

"PREEMPTIVE WAR": IS IT CONSTITUTIONAL?*

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 it in the final stages of preparing for such an assault. Thus, for the first time in the 214-year history of our country, America had begun a Preemptive War.¹

As early as May 2002, President Bush spoke about the use of "preemption" in a speech he gave at West Point on combating terrorism.² Subsequently, the administration continued to maintain the position that Iraqi's leadership must be eliminated because the Ba'ath regime was continuing the development of weapons of mass destruction, and might again use those weapons against an opponent, or supply those weapons 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 do us harm in the future.⁴ Obviously, the President has felt comfortable putting this claim, unique in

* The author wishes to thank Pierre Schlag for his thoughtful suggestions, Ann Scales for her ideas and encouragement, and extraordinary librarians Kelly Kunsch and Bob Menanteaux for all their invaluable help in locating sources to support my ideas.

¹ F. Grimmer (specialist in national defense, foreign affairs, defense, and trade division), "U.S. Use of Preemptive Military Force," Congressional Research Service Report for Congress, CRS-1 (September 28, 2002).

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 & Jean Cummings, "New Doctrine: How Bush Decided that Iraq's Hussein Must be Ousted, Chilling Warnings in October Sparked Internal Debate on Preemptive Strategy, A 'Dirty Bomb' scare in D.C.," WALL ST. J., June 14, 2002, at A1.

⁴ In fact, the current Director of the CIA said in a letter to Congress on October 10, 2002, "while Saddam Hussein poses little threat to America now, a U.S. invasion could push him into retaliating with chemical or biological weapons." According to the head of our nation's foreign intelligence, ironically, only by first engaging in Preemptive War would we assure true imminent danger to our soldiers, citizens, and nation. See, Julian Borger, "CIA in blow to Bush attack

our nation's history, into action. But does our Constitution anticipate such a use of military force by the federal government?

While there exists a significant body of literature on the respective allocation of war power between the President and Congress, there literally is not a single word written in case law or legal literature about whether or not the federal government (i.e., President and Congress in concert) possesses the power to wage preemptive war under our Constitution.

In this essay, I argue that the courts should find that the federal government lacks such a power. Others may disagree. That is fine; it is my intention to provoke response. None can question, however, that this is a debate in which the legal academy should engage.

A. Introduction: The Significant Legal Difference Between Anticipatory Versus Preemptive War

The Constitution provides the federal government with a number of interrelated enumerated powers which, when taken together with the “Necessary and Proper” clause, allow use of military force in a wide range of circumstances. These include powers to declare war and make appropriations to support the war, powers to enter into treaties, powers to function as commander in chief of the military, the powers to conduct foreign relations, and powers to ensure that the laws (including international law) are “faithfully executed.” Together, these provide the federal government with flexibility to use force to protect our citizens and property, our allies, our territory, our commerce, and to use our military as a member of an international peacekeeping and/or humanitarian force.

plans;” Robert Collier, “Bush’s Evidence of Threat Disputed, Findings Often Ambiguous,

Our federal government, however, is by design a government of limited powers.⁵ As I will show, a broad survey of American political-legal self-understanding in the realm of war fairly 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,”⁶ by which I mean “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.”⁷ Courts should, therefore, be prepared to declare a preemptive war, such as our current venture into Iraq, to be unconstitutional.

Let me put what I'm contending into perspective. Plainly, this nation can act in “anticipatory” self-defense if the threat to our country is truly imminent.⁸ Even before the modern world with its long range missiles and terrorists camps this concept was embodied in the *Caroline* doctrine of 1842,⁹ an agreement between British and American officials that defensive force is permitted when the

Contradict CIA,” THE SAN FRANCISCO CHRONICLE, October 12, 200, at A1.

⁵ “It must be remembered that the Federal government . . . at least the 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.” Nowak, Rotunda, and Youngs, CONSTITUTIONAL LAW 123 (3d ed. 1986). See, also, Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW 298 (2d ed. 1988) (“Constitution in granting congressional power simultaneously limits it.”); Stone, Sedman, Sustein, and Tushnet, CONSTITUTIONAL LAW 115-116 (1st ed. 1986) (Founders created government of “enumerated powers”).

⁶ Mary Ellen O’Connell, “The Myth of Preemptive Self-Defense”, American Society of International Law (Task Force on Terrorism) 2 (2002); (Yoram Dinstein, WAR, AGGRESSION, AND SELF-DEFENSE 168 (3rd ed. 2001); Ian Brownlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275(1963).

⁷ O’Connell, *supra*, n. 6, at 2 n.10.

⁸ See, e.g., O’Connell, *supra*, n. 6, at 7-9.

⁹ *Id.*, at 9. See, also, Note, “United States Foreign Policy Through Cloak and Dagger War Operations: Terrorism or Mandate of National Security?” 11 OKLA. CITY U. L. REV. 159, 192-193 (1986).

"[n]ecessity of that defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation."¹⁰

Modern circumstances admittedly require a bit more flexibility than envisioned in the *Caroline* doctrine. "Anticipatory" self-defense in the modern world, thus, would include attacking the Japanese fleet steaming toward Pearl Harbor in WWII provided we had clear and convincing evidence of their intent,¹¹ bombing a terrorist training camp planning attacks on our citizens or soil, going on the offensive after suffering an initial attack and knowing that further attacks are coming, attacking when we know that an enemy is preparing to launch missiles.¹²

In all these circumstances, the level and certainty of the risk to be endured before resorting to force fits well within the concept of "imminence" as that concept is conceived in the classic requirement for the use of deadly force in self-defense.¹³ Alternatively, one could designate the tipping point as where there is a "clear and present danger"¹⁴ that the risk will come to fruition. This standard,

¹⁰ John B. Moore, 2 DIGEST OF INTERNATIONAL 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, while the *Caroline* doctrine has been used as a general standard for when national self-defense is appropriate, 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 Kearly, "Raising The Caroline," 17 Wis. L. J. 325, 325 (1999).

¹¹ See, O'Connell, *supra*, n. 6, at 9; Yoram Dinstein, WAR AGGRESSION, AND SELF-DEFENSE 172 (3d ed. 2001).

¹² O'Connell, *supra*, n. 6, at 8-10.

¹³ "[I]mminent danger. The danger resulting from an immediately threatened injury sufficient to cause a reasonable prudent person to defend himself or herself." THE HANDBOOK OF CRIMINAL LAW TERMS 320 (Black's Law Dictionary Series) (Bryan A. Garner, ed. 2000).

¹⁴ See, e.g., *Herndon v. Lowry*, 301 U.S. 242 (1937).

taken from 1st Amendment doctrine involving advocacy of unlawful conduct, seeks to resolve the tension of 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, we are contemplating 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 to justifying the use of force by reference to some notion of "imminence" defined so as to recognize the realities of the modern world, Preemptive War is carried out when the situation is neither imminent in any meaningful sense, nor has reached the point of constituting a clear and present danger that the feared harm to our citizens and nation will become reality. It is, thus, this later use of military force which the courts should declare as beyond the powers possessed by the federal government under our Constitutional framework, and thereby unconstitutional.

Also, for reasons I will discuss later, a claim that use of military force is preemptive, and, therefore, unconstitutional, does not face the obstacle which has consistently blocked litigation concerning use of military force; i.e., the Political Question Doctrine.

B. The Federal Government Was Not Given the Constitutional Power to Conduct Preemptive Self-Defense or Preemptive War

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 unilaterally may engage in war, or whether

it is Congress which must declare war,¹⁵ with the President left only with the power necessary to repel a “sudden attack.”¹⁶

On the Congressional side of this debate are those emphasizing the need for broad based popular discussion and support of the war given the human and economic burdens war brings to its citizens, and the fact that the Constitution states that Congress is the branch to “Declare War.”¹⁷ On the executive side of this debate are those looking at the law of war as it existed in England prior to the Revolution,¹⁸ and to the fact that over 100 times in our history the executive has used troops without Congressional consultation.¹⁹ In between, are those who

¹⁵ See, gen., 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); Berger, “War making and the President,” 121 U. PAL. REV. 29 (1972); Monaghan, “Presidential War making,” 50 BU L. REV. 119 (1970); Ratner, “Coordinated War making Power—Legislative, Executive and Judicial Roles,” 44 SO. CAL. L. REV. 461 (1971); Yoo, “The Continuation of Politics by other Means: The Original Understanding of the War Power,” 84 CAL. L. REV. 167 (1996) [hereinafter: “Continuation of Politics”]; Note, “Congress, the President, and the Power to Commit Forces to Future Combat,” 81 HARV. L. REV. 1771 (1968) [hereinafter, “Future Combat”].

¹⁶ The successful proposal at the Constitutional Convention to change the word from “make” to “declare” when allocating war power to the Congress, 2. THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 319 (Max Farrand ed. 1911), has lead to the conclusion that the Founders wanted the President to retain the power to repel sudden attacks. See, gen., Ratner, *supra*, n. 15, at 467.

¹⁷ See, Ely, *supra*, n. 15; Note, “Future Combat,” *supra*, n. 15, at 1775.

¹⁸ See, Yoo, “Continuation of Politics,” *supra*, n. 15, 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 Congress 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 prize money applied, etc. *Id.*, at 242-244. But see, Note, “Combat Forces,” *supra*, n. 15, at 1772-1773 (author agrees that this may have been the original historical understanding of a “declaration,” but contends that the concept has taken on a less technical and a more functional understanding over time, experience and practice).

¹⁹ See, Yoo, “Applying the War Powers Resolution to the War on Terrorism,” 6 GREEN BAG 2d 175, 179 (2003) (troops employed “well over a hundred times in our Nation’s history, ... only handful with Congressional authorization, at 10, n. 27); see, also, Yoo, “Continuation of Politics,” *supra*, n. 15, at 177 (“at least 125 times”); Note, “Future of the War Powers Resolution,” 36 STAN. L. REV. 1407, 1414 (1984) (one author has found 192 instances) [hereinafter: “War Powers Resolution”].

believe that matters involving the use of military use force are properly issues of negotiation between the political branches,²⁰ or those who believe that absent Congressional action, the President has free reign in the military arena, but Congress always may constrain the Executive's actions.²¹

All of this is very interesting and important, yet none of this bears on whether or not the federal government—*both executive and legislative branches together*—possess the power to engage in preemptive war under our 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. They do not deal with the combined power of 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.²²

The lack of direct textual or case material, however, does not deny a court the ability to decide this issue. Under our law, circumstantial evidence has equal force to that which is direct. The weight of circumstantial evidence provides legitimacy to a claim that the federal government does not have the power under our Constitution to commit military force to Preemptive War. The circumstantial evidence falls into five categories: (1) the philosophical underpinnings of our Constitution's legitimacy; i.e., John Locke's Social Contract Theory; (2) the Founder's and the “Just War” Doctrine; (3) the Founder's perspective on War; (4)

²⁰ See, e.g., Broughton, “What is it good for? War Power, Judicial Review, and Constitutional Deliberation,” 54 OKLA. L. REV. 685, 691 (2001).

²¹ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Note, “The War Powers Resolution: Congress Seeks to Reassess Its Constitutional Role as a Partner in War Making,” RUTGERS L. J. 407 (1987). But see, Rotunda, “The War Powers Act in Perspective,” 2 MICH. L. E. POL'Y REV. 1, 5 (1997) (veto under WPR unconstitutional under *Chada*).

the possible permanent effect on the constitutional structure; and (5) the 214 year's experience of our nation in employing military force.

1. Preemptive War or Preemptive Self-Defense is at Odds with the Rationale Underlying the Social Contract Theory Upon which the Legitimacy of our Government Rests

"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.²³ While the social contract theory had appeared in writings on political philosophy for over a hundred years before the formation of this nation, only America took to heart Locke's theory to actually structure the government of a new nation.²⁴

The social contract theory postulated that back in the mists of time man lived in a state of nature where it was "all against all." In this world, each individual had "natural rights" revealed by their God-given reason. But each man was his own law with respect to asserting and protecting these rights, with force being the final arbiter. 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

²² *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch.) 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch.) 170 (1804); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

²³ J. Locke, TWO TREATISES OF GOVERNMENT, Second Treatise (C.B. MacPherson, ed. 1980).

²⁴ Doernberg, "'We The People': John Locke, Collective Constitutional Rights, And Standing to Challenge Government Action," 73 CAL. L. REV. 52-68 (1985); Gardner, "Consent, Legitimacy and elections: Implementing Popular Sovereignty Under the Lockean Constitution," 52 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 excessive 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."

ultimate law.²⁵ One, thus, 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. All disputes then were ultimately decided by the law, not by individual will.

Again, these Lockean related natural law notions directly guided the construction of our Constitution and our form of government,²⁶ and even played an explicit part in early Supreme Court decisions.²⁷ After all, those early judges were there at the creation of this nation. They knew that they had embarked upon a great and new political experiment in government. It was a nation simultaneously “of the people, by the people, and for the people.” Time has made us forget this, or at least caused us to think of only the trees of the constitutional text and not the underlying forest of political philosophy. Yet the theory of social contract lies at the very basis of the legitimacy of our government. Our government was not based on conquest or the Divine Right of Kings. Its legitimacy was based on the belief (treated as fact) that the citizenry had entered into a contract.

Each citizen’s security could obviously be threatened by foreign powers. The Constitution upholds the federal government’s side of the Lockean bargain²⁸ by promising to “[P]rovide for the common defense.” PREAMBLE, UNITED STATES CONSTITUTION. Reviewing the philosophical roots of that bargain, however, it

²⁵ See, Locke, *supra*, n. 23, at Editor’s Introduction.

²⁶ See, *supra*, n. 24.

²⁷ See, e.g., *Calder v. Bull*, U.S. (3 Dall.) 386 (1798); *Fletcher v. Peck*, 10 U.S. (6 (Cranch.) 87 (1810)); *Terrett v. Taylor*, 13 U.S. (9 Cranch.) 43 (1815).

²⁸ “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).

seems unlikely that the “common defense” would include any notion of “preemptive” defense.

After all, under the social contract theory, one trades the right to be their own law in return for the assurance that the government will protect them from the ultimate risk in the state of nature: That another to whom I have threatened no direct harm, will nonetheless take my “property” (which for Locke includes both my material goods, my land, and my life). 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 do that very thing to other individuals and nations outside our borders; i.e., attack when not directly threatened. The only enemies the Founders would have envisioned would have been European. These also were the countries of the colonists’ ancestry and heritage. The Founders of this fledgling nation could hardly have even conceptualized 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.

The “common defense,” thus, would have meant common *self-defense*; defense against actual or imminent attack. Of course the Founders had an Ocean between themselves and their European enemies. They could never 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. They never 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 that just changes the factual understanding of what threat can now be “imminent”. It does not change that an “imminent” threat is still the standard for the constitutional exercise the power to use military force.

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

The Founder’s 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 that there existed “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.²⁹ These rights were those revealed as “Natural law,” rights³⁰ made manifest through God-given reason,³¹ inherent in God’s creation of man.

As persons so fundamentally religious that their political philosophy and religious conceptions intellectually intertwined, the Founder’s view of war would have been circumscribed by the “Just War” Doctrine.³² The “Just War” Doctrine provided norms and criteria for assessing whether a government’s resort to force was morally justified. The doctrine provided criteria both for judging whether resort to force was justified (*ius ad bellum*) and criteria regarding the conduct of war once combat commenced(*ius in bello*).³³ The *ius ad bellum* contains six criteria: (1) just cause; (2) competent authority (3) right intention; (4) last resort

²⁹ See, 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, 301.

³⁰ Id., at 304-305; Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW 560-561 (2 ed. 1988).

³¹ See, Wardle, supra, n. 29, at 307-308.

³² For a general overview of the Just War, see, “War, Morality of” THE NEW CATHOLIC ENCYCLOPEDIA, vol. 14, page 635, et seq. (R.A. McCormick, D. Christiansen (2d. ed. 2003). See also, R. Musto: THE CATHOLIC PEACE TRADITION (1988)).

(5) probability of success; and (6) proportionality.³⁴ It is hard to imagine how a truly Preemptive War could ever meet these six criteria.

Admittedly, the 20th and 21st 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, our world is now plagued with guerilla warfare, terrorism and counter-terrorist campaigns, and ethnic cleansing. Yet none of that changes the basic Just War doctrine. “Just Cause” still means that the “war is permissible only to confront ‘a real national and certain danger’....”³⁵ Again, by definition that 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 a “Statement on Iraq” plainly indicated that war against Iraq would not be a “Just” one under the Doctrine.³⁶ In fact, in addition to the “just cause” and “last resort” criteria, the Bishops also questioned both the criteria for “competent authority” (questioning our country 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.)³⁷

3. Preemptive War is Inconsistent with the Founders Perspective on War

³³ Id., at 637.

³⁴ Ibid.

³⁵ “The Challenge of Peace: God’s Promise and our Response,” 1983 United State Bishops’ pastoral letter on nuclear war and deterrence.

³⁶ See, “Statement on Iraq,” United States of Catholic Bishops, Washington D.C., 1-2 (Nov. 13, 2002); Bishop Wilton D. Gregory, “Letter to President Bush,” 2 (Sept. 13, 2002).

³⁷ Ibid. See, also, “Consequences of Future Force Against Iraq (address to President Bush and Secretary of State Rumsfeld), Center for Constitutional Rights (January 24, 2002) (details humanitarian harm of Iraqi war on Civilian population).

The Founders had just gone through a bloody war on their soil. They had no interest in making the waging of war by the federal government an easy exercise.³⁸ Thus, in 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."³⁹ 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 colonies; they 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." The implication was clear: Don't bother us, we won't bother you. So strong was this inclination in fact that during the War of 1812 there were serious questions within the federal government whether it had the power to cross the border into Canada as part of its nation's defense.⁴⁰

³⁸ See, Bickel, "Congress, the President, and the power to Wage War," 48 CHICAGO-KENT L. REV. 131, 132-133 (1971) (Founders wanted to make it difficult to engage in real war). While Professors Ely and Yoo, *supra*, n. 15, 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 their chosen structure was to make the initiation of war difficult. Ely is concerned with a war initiated without the type of widespread political debate and support engendered by the legislative process. 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. Placing substantial control over the war power by the executive, Yoo, contends, lessened those concerns. See, Yoo, "Continuation of Politics," *supra*, n. 15, at 302.

³⁹ Yoo, "Continuation of Politics," *supra*, n. 15, at 190.

⁴⁰ Abraham D. Sofer, War, FOREIGN AFFAIRS AND CONSTITUTIONAL POWERS—THE ORIGINS, 268 (1976).

As constitutional convention delegate Oliver Ellsworth of Connecticut said, “there is material difference between making war and making peace. It shd. [sic.] be easier to get out of war than it is to get into it.” Supporting Ellsworth, George Mason of Virginia added that he “was for clogging rather than facilitating war; but for facilitating peace.”⁴¹

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. The greatest fear of the Anti-federalist regarding war powers was that the President, in alliance with or at least unopposed by Congress, would use a standing army to create a federal dictatorship.⁴² 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.”

⁴¹ Yoo, “Continuation of Politics,” *supra*, n. 15, at 263. 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* 274-75 (1990) (revised ed.). As Attorney General Randolph wrote to James Monroe in 1775:

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.’ Letter From Randolph to James Monroe (June 1, 1795) cited in Lobel, “The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy,” 24 *HARV. INT’L LAW J.* 1, 21 (1983); see, also, F. Wharton, *A Digest of International Law of the United States*, 2d ed. (Washington, D.C.: Government Printing Office, 1887), 3: 514.

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

The federal government faces the limits of its powers when its actions threaten a permanent alteration of the basic constitutional structure. 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. See, e.g., *Lopez v. United States*.⁴³ Underlying this stance is a more general notion, a notion embedded in logic. You cannot legitimately exercise a power given with the purpose of supporting an entity when that power is being employed in a manner which destroys that very entity.

The same concern inures in the misuse of federal military power. At the extreme, the federal government hardly could constitutionally use its power to use military force if that force was employed to seize control of all state governments when there was no insurrection. While permitting preemptory war does not raise this extreme scenario, it carries the risk of a serious undermining of the constitutional structure, and it is a risk to our federal republic that is far greater than that posed by any foreseeable misuse of the Commerce Clause.

For this harm to our constitutional structure to emerge would only require something like the following scenario: Claiming the right to conduct preemptive war, the federal government carries out a series of seemingly unending military

⁴² *Id.*, at 272-273.

⁴³ 514 U.S. 549 (1995) (congressional act barring possession of firearms in "school zones" beyond power of Congress). See, also, *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act beyond congressional power under Commerce Clause).

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 may have previously been unthinkable, now becomes relatively simple (especially with a compliant visual media which seems to find "war as a sporting event," or "war as a video game," good for ratings.)

How can this be? Again, it's simple. Relying upon the rationale of preemptive self-defense, particularly when conjoined with the recent belief in state sponsored terrorism, our country can justify attacking any other nation. In this post-9/11 world, it is litany 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. Therefore, e.g., employing the preemptive defense rationale, Russia could justify attacking Monaco on the claim that a group of croupiers at the casino had planned to provide a few vials of some deadly virus to the Chechnyan rebels.

So, now imagine our scenario has proceeded to where our country is embroiled in a series of wars. In this constant state of war, our 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 be enlisted in 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, increased pressure on civil liberties,⁴⁴ and an ever mounting presence of the federal government in our private lives. 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 our government would exist only in the most diluted form, as that structure undergoes *de facto* alteration.

5. In the Two-Hundred and Fourteen Year History of this Nation, Prior to Our Attack on Iraq, There Was Not a Single Instance When We Engaged in Preemptive War

The United States has sent troops into other sovereign nations well over 100 times.⁴⁵ Admittedly, history suggests that some of the official rationales were perhaps ingenuous, with the military action at least in part being motivated by, e.g., a desire to annex land on the North American continent.⁴⁶ Yet even these never amounted to anything akin to preemptive self-defense:

⁴⁴ 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 & Civil Liberties" (2003) (six month update of original report) (publication details: 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).

⁴⁵ See, *supra*, n. 19.

⁴⁶ Both the incursions into Spanish-controlled Florida in the early 1800s and the Mexican War in 1846 smack of the aggrandizement of territory. Yet neither was based on any claim of a right to conduct a Preemptive War. Florida combined instability in a territory we were in the process of negotiating to purchase, the request of a revolutionary government for our aid, and the reality that British troops would be stationed at the Southern border of the new nation, filling the vacuum resulting from the collapse of the Spanish Empire. See, Sofaer, *supra*, n. 40, at 294-326. The Mexican War involved our claim of a lawful right to disputed territory, which now constitutes much of Texas. President Polk sent troops to claim all land north of the Rio Grande. When the Mexican

The historical record indicates that the United States has never, to date, engaged in a 'preemptive' military attack against another nation.⁴⁷

Throughout our over 200 year history as a nation, use of force has been grounded in a variety of rationales. Some have involved the use of force to protect U.S. citizens and property.⁴⁸ Some involved circumstances where the local governments allegedly could no longer maintain order,⁴⁹ including some where treaty rights⁵⁰ supplemented this nation's right to intervene. We have even employed troops in a failed attempt to rescue American citizens held hostage.⁵¹

Some incursions were based on the Monroe Doctrine; sending troops to states in our hemisphere whose instability made them incapable of keeping "foreign powers" out of the Western Hemisphere.⁵² Force has also been used to

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, Grimmatt, supra, n. 1, at CRS-1; Ratner, supra, n. 15, at 468; note, "Future Combat," supra, n. 15, at 1780.

⁴⁷ See, Grimmatt, supra, n. 1, at CRS-1 to CRS-2.

⁴⁸ Troops have been deployed to protect citizens in Haiti (intermittently: 1915-1934); Dominican Republic (intermittently: 1916-1924; 1965); the Boxer Rebellion(1900) (though in the process were violated international law by taking reprisals against the rebel. See, O'Connell, supra, n. 2, at 6) Nicaragua (1912); Panama (1903, 1989); Grenada (1983) (also at request of neighboring islands when a Marxist faction overthrew the existing government); (Formosa 1955); Lebanon (1957). See, gen., Ratner, supra, n. 15, at 468-470; Note, "Future Combat," supra, n. 15, at 1788-1793.

⁴⁹ Ibid.

⁵⁰ Intrusions into Haiti and the Dominican Republic in the early portion of the 20th century were in part justified by treaties which in effect made those nations U.S. protectorates. Treaties involving Panama and the Canal were used as part of the justification for our intervention in 1903. Similarly, President Eisenhower's decision to send marines to the Dominican Republic in 1965 was based on O.A.S. obligations. See, Grimmatt, supra, n. 1, at CRS-2 TO CRS-3; Note, "Future Combat", supra, n. 15, at 1792-1793.

⁵¹ See Yoo, "Continuation of Politics," supra, n. 15, at 8 (troops sent in unsuccessful attempt to rescue Iranian hostages in 1980).

⁵² See, Sofaer, supra, n.40, at 255; Grimmatt, supra, n.1, at CRS-2 to CRS-3.

respond to a foreign state which sponsored terrorism that resulted in the death of American citizens in Europe.⁵³

Military force has been employed to restore governments to power in our own hemisphere,⁵⁴ and at other times has been used in conjunction with a treaty obligation to ensure the “neutrality” of the Isthmus of Panama.⁵⁵ We have also used our troops to preserve the status quo while negotiating for the annex of foreign held territory on our continent,⁵⁶ and have dispatched troops to pursue pirates, bandits, and outlaws.⁵⁷

We have protected our military personnel, such as in the *Pueblo*⁵⁸ and *Marquez*⁵⁹ incidents, and when our troops have been fired upon when providing military aid to neighboring nations.⁶⁰ We have fought wars against nations who continued to prey on our shipping and commerce,⁶¹ against nations that invaded “disputed territory” we claimed to have annexed, against a nation that attacked our Naval bases (Pearl Harbor), against a nation intertwined with terrorists who attacked on our soil (9/11), and against a nation which refused to leave its

⁵³ See, Henkin, *supra*, n. 15, at 99; Hon R. Torricelli, “War Powers Resolution After the Libya Crisis,” 7 PACE L. REV. 661 (1987).

⁵⁴ See, Henkin, *supra*, n.15, at 101 (troops to Haiti in 1994).

⁵⁵ See, Note, “Future Combat,” *supra*, n. 15, at 1789 (intervention in Panama against Columbia in 1903 based on 1846 treaty).

⁵⁶ See, discussion of intrusions into Spanish held Florida, *supra*, n. 44.

⁵⁷ We have chased Pancho Villa into Mexico, the Seminoles into Florida, and Noriega into Panama. See, Berger, *supra*, n. 15, at 59-60; Note, “Future Combat,” *supra*, n. 15, at 1789.

⁵⁸ See, Note, “Future Combat,” *supra*, n. 15, at 1781 (military response to North Korean attack on U.S. Naval ship, the *Pueblo*).

⁵⁹ See, Yoo, “Continuation of Politics,” *supra*, n. 15, at 181 (military response to Cambodian attack on Mayaquez in 1975).

⁶⁰ Note, “War Powers Resolution,” *supra*, n. 19, at 1422 (troops providing military aid at request of El Salvador fired upon; 1984).

⁶¹ For example, war against the Tripoli Pirates (1802) and Algiers (1815); Undeclared war against France (“Adam’s War, 1798-1800); War of 1812; WWI (1914). See, Ratner, *supra*, n. 15, at 465-466; Note, “Future Combat,” *supra*, n. 15, at 1785-1786.

Caribbean colony, declared war against us, and arguably sank one of our battle ships. (“Remember the Maine”).⁶²

Most of our use of force in the latter 20th Century, however, has been pursuant to some combination of regional and bilateral defense pacts (NATO, SEATO), treaty obligations, and UN membership.⁶³ In addition to justifying force against aggressors, these commitments also have provided the basis for providing troops for peacekeeping and humanitarian purposes.⁶⁴

Only the Cuban Missile Crisis (1962)⁶⁵ even hinted at the use of preemptive force. Yet that incident hardly stands as a precedent. In the first place, reasonable people could have characterized the risk to our citizens and soil as “imminent.” After all, our deadly enemy, the “Evil Empire”, whose leader had told ours that “We will bury you,” had surreptitiously brought nuclear missiles to an island ally of theirs, located a boat ride from our shore. 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, pointing at us. In the second place,

⁶² The Spanish-American War is somewhat complex in its origins. We ordered Spain to leave Cuba; they declared war on U.S.; we declared war on them; the Maine blew up and sunk. See, Grimmett, *supra*, n 1, at CRS-2; Ratner, *supra*, n 15, at 470.

⁶³ 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; the 1991 Iraqi War by a UN Resolution following Iraq’s Invasion of Kuwait. See, Office of the legal advisor, U.S. Department of State, “The legality of United States Participation in Viet Nam,” 75 YALE L. J. 1085 (1966); Note, “Future Combat,” *supra*, n. 15, at 1791-1792; Stramseth, “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, see, Van Alstine, “Congress, the President, and the Power to Declare War: A Requiem to Viet Nam,” 121 U. PAL. REV. 1, 15 (1972); and whether treaties can trump constitutional protections, Bishop, Jr., “Unconstitutional Treaties,” 42 MINN. L. REV. 773 (1958).

⁶⁴ *Ibid.* 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.

⁶⁵ See, Grimmett, *supra*, n. 1, at CRS-2; Yoo, “Applying the War powers Resolution To the War on Terrorism,” 6 GREEN BAG 2D 175, 179 (2003).

and most importantly, we did not attack Cuba. The combination of a naval blockade and tense negotiations led to removal of the missiles.

It is far more than mere coincidence that in 214 years our nation has never even attempted to resort to rationalizing our use of force under the label of “Preemptive” defense. It is far more than mere coincidence that such a rationale arguably would violate International Law.⁶⁶ Rather, any notion of attempting to legitimate 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 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.⁶⁷

It is fair to infer that our Founders were far too bright to place us at such risk.

C. The Issue of Whether the Constitution Denies the Federal Government the Power to Employ Preemptive Military Force is Justiciable

1. The Issue of the Limits of the Federal Government to Employ Military Force is a Legal One

In presenting a court with the issue of whether the federal government possesses the constitutional power to conduct preemptive war, one would be

⁶⁶ O’Connell, *supra*, n. 6, at 2-3, 21. See, also, Jennie Green, Barbara Olshansky, Michael Ratner, *AGAINST WAR WITH IRAQ: AN ANTI-WAR PRIMER*, (Open Media Pamphlet Series, 2003); Richard Falk, “Why International Law Matters: Pre-emptive War Flagrantly Contradicts the UN’s Legal Framework,” *THE NATION*, vol. 276, issue 9 (3/10/03). But see, rationale put forth in

asking that court to decide an issue square within the province of our judicial branch of government: Given our constitutional framework in which the federal government is one of limited, enumerated powers,⁶⁸ is the power to use force in a Preemptive War one which the federal government has been given? This issue is no different than deciding the limits of the power of the federal government to act under the Commerce clause when those actions interfere with the affairs of the States under our system of Federalism. See, e.g., *Lopez v. United States*, *supra*.⁶⁹

This is the classic stuff of *Marbury v. Madison*:⁷⁰ “It is emphatically the province and duty of the judicial department to say what the law is.” The political question doctrine of *Baker v. Carr*⁷¹ thus, has absolutely no application to this issue.

2. The Political Question Doctrine Has No Application To This Case

Courts have tended to almost reflexively associate the political question doctrine with any litigation attempting to enjoin the use of military force.⁷² The arguments by now are familiar. There is a textual commitment in the Constitution

Jason Burke & Ed Vulliamy; “War Clouds Gather as Hawks Lay Their Plans,” *OBSERVER* 14 (July 14, 2002).

⁶⁷ O’Connell, *supra*, n. 6, at 19 (fn. omitted).

⁶⁸ See, *supra*, n. 5.

⁶⁹ 514 U.S. 549

⁷⁰ 5 U.S. 1 (Cranch.) 137, 177 (1803).

⁷¹ 369 U.S. 186 (1962).

⁷² See, e.g., *Holtzman v. Schlesinger*, 484 F. 1307, 1309 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1973); *Lowery 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) (Justices Stewart and Douglas dissenting from denial of *certiorari* in case addressing constitutionality of Viet Nam War). On the other hand, there have been courts which found the issue of declaring war justiciable under the political question doctrine, denying the case on other grounds. See, e.g., *Orlando v. Larid*, 434 F.2d 1039, 1042 (2d Cir. 1971) (court finds evidence of “sufficient action” by Congress to authorize the war); *Dellums v. Bush*, 752 F. Supp. 1141, 1150-1151 (D.D.C. 1990) (case asking

to the two political branches of government;⁷³ it is for Congress and the executive to negotiate how they will handle events of military force or war, and the Court should not interfere;⁷⁴ the relationship between war, and foreign affairs, and political negotiations are complex, nuanced and beyond the understanding of the judiciary whose uninformed interference could jeopardized national interests;⁷⁵ courts lack the competence, information gathering capacity, or meaningful standards to assess such basically political issues⁷⁶ (such as whether the President's dispatch of troops constitutes "hostilities" under the War Powers Resolution);⁷⁷ Congress can resort to "self-help" to check Presidential powers;⁷⁸ the Founders considered disputes between the President and Congress as not constituting "cases" or "controversies".⁷⁹

court to find 1991 Iraqi war unconstitutional because Congress did not declare war; justiciable under political question doctrine, but not "ripe").

⁷³ See, Broughton, *supra*, n. 20, at 691 *Berk v. Laird*, 317 F. Supp. 715, 729 (ED NY 1970).

⁷⁴ See, Broughton, *supra*, n. 20, at 691.

⁷⁵ See, *Orlando v. Laird*, *supra*, 434 F.2d 1043 (It [inappropriate judicial inquiry] would indeed, destroy the flexibility of action which the executive and legislative must have in dealing with other sovereigns).

⁷⁶ See, Broughton, *supra*, n. 20, at 691.

⁷⁷ See, *Crockett v. Regan*, 558 F. Supp. 893, 898-899 (D.D.C. 1982). See, also, Ratner, *supra*, n. 15, at 482.

⁷⁸ See, *Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000), cert. denied, 531 U.S. 815 (2000) (Silberman J, concurring). Justice Silberman also wrote that there exist no principled judicial standards for defining "war" for purposes of constitutional interpretation. *Id.*, at 24-25. Even if Justice Silberman is correct (and his fellow jurist Tate disagreed with him, *Id.*, at 40), that would have no bearing on the present case. Whatever label one puts on the proposed use of preemptive military force against Iraq, that particular use of force is constitutionally beyond the power possessed by the federal government.

⁷⁹ See, Yoo, "Continuation of Politics," *supra*, n. 15, at 288 (Founders did consider disputes between legislative and executive branches "cases or controversies"). But see, *Dellum v. Bush*, *supra*, 752 F. Supp. 1141 (court in principle willing to consider dispute between Congress and President, but case not ripe.). In present case, the dispute is between a private citizen and the federal government.

While some have forcefully argued that issues involving commitment of U.S. troops can and in fact must be considered by the courts,⁸⁰ we need not consider these arguments here. For in this case, none of the rationales for which courts have employed the political question doctrine to abstain from deciding the merits of questions concerning war have any applications whatsoever.

It does not matter whether the President or Congress has initiated this action,⁸¹ or the meaning of “Declare” war in the Constitution⁸² or whether the war can take place without such a declaration,⁸³ or if there has been “sufficient” evidence of Congressional involvement with the President in the decision,⁸⁴ or the significance of the War Powers Act and whether “hostilities” have taken place so as to trigger the Act,⁸⁵ or if Congress has alternative means of “self-help” within their own legislative province and therefore do not need to involve the Judicial power.⁸⁶ The position I’m putting forth posits that federal government does not have the power to wage Preemptive War, even if both political branches agree and Congress files a Declaration of War.

⁸⁰ See, *Doe v. Bush*, (U.S. Court of Appeals for the First Circuit: #03-1266). BRIEF SUBMITTED ON BEHALF OF 74 CONCERNED LAW PROFESSORS AS AMICUS CURIAE SUPPORTING THE REQUEST OF APPELLANTS FOR REVERAL, at 15-21 [hereinafter “Brief”]. See, also, Thomas M. Franck, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992) (author posits that Court should apply same constitutional analysis in foreign affairs that it applies to domestic concerns).

⁸¹ See, *supra*, ns. 15, 18.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ See, *Campbell v. Clinton*, *supra*, 203 F.3d, at 25. Note, that it also does not matter whether Congress delegated the power to attack Iraq in the “October Resolution,” H.J. Res. 114 (107th Cong, 2d Sess, 2001), and if they did, whether that delegation would be constitutional, “Brief,” *supra*, n. 80, at 13-16. Congress can not delegate a power which the federal government does not possess.

⁸⁵ See, *Orlando v. Laird*, *supra*, 443 F.2d 1042.

⁸⁶ See, *Broughton*, *supra*, n. 20, at 717.

Likewise, traditional political questions arguments concerning the textual commitment of war to the political branches, the theory that structurally the Founders intended the Legislative and the Executive branches to provide systematic checks on the power of war (the Congress through controlling funding and impeachment; the President through use of veto power),⁸⁷ 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 similarly have no purchase here. There is no interest in helping the federal government pursue a power under the circumstances when the court determines that the federal government does not possess such a power. This then, is the very type of decision for which the judicial branch is uniquely competent; determining when the federal government has acted beyond its limited powers.⁸⁸

⁸⁷ See, Yoo, "Continuation of Politics," *supra*, n. 15, at 3.

⁸⁸ In the Iraqi situation, there was no question that the war was preemptive; but what if the matter was in dispute, with litigants claiming the use of force preemptive, and the government characterizing the use of force as anticipatory?

Martin v. Mott, 25 U.S. (12 Wheat.) 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 makes complete sense. 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 just assembling troops. But, in *Mott*, the Court was asked to decide whether the threat of invasion was **in fact** imminent. That, however, is a judgment for the Commander-in-Chief and the military. It is to the executive that the Constitution has committed the prosecution of war, and it is the President and military hierarchy that, as a practical matter, possess the requisite information and expertise to make that determination. The Court lacks this competence.

Here, however, the present issue and *Mott* part company. As a power granted under statute, the *Mott* Court found that the predicate factual findings made by the President to exercise that power were beyond review. *Id.*, at 30. But here we have an issue involving the very existence of a constitutional power. Whether the federal government's actions in committing troops falls on the constitutional or unconstitutional side of the line cannot be left to the *ipse dixit* of that same government.

What then is the Court to decide? This and only this: whether, based on the evidence the government provides (and not just their say-so), the Court finds that a "reasonable person" **could** find imminence and/or clear and present danger. In other words, the Court must find something

D. 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, make plain that the employment of Preemptive Self-Defense or Preemptive War are beyond the power given the federal government. We have, nevertheless, attacked Iraq and, with that action, lost another piece of what (if any) is left of our national innocence. Yet, use of military force against Iraq, which I have contended should be viewed as unconstitutional, must not now be seen as a legal precedent, next used to justify some similar incursions into Iran, North Korea, or who knows where else. Next time the courts should act in this completely justiciable arena; next time they should define the Constitutional limits of the federal power to employ military force.

akin to the "reasonable fact finder" standard of FRE 104(b); i.e., sufficient evidence that a reasonable fact finder "could" find the factual proposition in issue. That is a legal decision, not a political one.