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Recommended Citation

John B. Mitchell, Preemptive War: Is It Constitutional, 44 *SANTA CLARA L. REV.* 497 (2004).
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“PREEMPTIVE WAR”: IS IT CONSTITUTIONAL?

John B. Mitchell*

On March 19, 2003, at 2200 hours (EST), the United States launched a full-scale military attack against the sovereign state of Iraq. Iraq had neither attacked the United States, nor was in the final stages of preparing for such an assault. For the first time in its 214-year history, the United States of America had begun a preemptive war.¹

As early as May 2002 at West Point, President Bush spoke about the use of “preemption” in a speech on combating terrorism.² Subsequently, the administration maintained the position that Iraq’s leadership must be eliminated because the Ba’ath regime continued to develop weapons of mass destruction, and *might* use those weapons against an opponent, or *might* supply them to terrorist networks.³

Thus, the executive branch claimed the power to attack a sovereign nation solely on the grounds of fear that that nation might harm the United States in the future.⁴ President Bush

* Associate Professor of Law, Seattle University School of Law. J.D., Stanford Law School, 1970. The author wishes to thank Pierre Schlag and Michael Rooke-Ley for their thoughtful suggestions, Ann Scales for her ideas and encouragement, and extraordinary librarians Kelly Kunsch and Bob Menanteaux for all of their invaluable help.

1. Richard F. Grimmett, *U.S. Use of Preemptive Military Force: The Historical Record*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2002), available at <http://usinfo.state.gov/journals/itps/1202/ijpe/pj7-4grimmitt.htm>. Mr. Grimmett is a specialist in national defense, foreign affairs, defense, and trade division. *Id.*

2. See Mike Allen & Karen De Young, *Bush: U.S. Will Strike First at Enemies; In West Point Speech, President Lays Out Broader U.S. Policy*, WASH. POST, June 2, 2002, at AO1.

3. See Carla Anne Robbins, *How Bush Decided that Iraq’s Hussein Must Be Ousted*, WALL ST. J., June 14, 2002, at A1. For a detailed discussion of the preemptive strategy of the current Bush administration, see NOAM CHOMSKY, *HEGEMONY OR SURVIVAL: AMERICA’S QUEST FOR GLOBAL DOMINANCE* 1-50 (2003).

4. In fact, the press reported that the current Director of the CIA indicated in a letter to Congress in early October 2002 that, ironically, only by first engag-

has demonstrated a willingness to rely upon these unprecedented grounds for the use of military force. But does the Constitution anticipate such a use of military force by the federal government? Although a significant body of literature exists regarding the allocation of war power between the President and Congress, the author could locate nothing that has been written in case law or legal literature about whether or not the federal government (i.e., the President and Congress in concert) possesses the constitutional power to wage preemptive war.

In Section I, this article discusses the difference between anticipatory self-defense and preemptive war. In Section II, the article discusses existing jurisprudence concerning the war power, and finds that none of the doctrine deals with the specific issue of preemptive war. The article then traces the five grounds upon which the author maintains that preemptive war is beyond the power of the federal government and therefore unconstitutional. These grounds include: (1) the social contract theory of John Locke upon which the legitimacy of our form of government and the Constitution was based; (2) the founders' views of war; (3) the founders and the "just war" doctrine; (4) the risk of permanent alteration of the basic constitutional structure; and (5) America's 214-year history involving the use of military force. In Section III, the article discusses the political question doctrine, and explores why prior cases invoking this doctrine to avoid deciding challenges

ing in preemptive war would we risk imminent danger to our soldiers and citizens:

President George Bush's attempt to maintain public support for military action against Iraq has taken a fresh blow from an unexpected quarter, with the publication of a letter from the CIA stating that while Saddam Hussein poses little threat to America now, a U.S. invasion could push him into retaliating with chemical or biological weapons.

See Julian Borger, *CIA in Blow to Bush Attack Plans*, GUARDIAN (London), Oct. 10, 2002, at 1; Robert Collier, *Bush's Evidence of Threat Disputed, Findings Of-ten Ambiguous, Contradict CIA*, S.F. CHRON., Oct. 12, 2002, at A13. On a global level, preemptive war engendered an analogous risk:

Another well-known specialist warned that the "general strategy of preemptive war" is likely to provide others with "overwhelming incentives to wield weapons of terror and mass destruction" as a deterrent to "the unbridled use of American power." Many have noted the likely impetus to Iranian nuclear weapons programs. And "there is no question that the lesson that the North Koreans have learned from Iraq is that it needs a nuclear deterrent," Selig Harrison commented.

CHOMSKY, *supra* note 3, at 37-38 (footnote omitted).

to the use of military force and the war power do not apply to the issue of preemptory force. The author takes the position that courts have a legitimate role in reviewing the question of whether a proposed use of military force against another nation in fact responds to an imminent threat, or is forbidden as an exercise of preemptive war.⁵ That judicial role, however, is confined to the evaluation of whether the federal government has presented sufficient evidence in an in-camera review from which a reasonable citizen *could* find an attack to be imminent.⁶

I. THE SIGNIFICANT LEGAL DIFFERENCE BETWEEN ANTICIPATORY (I.E., IMMINENT THREAT) AND PREEMPTIVE WAR

The Constitution provides the President and Congress with a number of interrelated enumerated powers which, when taken together with the “necessary and proper” clause that empowers the legislative branch, allow the use of military force in a wide range of circumstances. Such enumerated powers include making declarations of war, making appropriations, entering into treaties, acting as commander in chief of the military, and ensuring “faithful execution” of domestic and international law.⁷ Together, these powers provide the federal government with flexibility to use force to protect U.S. citizens, property, allies, territory, and commerce, and allow the government to use the military to support international peacekeeping and/or humanitarian efforts.

By design, the federal government has limited powers.⁸

5. *See infra* Part VI.

6. *See infra* Part VI.B.

7. The powers supporting use of military force by the federal government are distributed throughout Articles I and II of the Constitution. U.S. CONST. art. I, § 8, cl. 1, 2, 10, 11-16, 18, outlines the following legislative powers: [1] the power to lay and collect taxes, and provide for the common defense; [2] the power to borrow money; [10] the power to punish piracy and offenses against Law of Nations; [11] the power to declare war; [12], [13], and [14] the power to raise and regulate armies and navies; [15] and [16] the power to create and regulate a militia; and [18] the power to make all laws “necessary and proper” to explicit powers. U.S. CONST. art II, § 2, cl. 1, 2 outlines the following executive powers: [1] commander in chief of military; and [2] the power to enter into treaties with the advice and consent of the Senate, and the power to appoint ambassadors. U.S. CONST. art. II, § 3 also gives the executive the power to receive ambassadors and ministers, and take care that the laws be faithfully executed.

8. “It must be remembered that the Federal government . . . at least the

A broad survey of American political-legal developments in the realm of war leads one to conclude that those powers should not include the right to use military force in support of “preemptive war” or “preemptive self-defense,”⁹ meaning “us[ing] force to quell any possibility of future attack by another state, even where there is no reason to believe that an attack is planned and where no prior attack has occurred.”¹⁰

There is no question that this nation can act in “anticipatory” self-defense if the threat is truly imminent.¹¹ Even before the modern invention of long range missiles and the existence of terrorist camps, the *Caroline* Doctrine of 1842¹² embodied this concept. This doctrine, an agreement between British and American officials, states that defensive force is permitted when the “[n]ecessity of that defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation.”¹³

Modern circumstances admittedly require a bit more

form, was granted neither a general policy power nor the inherent right to act on any subject matter in order to promote the health safety or welfare of the people throughout the nation.” JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 123 (3d ed. 1986); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 115-16 (1986) (describing how the founders created government of “enumerated powers”); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 298 (2d ed. 1988) (The “Constitution in granting congressional power simultaneously limits it.”).

9. Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense* 2 (American Society of International Law Task Force on Terrorism, ed., 2002) at <http://www.asil.org/taskforce/oconnell.pdf>; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 168 (3rd ed. 2001); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275 (1963).

10. O’Connell, *supra* note 9, at 2 n.10.

11. *See, e.g., id.* at 8-11.

12. *Id.* at 9; *see also* Edward D. Hasbrook, Note, *United States Foreign Policy Through Cloak and Dagger War Operations: Terrorism or Mandate of National Security?*, 11 OKLA. CITY U. L. REV. 159, 192-93 (1986).

13. John B. Moore, 2 DIGEST OF INT’L LAW 412 (1906). The *Caroline* case took place within the context of the Canadian Rebellion of 1837. In spite of a request by the United States government that its citizens not get involved, many did, including those bringing arms from New York to the rebels on the vessel *Caroline*. The British captured and destroyed the ship; the problem was that the attack took place in the territorial waters of the United States. Thus, although the *Caroline* Doctrine has been used as a general standard for the appropriate use of national self-defense, a recent commentator has suggested that the doctrine be limited to its original historical context; i.e., “extra-territorial use of force by a state in peacetime” within the sovereign territory of another state “which was unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the state taking action.” Timothy Kearley, *Raising the Caroline*, 17 WIS. INT’L L.J. 325, 325 (1999).

flexibility than envisioned in the *Caroline* Doctrine. Thus, “anticipatory” self-defense in the modern world would include attacking the Japanese fleet steaming toward Pearl Harbor in World War II, provided the United States had clear and convincing evidence of its intent,¹⁴ bombing a terrorist training camp planning attacks on U.S. citizens or soil, launching offensives after suffering an initial attack and knowing the imminence of further attacks, and attacking with the knowledge that an enemy is preparing to launch missiles.¹⁵

In all these circumstances, the magnitude and certainty of the risk fit well within the concept of “imminence,” as that concept is conceived in the classic requirement for the use of deadly force in self-defense.¹⁶ Alternatively, one could designate the tipping point as the point at which a “clear and present danger”¹⁷ exists that the risk will come to fruition. Taken from the First Amendment doctrine involving advocacy of unlawful conduct,¹⁸ this standard seeks to resolve the problems associated with granting an extremely serious use of power to the federal government (barring or punishing speech) in a context where the feared risk has not yet materialized. Likewise, in the present situation in Iraq, the United States employed an extremely serious use of federal power (armed military force) in the face of a risk that was only a possible future risk, and not a current reality.

In contrast, the use of force in preemptive war finds no justification in notions of “imminence.” By definition, war is preemptory when the situation is neither imminent, nor has reached the point of constituting a clear and present danger that the feared harm to national interests will materialize. Courts should declare the use of preemptory military force beyond the powers possessed by the federal government under the constitutional framework. Furthermore, as will be discussed, a claim that the use of military force is preemptive and therefore unconstitutional does not face the obstacle which has consistently blocked litigation concerning the use

14. See DINSTEIN, *supra* note 9, at 17; O’Connell, *supra* note 9, at 9.

15. O’Connell, *supra* note 9, at 8-10.

16. Imminent danger is defined as “[t]he danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself.” THE HANDBOOK OF CRIMINAL LAW TERMS 320 (Bryan A. Garner ed., 2000).

17. See, e.g., *Herndon v. Lowry*, 301 U.S. 242 (1937).

18. See U.S. CONST. amend. I.

of military force: the political question doctrine.¹⁹

II. THE FEDERAL GOVERNMENT DOES NOT HAVE THE CONSTITUTIONAL POWER TO CONDUCT PREEMPTIVE WAR OR PREEMPTIVE SELF-DEFENSE

One searches in vain to locate a specific case or textual discussion of the issue of preemptive war and federal power. In contrast, literature abounds with debates about whether the President may engage in war unilaterally, or whether Congress must declare war,²⁰ with the President having only the power necessary to repel a "sudden attack."²¹

Those giving Congress preeminence in war-making emphasize the need for broad-based popular discussion and support for war, given the human and economic burdens war brings to its citizens and the constitutional mandate that Congress has the power to declare war.²² Advocates of the position that the executive branch should have the lead in waging war look at the law of war as it existed in England prior to the Revolution,²³ and to the over 100 times in our history

19. See discussion *infra* Part III.B.

20. See generally JOHN H. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 119 (Special Issue 1970); Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles*, 44 SO. CAL. L. REV. 461 (1971); John C. Yoo, *Continuation of Politics by Other Means: The Original Understanding of the War Power*, 84 CAL. L. REV. 167 (1996); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968) [hereinafter *Combat Forces*].

21. The successful proposal at the Constitutional Convention to change the word from "make" to "declare" when allocating war power to the Congress has led to the conclusion that the founders wanted the President to retain the power to repel sudden attacks. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 319 (Max Farrand ed., 1911); see generally Ratner, *supra* note 20, at 467.

22. See ELY, *supra* note 20, at 3-5; *Combat Forces*, *supra* note 20, at 1775.

23. See Yoo, *supra* note 20, at 167-240. According to Professor Yoo, the founders adopted the English model, with which they were familiar, in which the King's power to wage war was balanced by Parliament's control of the purse. The power to "declare" war placed in the hands of Congress did not alter this basic "King-Parliament" conception of the President's power to send troops into battle, since that power was checked by both congressional appropriations and impeachment powers. According to Yoo, "declaration" was no more than a formal device under international law listing the "crimes" of the enemy (like the Declaration of Independence) and having the effect of creating legal consequences; e.g., the participants were not insurrectionists or outlaws, the rules of

that the executive has used troops without congressional consultation.²⁴ In between, some believe that matters involving the use of military force are issues to be negotiated between the political branches.²⁵ Still others believe that absent congressional action, the President has free reign in the military arena, but Congress always may constrain the executive's actions.²⁶

Though these debates carry great importance, none of them focus on whether or not the federal government—*both the executive and legislative branches*—possesses the power to engage in preemptive war under the Constitution. Those few cases reaching the merits of any issue in which the existence of a state of war is relevant are similarly of no use in this inquiry.²⁷ They do not deal with the combined power of

prize money applied, etc. *Id.* at 242-44. *But see Combat Forces, supra* note 20, at 1772-73 (indicating that this may have been the original historical understanding of a “declaration,” but contending that the concept has taken on a less technical and a more functional understanding over time, experience, and practice).

24. *See* John C. Yoo, *Applying the War Powers Resolution to the War on Terrorism*, 6 GREEN BAG 2d 175, 179 (2003) (stating that troops have been employed “well over a hundred times in our Nation’s history,” only a handful with congressional authorization); *see also* Yoo, *supra* note 20, at 177 (indicating “at least 125 times”); Martin Wald, Note, *Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1414 (1984) (indicating that one author has found 192 instances).

25. *See, e.g.*, J. Richard Broughton, *What Is It Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 691 (2001).

26. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); William P. Agee, Note, *The War Powers Resolution: Congress Seeks to Reassert Its Constitutional Role as a Partner in War Making*, 18 RUTGERS L.J. 407 (1987). *But see* Ronald D. Rotunda, *The War Powers Act in Perspective*, 2 MICH. L. E. POLY REV. 1, 5 (1997) (stating that vetoes under the War Powers Resolution are unconstitutional based on the decision in *Immigration and Naturalization Service v. Chadha*). *Chadha* held that to the extent a “legislative veto” of an administrative action conducted pursuant to statutory delegation can be characterized an “exercise of legislative power” the legislative veto is unconstitutional, violating the bicameral and/or presentment clause of Art. I § 7. 462 U.S. 919, 946 (1983).

27. *See* *The Amy Warwick*, 67 U.S. 635 (1863) (addressing the issue of whether ships seized in a blockade ordered by President Lincoln in the face of southern insurrection were subject to be taken as prizes under the law of war, and holding that a formal declaration of war by Congress was not a necessary predicate for implementation of prizes rules); *Little v. Barreme*, 6 U.S. 170 (1804) (addressing the issue of the percentage of value of a ship and cargo, seized by American commander during naval operations against the French, that would flow to the commander versus the ship’s owner, and rejecting the owner’s claim that prize rules should not operate when there was no formal declaration of war by Congress); *see also* *Talbot v. Seeman*, 5 U.S. 1 (1801); *Bas v.*

the political branches of government to use military force; rather, they involve statutory and admiralty law regarding taking and/or selling “prize” ships and their goods.²⁸

The lack of direct textual or case material, however, does not deny a court the ability to decide this issue. Under accepted principles of evidence and proof, circumstantial evidence has equal force to direct evidence.²⁹ It is the position of the author that the weight of circumstantial evidence legitimates the claim that the federal government does not have the power under the Constitution to commit military force to preemptive war. The circumstantial evidence falls into five categories: (1) the philosophical underpinnings of the Constitution’s legitimacy, i.e., John Locke’s social contract theory; (2) the founders and the “just war” doctrine; (3) the founders’ perspective on war; (4) the possible permanent effect on the constitutional structure in permitting preemptive war; and (5) the 214 years of experience of the U.S. in employing military force. Each of these categories will now be discussed in sequence.

A. Preemptive War or Preemptive Self-Defense Is at Odds with the Rationale Underlying the Social Contract Theory

“We the people, in order to form a more perfect union . . .” is a direct expression of the political theory provided in the *Social Contract* of John Locke.³⁰ Although the social contract theory had appeared in writings on political philosophy for over a hundred years before the formation of this nation, only the United States took to heart Locke’s theory to structure its government.³¹

Tingy, 4 U.S. 37 (1800).

28. See *supra* note 27.

29. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 132 (2003) (“Direct evidence is not necessarily better than circumstantial evidence.”); 9TH CIR. JURY INSTR. 3.1, Instruction 1.6 (2001) (“The law makes no distinction between the weight to be given to either direct or circumstantial evidence.”).

30. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson, ed., 1980).

31. Donald L. Doernberg, “We The People:” John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 52-68 (1985); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189 (1990). In fairness, it should be noted that some of the founders espoused the addition of the philosophy of Civic Republicanism (civic virtue) to Locke’s Social Contract in order to mitigate what they believed was the exces-

The social contract theory postulated that back in the mists of time man lived in a state of nature where it was every man for himself, "all against all."³² In this world, each individual had "natural rights" revealed by their God-given ability to reason.³³ But each man was his own law with respect to asserting and protecting these rights, with force being the final arbiter.³⁴ In other words, man possessed a great deal of freedom, but not much security.

To gain security for their lives and property, people were willing to leave the state of nature, and with it, their previously unappealable right to be the ultimate law.³⁵ Thus, one gave up the right to make the rules for day-to-day life, leaving that to a representative body which itself was subject to law.³⁶ The law, not individual will, then ultimately decided all disputes.

These Lockean natural law notions guided the construction of the Constitution and the United States government,³⁷ and even played an explicit part in early Supreme Court decisions.³⁸ Early Supreme Court Justices were present at the creation of the United States and knew that they had embarked upon a great and new political experiment in government. It was a nation built on the radical theories of a sixteenth-century English philosopher. This idea has become lost in time, and scholars tend to think of only the trees of the constitutional text and not the forest of political philosophy. Yet the theory of social contract forms the very basis, and legitimacy, of American government. The framers of the Constitution did not base the government on conquest or the di-

sive individualism of Locke's theory. *See, e.g.*, THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM—THE MORAL VISIONS OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988).

32. *See* LOCKE, *supra* note 30, at xiii-xvi (discussing Locke's view of the "state of nature").

33. *Id.* at 9; Thomas L. Pangle, *The Philosophic Understandings of Human Nature Informing the Constitution*, in *CONFRONTING THE CONSTITUTION* 9 (Alan Bloom ed., 1990) [hereinafter *CONFRONTING THE CONSTITUTION*].

34. LOCKE, *supra* note 30, at 11-12; Frank D. Balog, *The Scottish Enlightenment and the Liberal Political Tradition*, in *CONFRONTING THE CONSTITUTION*, *supra* note 33, at 202.

35. *See* LOCKE, *supra* note 30, at Editor's Introduction.

36. *Id.* at 16, 53, 66, 70-71, 111; Gardner, *supra* note 31, at 202.

37. *See supra* note 29.

38. *See, e.g.*, *Terrett v. Taylor*, 13 U.S. 43 (1815); *Fletcher v. Peck*, 10 U.S. 87 (1810); *Calder v. Bull*, 3 U.S. 386 (1798).

vine right of kings. They based it on the belief that the citizenry had entered into a contract.

Because foreign powers can threaten each citizen's security, the Constitution upholds the federal government's side of the Lockean bargain³⁹ by promising to "provide for the common defence."⁴⁰ Reviewing the philosophical roots of that bargain, however, one would unlikely construe the "common defense" to include any notion of "preemptive" defense.

Under the social contract theory, people trade the right to be their own law in return for the assurance that the government will protect them from the ultimate risk of a fatal attack in the state of nature.⁴¹ It would be anomalous if the founders, who had adopted the social contract theory as the basis for their government's legitimacy, would arrogate to that same government the right to attack others outside its borders when not directly threatened. The only enemies the founders may have envisioned were likely the European countries of the colonists' ancestry and heritage. It is difficult to imagine that the founders of this fledgling nation could conceptualize such old and culturally rich countries as England, France, and Spain as suddenly living in, and subject to the rules of, the state of nature. It is not surprising, therefore, that military force under the constitutional structure should have been conceived as defensive in nature.

As such, the power provided for the "common defense" included within the legislative power in the Constitution⁴² was envisioned to be necessary to repel "external attacks" (i.e., self-defense).⁴³ Of course, the founders had an ocean between themselves and their European enemies. They could hardly imagine an object that could be launched across that ocean and land with such explosive force that the object could obliterate any city existing in their world. Likely, they never

39. "Security against foreign danger" was "an avowed and essential object of the American Union." *THE FEDERALIST* NO. 41, at 304 (James Madison) (Jacob E. Cook ed., 1982).

40. U.S. CONST. pmbl.

41. Locke saw this as a risk that "each was 'constantly exposed to the invasion of others,' his life and property 'very unsafe, very insecure', and his existence 'full of fears and continual dangers'." LOCKE, *supra* note 30, at xiv.

42. See U.S. CONST. art. I, § 8, cl. 1.

43. See *THE FEDERALIST* NO. 23 (Alexander Hamilton) ("The principle purposes to be answered by Union are these—The common defence of the members - the preservation of the public peace as well against internal convulsions as external attack . . .").

imagined structures the size of a hundred houses stacked on top of one another and a flying object crashing into the structure, exploding and destroying the entire edifice. But, while the invention of weapons of mass destruction changes the factual understanding of what threats can now be “imminent,” an “imminent” threat is still the standard for the constitutional exercise of the power to use military force.

B. Preemptive War or Preemptive Self-Defense Would Be Antithetical to the Framers’ Notion of a “Just War”

The founders’ Christian beliefs were inextricably tied into the social contract theory. The limited government conceived at the Constitutional Convention was in part limited because of the belief in the existence of “inalienable rights,” such as those at the center of the Declaration of Independence, which could neither be ceded to nor taken by the federal government.⁴⁴ These rights were “natural law” rights⁴⁵ manifested through God-given reason,⁴⁶ inherent in God’s creation of man.

As persons whose Lockean political philosophy and Christian religious conceptions were intellectually intertwined,⁴⁷ the founders’ view of war would have been circumscribed by the “just war” doctrine.⁴⁸ The “just war” doctrine provides norms and criteria for assessing whether a government’s resort to force is morally justified.⁴⁹ The doctrine pro-

44. See David L. Wardle, *Reason to Ratify: The Influence of John Locke’s Religious Beliefs on the Creation and Adoption of the United States Constitution*, 26 SEATTLE U. L. REV. 291, 304-05 (2002).

45. *Id.*; TRIBE, *supra* note 8, at 560-61.

46. See Wardle, *supra* note 44, at 307-08.

47. See generally *id.* at 292 (“The pervasive influence of Lockean religious convictions motivated the framers of the Constitution to establish a new form of government, provided the theoretical basis for the document itself, and inspired its popular ratification”); see also *id.* at 308:

Sharing Locke’s belief that the government of men should model God’s plan for their salvation, the convention determined to create a government by social contract. Because they believed that God would inspire men through the gift of reason, they exercised faith and surrendered the Constitution to the American people for their ratification.

Id.

48. For a general overview of the concept of just war, see “*War, Morality of*,” in 14 THE NEW CATHOLIC ENCYCLOPEDIA 635 (R.A. McCormick & D. Christiansen eds., 2d ed. 2003) [hereinafter NEW CATHOLIC ENCYCLOPEDIA]. See also RONALD G. MUSTO, THE CATHOLIC PEACE TRADITION (1988).

49. See NEW CATHOLIC ENCYCLOPEDIA, *supra* note 48, at 635.

vides both criteria for judging whether resort to force is justified (*ius ad bellum*) and criteria regarding the conduct of war once combat has commenced (*ius in bello*).⁵⁰ The *ius ad bellum* contains six criteria: (1) just cause, (2) competent authority, (3) right intention, (4) last resort, (5) probability of success, and (6) proportionality.⁵¹ One could hardly imagine how a truly preemptive war could ever meet these six criteria.

Admittedly, the twentieth and twenty-first centuries have seen conflicts break out in permutations different than a war begun by some aggressor nation, such as Germany in WWII. Adding to the type of traditional war, such as the one the federal government has conducted against Iraq, the world is now plagued with guerilla warfare, terrorism and counterterrorism, and ethnic cleansing. Yet, none of these developments change the basic just war doctrine. "Just cause" still means that the "war is permissible only to confront 'a real national and certain danger'"⁵² By definition, this principle cannot encompass preemptive war.

Not surprisingly, given this definition of "just cause," as well as the requirement of "last resort," the United Conference of Catholic Bishops in its *Statement on Iraq* plainly indicated that war against Iraq would not be a "just" one.⁵³ In fact, in addition to the "just cause" and "last resort" criteria, the Bishops also questioned both the criteria for "competent authority" (questioning the U.S. taking such action other than as part of a UN initiative) and "proportionality" (citing the current suffering of the Iraqi people under the sanctions, and the likely further suffering in the event of war).⁵⁴

50. *Id.* at 637.

51. *Id.*

52. Summary of a pastoral letter on war and peace by the National Conference of Bishops, *The Challenge of Peace: God's Promise and Our Response* (May 3, 1983), at <http://www.zero-nukes.org/challengeofpeace.pdf>.

53. See United States Conference of Catholic Bishops, *Statement on Iraq*, (Nov. 13, 2002), at <http://www.usccb.org/bishops/iraq.htm>; Bishop Wilton D. Gregory, *Letter to President Bush on Iraq*, (Sept. 13, 2002), at <http://www.usccb.org/sdwp/international/bush902.htm>.

54. *Id.*; see also Center for Constitutional Rights, *Consequences of Future Force Against Iraq* (Jan. 24, 2002), at http://www.ccr-ny.org/v2/newsroom/docs/letter_to_georgebush.pdf (addressing President Bush and Secretary of State Rumsfeld, detailing humanitarian harm of Iraqi war on civilian population).

C. Preemptive War Is Inconsistent with the Founders' Perspective on War

At the time of the adoption of the Constitution, the founders had just endured a bloody war on their soil and had no interest in granting the federal government the power to easily wage the country in war.⁵⁵ Thus, at the Pennsylvania ratifying conference, James Wilson spoke of the Constitution and war: "The system will not hurry us into war; it is calculated to guard against it."⁵⁶ Wars were matters of necessity; something to be avoided if possible. With this perspective, it is hard to imagine that the founders would have given the federal government the power to make war on the grounds other than true "imminent" danger; i.e., traditional self-defense.

Americans did not seek empire and conquest. They had been subject to colonization and were not at heart colonialists to the extent of the European powers. They had gone into battle under a banner displaying a coiled rattlesnake ready to strike, under which was written, "don't tread on me."⁵⁷ This symbol appears to convey a sentiment about what those fighting for the would-be nation thought about military force: do not bother us, we will not bother you; strike us and you will suffer.

The young nation was so cautious about extending the war power beyond repelling an attack within its borders that during the War of 1812, there were serious questions within the federal government whether it had the power to cross the

55. See Alexander M. Bickel, *Congress, the President, and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 132-33 (1971) (indicating that the founders wanted to make it difficult to engage in real war); see also Ely, *supra* note 20; Yoo, *supra* note 20. Although Professors Ely and Yoo hold diametrically opposed views on the locus of power to initiate war under our Constitution (Ely placing it in the Congress; Yoo in the President), both agree that one purpose of the founders' chosen structure was to make the initiation of war difficult. See *supra* note 20. Ely is concerned with a war initiated without the type of widespread political debate and support engendered by the legislative process. Ely, *supra* note 20, at 3-5. Yoo cites concerns of the founders that, "Classical history displayed wild tendencies by pure democracies toward war" and that the popular will might be "consumed with private interests" in seeking war. Yoo, *supra* note 20, at 302. Yoo contends that the founders lessened those concerns by placing substantial control over the war power by the executive. See *id.* at 302.

56. Yoo, *supra* note 20, at 190.

57. This phrase appeared on the first American flag, raised by Lt. John Paul Jones in Commodore Esek Hopkin's flagship, the Alfred, on December 3, 1775. See John Ferri, *O&A*, TAMPA TRIBUNE, Mar. 16, 1997, at Nation/World 13.

border into Canada as part of its nation's defense.⁵⁸ The question was eventually answered in the affirmative, and the U.S. attacked Canada.⁵⁹ But the fact that some in government seriously debated over what today we would find obvious gives insight into how strongly those in the new nation perceived the use of military force as tied to true self-defense.

As Constitutional Convention delegate Oliver Ellsworth of Connecticut said, "there is material difference between the cases of making war and making peace. It shd. [sic] be more easy to get out of war, than into it."⁶⁰ Supporting Ellsworth, George Mason of Virginia added that he "was for clogging rather than facilitating war; but for facilitating peace."⁶¹

58. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWERS—THE ORIGINS 268 (1984).

59. *Id.*

60. Yoo, *supra* note 20, at 263.

61. *Id.* In fact, the new nation possessed neither economic nor military resources to wage war (at the time Washington assumed the presidency, there were fewer than 840 men in the U.S. Army, and there were no naval forces to command). See Jules Lobel, *Foreign Affairs and the Constitution: The Transformation of the Original Understanding*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 273, 274-75 (David Kairys, ed., 2d ed. 1990). As Attorney General Randolph wrote to James Monroe in 1775:

An infant country, deep in debt; necessitated to borrow in Europe; without manufacture; without a land or naval force; without a competency of arms or ammunition; with a commerce, closely connected beyond the Atlantic, with a certainty of enhancing the price of foreign productions, and diminishing that of our own; with a constitution more than four years old; in a state of probation, and not exempt from foes—[such a country can have no greater curse in store for her than war. That peace was our policy has been admitted by Congress, and France by herself.

Letter from Randolph to James Monroe of June 1, 1775, in Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, HARV. INT'L L.J. 1, 21 (1983). Lobel has also noted:

Foreign policy was a major concern underlying the convocation of the Constitutional Convention in Philadelphia. Various state governments were violating international law and treaty agreements, provoking retaliatory actions by European powers. Randolph opened the main business of the convention by listing the defects of the Articles of Confederation, the first of which included "that they could not cause infractions to treaties or of the law of nations to be punished." Madison echoed this theme, asking whether the proposed constitutional plan will "prevent those violations of the law of nations and treaties which if not prevented must involve us in the calamities of war."

Jules Lobel, *Foreign Affairs and the Constitution: The Transformation of the Original Understanding*, in THE POLITICS OF LAW—A PROGRESSIVE CRITIQUE 275 (David Kairys ed. 1982).

Moreover, a significant percentage of the citizenry at that time would not have wanted to give the federal government any more excuse to raise an army than necessary. Regarding war powers, the greatest fear of the anti-federalist was that the President, in alliance with or unopposed by Congress, would use a standing army to create a federal dictatorship.⁶² Allowing preemptive war would have given the executive a rationale for constantly maintaining an army. The new American citizens had just fought and died to expel just such a government in the form of the Crown and its troops. They were not about to fall under the heels of the same form of government, with the title "President" substituted for "King."

D. Permitting Preemptive War Risks Permanent Alteration of the Basic Constitutional Structure

It seems a fair proposition to contend that the federal government faces the limits of its powers when its actions threaten a permanent alteration of the basic constitutional structure.⁶³ Thus, recent Tenth Amendment Supreme Court jurisprudence retains sensitivity to the concern that excessive federal encroachment into matters affecting the states risks erosion of state sovereignty, and with it, the basic federalist constitutional structure.⁶⁴ In effect, these cases found that an enumerated power given to the federal government to benefit the federal-republic (i.e., the Commerce Clause) could not constitutionally be employed in a manner actually tending to erode that same federal-republic (i.e., weaken the federal-state relationship embodied in the concept of federalism).

The same concern inures in the misuse of federal military power. At the extreme, the federal government cannot constitutionally exercise its power to use military force if that force is employed to seize control of all state governments in order to impose a federal dictatorship. Although permitting preemptory war does not raise this extreme scenario, it risks seriously undermining the constitutional structure, a risk at

62. Yoo, *supra* note 20, at 272-73.

63. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Violence Against Women Act exceeded congressional power under the Commerce Clause); *Lopez v. United States*, 514 U.S. 549 (1995) (holding that a congressional act barring possession of firearms in "school zones" is beyond the power of Congress).

64. *See* cases cited *supra* note 63.

least as great as that posed by any foreseeable misuse of the Commerce Clause.

The following scenario illustrates how this harm to the constitutional structure could emerge. Claiming the right to conduct preemptive war, the federal government carries out a series of seemingly unending military actions from Afghanistan to Iraq, Iraq to Syria, Syria to Iran, Iran to Somalia, Somalia to North Korea, North Korea to [*fill in the blank*]. Once preemptive self-defense is accepted as legitimate, what previously may have been unthinkable⁶⁵ becomes relatively simple,⁶⁶ especially with a compliant visual media which seems to find “war as a sporting event,” or “war as a video game,” good for ratings.

The foundations of preemptive war make such behavior possible. Relying upon the rationale of preemptive self-defense, particularly when conjoined with the recent belief in state-sponsored terrorism, the United States can justify attacking any other nation. In this post-9/11 world, many people believe that a handful of terrorists armed with so-called weapons of mass destruction could cause significant harm and inflict large-scale casualties on an otherwise powerful country.⁶⁷ Therefore, for example, employing the preemptive defense rationale, Russia could justify attacking a tiny, powerless nation on the claim that a small group of residents of that state were likely some day to provide a few vials of some deadly virus to the Chechnyan rebels.

Imagine the scenario has proceeded to a point where the U.S. is embroiled in a series of wars. In this constant state of

65. *But see* Billy Bragg, *North Sea Bubble*, in NO POP, NO STYLE, STRICTLY ROOTS (1979) (asking, in this musical recording, “War – What is it good for? It’s good for business.”), available at http://www.billybragg.co.uk/releases/albums/dont_try_this/dont13.html.

66.

Virtually any country has the potential and ability to produce WMD, and intent is in the eye of the beholder. Hence the refined version of the grand strategy effectively grants Washington the right of arbitrary aggression. Lowering the bar for the resort to force is the most significant consequence of the collapse of the proclaimed argument for the invasion.

CHOMSKY, *supra* note 3, at 14.

67. *See, e.g.*, Steve Shultze & Meg Jones, *Many Americans Fear Another Terror Attack, Poll Finds*, MILWAUKEE J. SENTINEL, Sept. 5, 2003, at 1A (stating that three-fourths of the people polled expected occasional ongoing terrorist attacks, with 58% fearing attacks might come soon).

war, society's almost exclusive focus becomes the current war. Federal funds and priorities become focused on all things military. But, because any attack on a nation in the twenty-first century carries the threat of terrorist reprisals, states must enlist in providing anti-terrorism security. This, however, will tend to drain state coffers, leaving insufficient funding for such traditional state functions as education and crime control. At the same time, the constant danger of enemy attack can be used to justify broad security-directed legislation like the Patriot Act,⁶⁸ increased pressure on civil liberties,⁶⁹ and an ever-mounting presence of the federal government in the private lives of citizens. The result is a dominating federal government in which the states and the citizens principally exist to endlessly support the federal military-industrial complex, preemptive war to preemptive war. Under these circumstances, the federalist conception reflected in the constitutional structure of American government would exist only in the most diluted form, as that structure undergoes de facto alteration.

E. Prior to Our Attack on Iraq, the United States Never Engaged in Preemptive War

The United States has sent troops into other sovereign nations "well over a hundred times."⁷⁰ Admittedly, history suggests that some of the official rationales were perhaps ingenuous, with the military action at least in part being motivated by, for example, a desire to annex land on the North

68. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

69. Recent experience has unfortunately made this risk palpable. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW AND POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES* (2003) (update to LAWYERS COMMITTEE, *A YEAR FOR LOSS: RE-EXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11*) (discussing widespread post-9/11 enhancement of governmental powers to spy on U.S. citizens and to gather information about U.S. citizens; legislation limiting citizens' access to information about the federal government; indefinite incarceration of U.S. citizens; expanded power to search libraries, bookstores, and the Internet; proposals that would permit extradition of U.S. citizens for trial in foreign countries with which we have no extradition treaties; proposals that would permit loss of U.S. citizenship as punishment for certain acts; and lessening constraints on foreign intelligence services to conduct domestic surveillance).

70. Yoo, *supra* note 24, at 179.

American continent.⁷¹ Yet, even these actions never amounted to anything akin to preemptive self-defense: "The historical record indicates that the United States has never, to date, engaged in a 'preemptive' military attack against another nation."⁷²

Throughout its over 200-year history, the United States has used a variety of rationales to justify use of force. Some rationales have involved the use of force to protect U.S. citizens and property.⁷³ Others involved circumstances where the local governments allegedly could no longer maintain order,⁷⁴ including situations where treaty rights⁷⁵ supplemented this nation's right to intervene. The United States has even employed troops in a failed attempt to rescue American citizens held hostage.⁷⁶

Some incursions were based on the Monroe Doctrine:

71. The incursions into Spanish-controlled Florida in the early 1800s and the Mexican War in 1846 smack of the aggrandizement of territory, yet neither action was based on any claim of a right to conduct a preemptive war. The rationale underlying our military aggression into Florida was comprised of a combination of factors, including instability in a territory we were in the process of negotiating to purchase, the request of a revolutionary government for our aid, the reality that otherwise British troops would be stationed at the Southern border of the new nation, and filling the vacuum resulting from the collapse of the Spanish Empire. See SOFAER, *supra* note 58, at 294-326. The Mexican War involved our claim of a lawful right to disputed territory that now constitutes much of Texas. President Polk sent troops to claim all land north of the Rio Grande, and when the Mexican government understandably objected and crossed the Rio Grande, America considered itself "attacked on its soil," and thus responded in self-defense of its territory and people. See Grimmert, *supra* note 1; Ratner, *supra* note 20, at 467-68; *Combat Forces*, *supra* note 20, at 1780.

72. Grimmert, *supra* note 1.

73. Troops have been deployed to protect citizens in Haiti (intermittently: 1915-1934); Dominican Republic (intermittently: 1916-1924, 1965); the Chinese Boxer Rebellion (1900) (though in the process international laws were violated by taking reprisals against the rebels); Nicaragua (1912); Panama (1903, 1989); Grenada (1983) (acting upon the request of neighboring islands when a Marxist faction overthrew the existing government); Formosa (1955); and Lebanon (1957). See generally Ratner, *supra* note 20, at 468-70; *Combat Forces*, *supra* note 20, at 1788-93.

74. *Supra* note 71.

75. Intrusions into Haiti and the Dominican Republic in the early portion of the twentieth century were in part justified by treaties that in effect made those nations U.S. protectorates. Grimmert, *supra* note 1, at CRS-3. Treaties involving Panama and the Canal were used as part of the justification for our intervention in 1903. *Id.* at CRS-3. Similarly, President Eisenhower's decision to send marines to the Dominican Republic in 1965 was based on O.A.S. obligations. See Grimmert, *supra* note 1; *Combat Forces*, *supra* note 20, at 1792-93.

76. See Yoo, *supra* note 20, at 8 (discussing deployment of troops in an ultimately unsuccessful attempt to rescue Iranian hostages in 1980).

sending troops to states whose instability made them incapable of keeping “foreign powers” out of the Western Hemisphere.⁷⁷ Force has also been used to respond to a foreign state that sponsored terrorism that resulted in the death of American citizens in Europe.⁷⁸

Military force has been employed to restore governments to power in the Western Hemisphere,⁷⁹ and at other times has been used in conjunction with a treaty obligation to ensure the “neutrality” of the Isthmus of Panama.⁸⁰ The United States has also used troops to preserve the status quo while negotiating for the annex of foreign-held territory in North America,⁸¹ and has dispatched troops to pursue pirates, bandits, and outlaws.⁸²

The United States has protected its military personnel, such as in the *Pueblo*⁸³ and *Mayaguez*⁸⁴ incidents, and has acted when its troops have been fired upon when providing military aid to neighboring nations.⁸⁵ Furthermore, the United States has fought wars against nations that preyed on its shipping and commerce;⁸⁶ nations that invaded “disputed territory” the U.S. claimed to have annexed; a nation that attacked U.S. Naval bases (Pearl Harbor); a nation intertwined with terrorists who attacked U.S. soil (9/11); and a nation which refused to leave its Caribbean colony, declared war against the U.S., and arguably sank a U.S. battle ship (“Re-

77. See SOFAER, *supra* note 58, at 255; see also Grimmett *supra*, note 1.

78. See HENKIN, *supra* note 20, at 99; Honorable Robert G. Torricelli, *War Powers Resolution After the Libya Crisis*, 7 PACE L. REV. 661, 666 (1987).

79. See HENKIN, *supra* note 20, at 101 (discussing deployment of troops to Haiti in 1994).

80. See *Combat Forces*, *supra* note 20, at 1789 (discussing intervention in Panama against Columbia in 1903 based on 1846 treaty).

81. See *supra* note 69 (discussing intrusions into Spanish-held Florida).

82. We have chased Pancho Villa into Mexico, the Seminoles into Florida, and Noriega into Panama. See Berger, *supra* note 20, at 59-60; *Combat Forces*, *supra* note 20, at 1789.

83. See *Combat Forces*, *supra* note 20, at 1781 (discussing the military response to the North Korean attack on a U.S. naval ship, the *Pueblo*).

84. See Yoo, *supra* note 20, at 181 (discussing the military response to Cambodian attack on *Mayaguez* in 1975).

85. Wald, *supra* note 24, at 1422 (stating that troops providing military aid at the request of El Salvador were fired upon in 1984).

86. Examples of wars based on shipping and commerce include the wars against the Tripoli Pirates (1802), Algiers (1815), undeclared war against France (Adam’s War, 1798-1800), the War of 1812, and World War I (1914). See Ratner, *supra* note 20, at 465-66; *Combat Forces*, *supra* note 20, at 1785-86.

member the Maine").⁸⁷

Most of America's use of force in the latter twentieth century, however, has been pursuant to some combination of regional and bilateral defense pacts (NATO, SEATO), treaty obligations, and UN membership.⁸⁸ In addition to justifying force against aggressors, these commitments also have provided the basis for providing troops for peacekeeping and humanitarian purposes.⁸⁹

Only the Cuban Missile Crisis of 1962⁹⁰ even hinted at the use of preemptive force. Yet, that incident hardly stands as a precedent. First, reasonable people could have characterized the risk to U.S. citizens and soil as "imminent." The "Evil Empire,"⁹¹ whose leader made threats against American interests by claiming that "we will bury you,"⁹² surreptitiously brought nuclear missiles to an island ally, located a boat ride

87. The Spanish-American War is somewhat complex in its origins. Shortly prior to a U.S. declaration of war, Congress had passed an act (1) declaring Cuba independent of Spain, (2) demanding that Spain withdraw its troops from Cuba, and (3) authorizing the President to use military force to achieve those ends. Spain rejected the demands, and declarations of war by both nations followed. When the battleship Maine blew up and sunk in Manila Harbor, America proceeded to attack the Spanish held territories of Cuba and the Philippines. See Grimmett, *supra* note 1, at CRS-3; Ratner, *supra* note 20, at 470.

88. The Korean War (1950) was justified by our commitments to the UN charter; Viet Nam was justified by the SEATO mutual defense pact and the 1954 Geneva Accord which divided North and South Korea; and the 1991 Iraqi War by a UN resolution following Iraq's invasion of Kuwait. See U.S. Dept. of State Office of the Legal Advisor, *The Legality of United States Participation in Viet Nam*, 75 YALE L.J. 1085 (1966); *Combat Forces*, *supra* note 20, at 1791-92; Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 MIAMI L. REV. 145 (1995). This has prompted some authors to question whether UN resolutions and treaties can supplant Congress's role in declaring war, and whether treaties can trump constitutional protections. See Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem to Viet Nam*, 121 U. PAL. REV. 1, 15 (1972); Bishop, Jr., *Unconstitutional Treaties*, 42 MINN. L. REV. 773 (1958).

89. *Supra* note 86. Sending troops into Lebanon (1982) (secular violence continues after Israeli invasion), Kosovo (1984), and Somalia (1993), all were part of UN or NATO peacekeeping and humanitarian missions.

90. See Grimmett, *supra* note 1; Yoo, *supra* note 24, at 179.

91. The Soviet Union was referred to as the "Evil Empire" by American politicians throughout the Cold War. See, e.g., *Regan Stresses Morality, Other Conservative Themes; Calls U.S.S.R. "Evil Empire,"* 1983 FACTS ON FILE WORLD NEWS DIGEST, Mar. 11, 1983, at A3.

92. In 1956, during a meeting of the UN Assembly, Soviet President Nikita Khrushchev banged his shoe on his desk and shouted "we will bury you" to the U.S. Representative. Nyta Mann, *When the Diplomatic Mask Slips*, BBC NEWS WORLD EDITION, Oct. 28, 2002.

from U.S. shore.⁹³ Advisors from that “cold war” enemy nation were helping set up and man the missile batteries, and these missiles would soon be, if not already, targeting the United States.⁹⁴ Second, and most importantly, the U.S. did not attack Cuba. The combination of a naval blockade and tense negotiations led to removal of the missiles.⁹⁵

It is far more than mere coincidence that in 214 years of its history, the United States has never attempted to rationalize its use of force under the label of “preemptive” defense. Arguably, such a rationale would violate international law.⁹⁶ In any event, the notion of attempting to justify the rationale of preemptive war should strike one as deeply terrifying if one takes but a moment to think of its implications for any possibility of a world at peace:

If America creates a precedent through its practice, that

93. Abram Chayes, *Living History Interview—Symposium: Nuclear Weapons, the World Court, and Global Security*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 459, 461 (1997).

94. *Id.*

95. See ROBERT SMITH THOMPSON, *THE MISSILES OF OCTOBER: THE DECLASSIFIED STORY OF JOHN F. KENNEDY AND THE CUBAN MISSILE CRISIS* (1992).

96. O'Connell, *supra* note 9, at 2-3, 21; see also JENNIE GREEN ET AL., *AGAINST WAR WITH IRAQ: AN ANTI-WAR PRIMER* (2003); Richard Falk, *Why International Law Matters: Pre-emptive War Flagrantly Contradicts the UN's Legal Framework*, 9 *THE NATION* 276 (Mar. 10, 2003). See also CHOMSKY, *supra* note 3, at 12-13:

Preventive war [i.e., preemptive war] falls within the category of war crimes. If indeed it is an idea “whose time has come,” then the world is in deep trouble. As the invasion of Iraq began, the prominent historian and Kennedy adviser Arthur Schlesinger wrote that:

The President has adopted a policy of “anticipatory self-defense” that is alarmingly similar to the policy that imperial Japan employed at Pearl Harbor, on a date which, as an earlier American president said it would, lives in infamy. Franklin D. Roosevelt was right, but today it is we Americans who live in infamy.

He added that:

“[T]he global wave of sympathy that engulfed the United States after 9-11 has given way to a global wave of hatred of American arrogance and militarism,” and even in friendly countries the public regards Bush “as a greater threat to peace than Saddam Hussein.” International law specialist Richard Falk finds it “inescapable” that that Iraq war was a “Crime against Peace of the sort for which surviving German leaders were indicted, prosecuted, and punished at the Nuremberg trials.”

Id. (footnotes omitted). But see Jason Burke & Ed Vulliamy, *Crisis in the Middle East: Iraq Waits for War as Hawks Lay Their Plans*, *OBSERVER*, July 14, 2002, at 14.

precedent will be available, like a loaded gun, for other states to use as well. The preemptive use of military force would establish a precedent that the United States has worked against since 1945. Preemptive self-defense would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia, for North Korea to attack South Korea, and so on. Any state that believes another regime poses a possible future threat—regardless of the evidence—could cite the United States invasion of Iraq.⁹⁷

Fairly, one could infer that our founders were far too bright to place the United States at such risk.

III. WHETHER THE CONSTITUTION DENIES THE FEDERAL GOVERNMENT THE POWER TO EMPLOY PREEMPTIVE MILITARY FORCE IS JUSTICIABLE

A. *The Issue of the Limits of the Federal Government to Employ Military Force Is a Legal One*

Preemptive war presents the courts with an issue squarely within the province of the judicial branch of government: Given the constitutional framework in which the federal government is one of limited, enumerated powers,⁹⁸ is the power to use force in a preemptive war one which the federal government has been given? This issue is no different than issues involving the limits of federal power to act under the Commerce Clause when those actions interfere with the affairs of the states under the system of federalism.⁹⁹

As historically espoused in *Marbury v. Madison*:¹⁰⁰ “It is emphatically the province and duty of the judicial department to say what the law is.”¹⁰¹ Therefore, as discussed next, the political question doctrine of *Baker v. Carr*¹⁰² has no application to this issue.

97. O’Connell, *supra* note 9, at 19.

98. *See supra*, note 8.

99. *See, e.g.*, Lopez v. United States, 514 U.S. 549 (1995).

100. 5 U.S. 137 (1803).

101. *Id.* at 177.

102. 369 U.S. 186 (1962).

B. The Political Question Doctrine Has No Application to This Case

1. The Traditional Rationales for Applying the Political Question Doctrine to Suits Challenging Presidential Resort to Military Force Have No Bearing

Courts tend to associate the political question doctrine with any litigation attempting to enjoin the use of military force.¹⁰³ The following arguments supporting resort to the political question doctrine by now are familiar. The Constitution has a textual commitment to the two political branches of government.¹⁰⁴ Congress and the executive branch need to negotiate how they will handle events of military force or war, without interference from the courts.¹⁰⁵ Moreover, the relationship between war, foreign affairs, and political negotiations are complex, nuanced, and beyond the understanding of the judiciary whose uninformed interference could jeopardize national interests.¹⁰⁶ Courts also lack the competence, information-gathering capacity, or meaningful standards to assess

103. *See, e.g.,* Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1973); Lowry v. Regan, 676 F. Supp. 333 (D.D.C. 1987); Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1970). *But see* Mora v. McNamara, 389 U.S. 934 (1967) (Stewart & Douglass, JJ., dissenting) (denying certiorari in a case addressing the constitutionality of Viet Nam War). On the other hand, some courts have found the issue of declaring war justiciable under the political question doctrine, but denied cases on other grounds. *See, e.g.,* Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971) (finding evidence of "sufficient action" by Congress to authorize war); Dellums v. Bush, 752 F. Supp. 1141, 1150-51 (D.D.C. 1990) (holding that a case asking the Court to find the 1991 Iraqi war unconstitutional because Congress did not declare war was justiciable under the political question doctrine, but was not "ripe").

In fact, the current Supreme Court may be more willing to look at the exercise of war powers. While the Court's grant of certiorari in the Guantanamo detention cases, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 124 S.Ct. 534 (2003), was delineated as being done only to decide upon the federal court's jurisdiction over the matter, the Court's action can be perceived as "[s]etting the stage for a historical clash between the presidential and judicial authority in a time of military conflict . . ." Linda Greenhouse, *Justices to Hear Case of Detainees at Guantanamo—A Jurisdiction Question*, N.Y. TIMES, Nov. 11, 2003, at A1.

104. *See* Berk v. Laird, 317 F. Supp. 715, 729 (E.D.N.Y. 1970); Broughton, *supra* note 25, at 691.

105. *See* Broughton, *supra* note 25, at 691.

106. *See* Orlando, 443 F.2d at 1043 ("It [inappropriate judicial inquiry] would, indeed, destroy the flexibility of action which the executive and legislative branches must have in dealing with other sovereigns.").

such basically political issues,¹⁰⁷ such as whether the President's dispatch of troops constitutes "hostilities" under the War Powers Resolution.¹⁰⁸ Furthermore, Congress can resort to "self-help" to check presidential powers.¹⁰⁹ Finally, the founders considered disputes between the President and Congress as not constituting "cases [or] controversies."¹¹⁰

Although some have forcefully argued that issues involving commitment of U.S. troops can and must be considered by the courts,¹¹¹ these arguments need not be considered here. None of the rationales for which courts have employed the political question doctrine to abstain from deciding the merits of questions concerning whether Congress or the President may declare war have any application to the current question of whether the Constitution permits the federal government to conduct a preemptory war at all.

When considering preemptory war, none of the previous concerns underlying resort to the political question doctrine matter. Whether the President or Congress has initiated this action bears no importance.¹¹² The meaning of "declare" war

107. See Broughton, *supra* note 25, at 691.

108. See *Crockett v. Reagan*, 558 F. Supp. 893, 898-99 (D.D.C. 1982); see also Ratner, *supra* note 20, at 482.

109. See *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring), *cert. denied*, 531 U.S. 815 (2000). Justice Silberman also wrote that no principled judicial standards exist for defining "war" for purposes of constitutional interpretation. *Id.* at 24-25. Even if Justice Silberman is correct, his analysis would have no bearing on the present case. See *id.* at 40 (Tatel, J., dissenting). It does not matter whether one terms a preemptive "war" a preemptive "attack," preemptive "use of significant military force," preemptive "self-defense," preemptive "attack on another nation to prevent it from attacking us in the future," or such. Whatever label one puts on the use of preemptive military force such as directed against Iraq, that particular use of force is constitutionally beyond the power possessed by the federal government. See discussion *infra* Part III.B.1.

110. See Yoo, *supra* note 20, at 288 (indicating that the founders did not consider disputes between legislative and executive branches "cases or controversies"). But see *Dellums v. Bush*, 752 F. Supp. 1141, 1149 (D.D.C. 1990) (stating that the court may be willing to consider a dispute between Congress and the President in principle, but finding that the particular case was not ripe).

111. See *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003); Brief Submitted on Behalf of 74 Concerned Law Professors as Amicus Curiae Supporting the Request of Appellants for Reversal at 15-21, *Doe v. Bush*, 323 F.3d 133 (No. 03-1266) [hereinafter Brief]; see also THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992) (arguing that the Court should apply the same constitutional analysis in foreign affairs that it applies to domestic concerns).

112. See *supra* notes 15, 18.

in the Constitution is irrelevant.¹¹³ Whether the war can take place without such a declaration,¹¹⁴ or whether there has been “sufficient” evidence of congressional involvement with the President in the decision are not important.¹¹⁵ The significance of the War Powers Act and whether “hostilities” have taken place so as to trigger the Act do not matter.¹¹⁶ It is irrelevant if Congress has alternative means of “self-help” within its legislative province and therefore does not need to invoke the judicial power.¹¹⁷ As argued before, the federal government lacks the power to engage in a preemptive attack against another action, even if both political branches agree and Congress files a declaration of war.

If the federal government lacks the constitutional power to even engage in preemptive war, many other ideas associated with the political question doctrine, likewise, have no purchase. The traditional political question arguments concerning the textual commitment of war to the political branches—including the theory that structurally the founders intended the legislative and executive branches to provide systematic checks on the power of war,¹¹⁸ the notion that Congress and the President must be left free to negotiate over their relative roles in war, and the idea that courts have no competency to interfere with this most extreme tool of foreign relations and diplomacy—do not matter. The courts cannot have any interest in helping the federal government pursue a power under the circumstances when they determine that the federal government does not possess such a power (i.e., the power to wage preemptive war). Determining when the federal government has acted beyond its limited powers is the very type of decision for which the judicial branch is uniquely competent.

113. *Id.*

114. *Id.*

115. *See* Campbell v. Clinton, 203 F.3d 19, 25 (D.C. Cir. 2000). Note that whether Congress delegated the power to attack Iraq in the “October Resolution,” H.R.J. Res. 114, 107th Cong. (2001), and if it did, whether that delegation would be constitutional, are irrelevant issues. Brief, *supra* note 111, at 13-16. Congress cannot delegate a power which the federal government does not possess.

116. *See* Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971).

117. *See* Broughton, *supra* note 25, at 717.

118. *See* Yoo, *supra* note 20, at 170. These checks involve Congress’s control of funding and impeachment and the President’s power to veto.

2. *A Limited Review on the Issue of "Imminence" Involves a Justiciable Decision*

There was little question that the war in Iraq was preemptive. But what if the matter was in dispute, with the government contesting a plaintiff's claims of a lack of "imminence?"¹¹⁹ How would a court, without stepping back into the mire of the political question doctrine, resolve this seemingly factual question underlying the constitutional decision of whether this is "anticipatory" self-defense (constitutional) or "preemptive" self-defense (unconstitutional)? In response to that concern, this article proposes a limited legal review within a system of shifting burdens.¹²⁰

VI. AUTHOR'S PROPOSAL TO IMPOSE SHIFTING PROCEDURAL BURDENS ON THE PLAINTIFF AND GOVERNMENT

A. *The Plaintiff's Burden*

First, the plaintiff must carry the burden of establishing a prima facie showing that the government's proposed use of military force was not in response to an "imminent threat," and thereby, constituted preemptive war. Without this bur-

119. *Martin v. Mott*, 25 U.S. 19 (1827), superficially appears to speak to these issues. In that case, the Court refused to question the judgment of the President whether "sufficient danger of invasion" existed to justify calling up the militia under a federal statute. The decision in *Mott* makes sense because the Court was asked to decide whether the threat of invasion was in fact imminent. The President must be able to respond quickly to the threat of invasion, and the judiciary is in a poor position to second-guess him on the question of assembling troops. Whether or not there is "in fact" a threat of invasion is a judgment for the commander in chief and the military. The Constitution has committed the prosecution of war to the executive, and the President and military hierarchy, as a practical matter, possess the requisite information and expertise to make the determination to engage in war. The Court lacks this competence. As I discuss in this section, however, determining whether and when to prosecute war is not at all the type of judicial decision I am proposing. Moreover, *Mott* involved a power granted under statute. *Id.* at 39. In contrast, the current issue about the legitimacy of preemptive war involves the very existence of a constitutional power. Whether the federal government's actions in committing troops fall on the constitutional or unconstitutional side of the line cannot be left to the *ipse dixit* of that same federal government.

120. This decision-making format is roughly modeled upon *Batson v. Kentucky*, 476 U.S. 79 (1986), employed by courts in assessing whether preemptory challenges have been used by the prosecution for racial purposes. The complaining defendant first must make a prima facie showing of a "pattern of discrimination." *Id.* at 97. Only then must the government present evidence that its challenges had neutral, non-racial explanations.

den of proof by the plaintiff, the government could be dragged into court every time it commits troops in order to justify its actions as non-preemptive. Allowing such litigation could interfere with the serious business carried out by those guiding our nation and making the difficult decisions concerning the military. Requiring the plaintiff to make this initial showing precludes the possibility that a claim of unconstitutional preemptive war can be raised absent a strong initial proof.

B. The Government's Burden

If, and only if, the plaintiff meets its initial burden, the government must respond by providing the court *in camera* with evidence¹²¹ that the proposed use of force was not pre-

121. The State will certainly resist such an inspection by claiming a privilege under national security and military secrets, and the courts will take this claim very seriously. See also *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) (indicating that the privilege for state secrets is "absolute"); *United States v. TRW, Inc.*, 211 F.R.D. 388, 393 (C.D. Cal. 2002) (also indicating that the privilege for state secrets is "absolute"); cf., e.g., *United States v. Nixon*, 418 U.S. 683, 710 (1974) (rejecting Nixon's claim of privilege and noting that "He does not place his claim of privilege on the ground they are military or diplomatic secrets"). Ultimately, however, I do not believe the executive can successfully oppose the *in camera* review.

In the first place, even should such a claim be found to bar *in camera* review, it is difficult to see how the ban on *in camera* review would benefit the government. The question of an *in camera* review only takes place at the point in my proposal when the burden has already shifted to the government. Without presenting evidence of "imminence" to the court, privileged or otherwise, the government cannot show that its proposed actions are constitutional. Moreover, the required showing for "imminence" would not necessarily involve revealing sources, methods of information gathering, exact sites of anticipated enemy attacks, or actual secret documents. A more general presentation might suffice so long as it principally consisted of concrete evidence rather than solely "take our word for it" conclusions.

In the second place, I do not believe that even as powerful a privilege as involved in state/military secrets would bar the inspection *under our particular circumstances* where the claim is that the federal government is exceeding its constitutional authority in pursuing a preemptive use of military force. In such a case, the information will only be seen by a federal judge, not by plaintiffs or other third parties. Further, national security and military secrets are not "relational" privileges, such as the attorney-client privilege, where the policies underlying the privilege would be violated if a third party (even a federal judge) is made privy to the information. In contrast, the issue surrounding third parties viewing military secrets would not involve any breach of a confidential relationship, but, rather, involve trust concerning the recipient of the information not revealing the contents. In this regard, a federal judge would seem as good a security risk as some members of the armed forces or other departments of the executive branch. Further, the Supreme Court has made clear that, with the appropriate *prima facie* showing, even material falling under the claim of a re-

emptive, but “anticipatory” (i.e., the risk of harm to U.S. interests was imminent or a clear and present danger existed).

However, the court will not decide whether in fact the use of force was or was not “anticipatory.” That is a judgment for the commander in chief and the military. The Constitution commits the executive branch to oversee the prosecution of war, and the President and military hierarchy possess the requisite information and expertise to make that determination. Courts lack such competence.

Courts may only decide whether, if based on the evidence the government provides, they find that a “reasonable person” could find imminence and/or clear and present danger. In other words, the court only must find something akin to the “reasonable fact-finder” standard of Federal Rule of Evidence 104(b).¹²² This standard requires sufficient evidence that a reasonable fact-finder “could” find the factual proposition in

lational privilege may be subject to an *in camera* inspection. *See United States v. Zolin*, 491 U.S. 554 (1989) (stating that with sufficient evidence to support a “reasonable belief” that the crime-fraud exception to the attorney-client privilege may apply, the court may order *in camera* inspection of materials claimed privileged).

Finally, the courts are a co-equal branch of government, charged with providing a constitutional check on the legislature and executive. The courts will ultimately decide the scope of any executive claim of privilege, *Nixon*, 418 U.S. at 697, particularly given the fact that executive privilege is a creature of common law. *Northrop Corp.*, 751 F.2d at 399. As such, there is no reason for the courts to support a claim by the executive that would thwart the courts’ ability to carry out their constitutional role (here, insuring that the federal government does not exceed the power granted it under the war power). *But see United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the Court noted:

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

Id. at 10.

Nevertheless, I do not believe that this language controls our situation. The language is obvious dicta, and it arises in the context of a torts dispute, not an action testing the constitutional limits of our government to commit military troops to a war. Although it may not be worth the risk of giving even a federal judge (and perhaps select staff) access to such information in a torts dispute, the power of the government to commit troops to war, involving a fundamental check on federal constitutional power, would seem to warrant a different risk analysis.

122. FED. R. EVID. 104(b).

issue,¹²³ and provides the framework for a legal, as opposed to a political, decision.

Perhaps the federal government will have little difficulty in crafting its presentation to meet this standard whenever it desires. Perhaps it will be able to scare judges with stories about the terrible consequences to the United States if the government does not launch an attack, and that no judge will take the personal responsibility of finding that the required showing has not been met and, therefore, the military may not strike. Perhaps the military will show the judge totally false information because no one else will see the information.

These hypothetical possibilities, however, do not mean that the process will be an empty formality. In making the required showing, the legislative and executive branches must at least present *something* other than a few sound bites to justify their actions. Also, because all of these actions would take place against a legal and cultural backdrop where preemptive war has been declared unconstitutional, the very existence of court review in the area would reasonably affect the federal government's initial decisions on the actual use of military force as much as it inevitably would inform the rhetoric of the government's attorneys should they ever have to justify those decisions.

V. CONCLUSION

A review of the philosophy underlying the Constitution, the "just war" doctrine, the founders' view on the role of war, the possible permanent effect on the constitutional structure, and the 214-year experience in using military force reasonably leads one to the conclusion that the employment of preemptive self-defense or preemptive war is beyond the power given the federal government. Nevertheless, the United States has attacked Iraq and, with that action, lost another piece of what (if any) is left of its national innocence. Use of military force against Iraq, which should be viewed as unconstitutional, must not now be seen as a legal precedent¹²⁴ and

123. *Id.*

124. *See, e.g.,* CHOMSKY, *supra* note 3, at 21:

After the invasion of Iraq was declared a success, it was publicly recognized that one motive for the war had been to establish the imperial grand strategy as a new norm: "Publication of the [National Security Strategy] was the signal that Iraq would be the first test, not the last,"

next used to justify some similar incursions into countries like Iran or North Korea. The next time, the courts should act in this completely justiciable arena, and should define the constitutional limits of the federal power to employ military force.

POSTSCRIPT

The author has intimated that the founders would have been too wise to condone the use of military force in the conduct of a preemptive war. Recent events have further clarified the inherently problematic nature of a preemptive war. First, because preemptory war does not require the other nation to actually attack or be in the process of carrying out an imminent attack, it is all too easy for an administration to create the "threat" that is then used as the basis for the preemptive war. Weapons of mass destruction, claims in a State of the Union address about enriched uranium purchases from Africa, supposed ties between Saddam Hussein and 9/11 appear at this time not to have been well-founded.¹²⁵ Second,

the *New York Times* reported. Iraq became the Petri dish in which this experiment in pre-emptive policy grew." A high official added that "we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively," now that the norm has been established.

Id.

125. On weapons of mass destruction:

In an interview on Dec. 16, television anchorwoman Diane Sawyer pressed Bush on the fact that no unconventional weapons had been found in Iraq some nine months after the search had begun. Bush kept interjecting: "Yet." Sawyer persisted, asking about the administration's flat statements that Saddam had such weapons versus the mere possibility that he could acquire them. An exasperated Bush replied: "So what's the difference?"

Helen Thomas, *Some Words Better Left Unuttered*, SEATTLE POST-INTELLIGENCER, Dec. 30, 2001, at B6; see also Thomas L. Freidman, *Presidents Remade by War*, N.Y. TIMES, Dec. 7, 2003, at 13, section 4 (observing that no weapons of mass destruction were unearthed to that point, and that Bush, like Presidents of past, redefined the rationale for war, in this case from weapons of mass destruction to bringing democracy to Iraq); *The President's News Conference; Sidestepping on Iraq*, N.Y. TIMES, July 31, 2003, at A24; *Reviewing the Intelligence in Iraq*, N.Y. TIMES, May 26, 2003, at A14; *Was the Intelligence Cooked?*, N.Y. TIMES, June 8, 2003, at 12, section 4.

On the alleged attempt by Saddam to buy enriched uranium, one article noted, "In his January 28, 2003 State of the Union Address, President Bush stated, 'The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.'" Office of the Press Secretary, *President Delivers "State of the Union,"* Jan. 28, 2003, at

even if you triumph in a preemptive war, things are far from easy. Because the defeated nation never really did anything to you, it is a bit difficult to have any legitimacy in the eyes of those you are occupying. You are an aggressor nation, an occupier, and therefore the likelihood of a patriotically-inspired resistance movement against your occupying forces is substantial.

<http://www.whitehouse.gov/news/releases/2003/01>. At the time, the intelligence community already knew that this information was false. See James Risen, *Debating a Leak: News Analysis; All Roads Lead to Iraq*, N.Y. TIMES, Oct. 2, 2003, at A1; David E. Sanger & Carl Hulse, *After the War: War's Rationale; Bush Charge on Iraq Arms Had Doubters, House Told*, N.Y. TIMES, July 9, 2003, at A10; Richard W. Stevenson, *After the War: CIA Uproar; White House Tells How Bush Came to Talk of Iraq Uranium*, N.Y. TIMES, July 19, 2003, at A6; Joseph C. Wilson, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, at 9, section 4.

On the connection between Saddam and 9/11, one writer noted that in spite of the stance of hardliners at the Pentagon and the White House, "the C.I.A. and F.B.I. eventually concluded that . . . there was no hard evidence that Mr. Hussein's government was involved in the Sept. 11 plot." James Risen, *A Region Inflamed: Inquiry; Iraqi Agent Denies He Met 9/11 Hijacker in Prague Before Attacks on the U.S.*, N.Y. TIMES, Dec. 13, 2003, at A10.
