s brutality. Strategic choices did not value Korean lives. Civilians were not protected but treated as suspects.\textsuperscript{438} This is evidence of what historian John Dower has called a “failure of imagination” fueled by racism.\textsuperscript{439} An outdated conceptualization of the war is nevertheless captured in opinions that are built on as precedent, without regard to the shifting historiography. This allows perpetuation of the fiction that the Korea “police action” was somehow less than all-out war, and it helps to justify executive unilateralism in subsequent deadly conflicts.

Bradley and Morrison emphasize that in historical practice analysis, “mere recitations of operationally similar past uses of force should not suffice.”\textsuperscript{440} OLC opinions invoking the Korean War often engage in this kind of recitation.\textsuperscript{441} Instead, as Griffin has argued, understanding constitutional change requires “intensive study of the historical contexts in which government action occurs,” an approach adopted in this Article.

If the past is to inform the present, the use of history must not rest on a gloss of discarded ideas, as has happened with the Korean War. To accomplish this, history cannot be detached from historiographic change. And most important: some past actions should serve as negative examples of what leaders should avoid.\textsuperscript{443} The full history of the Korean War should serve as a cautionary tale, informing the importance of restoring Congress’s role, and of executive branch restraint.

\textbf{Conclusion}

The history of war has long informed law, culture, and politics. The meanings of war are shaped in part by memory, and in that respect it is not surprising to see competing understandings of a war serving diverse purposes. More is at stake, however, when a president’s military actions become legal prece-
dent. As this Article has shown, in historical practice analysis, an early understanding of war-related actions gets locked into executive power and amplified over time, even as historians rewrite the history of the conflict itself.

Felix Frankfurter was right that looking to history allows constitutional interpretation to break free from the “inadmissibly narrow conception of American constitutional law” confined to the words of the Constitution alone.\(^\text{444}\) He sought to inform interpretation with the “gloss” that life had written upon the words. The life Frankfurter had in mind surely didn’t come to an end once an opinion was written, and then destined to serve as precedent. As the justice himself would have known, understanding of the past deepens over time.\(^\text{445}\)

What is at stake in the role the Korean War has played as historical gloss goes well beyond the way the president’s dismissal of Congress’s power is replicated over time. The flattened vision of the war in precedent cannot hear the voice of Kim Yeh Soon, whose oral history decades after the conflict captured her terror.\(^\text{446}\) She did not speak to questions of constitutional interpretation, but her voice illuminates the nature of the power legal precedent now allows one human to unleash.

Historians, of course, cannot restrain the forces of executive overreach, militarization, and conflict, but it is nevertheless true that the use of history in war powers precedent fails when it is untethered from evolving understandings in the work of historians.

\(^{444}\) Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

\(^{445}\) See generally Brad Snyder, Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment (2022).

\(^{446}\) See supra text accompanying notes 88–91.