

# THE VIRTUES OF PREEMPTIVE DETERRENCE

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## I. INTRODUCTION

Although much about America's twenty-first-century foreign and defense policies seems to irritate its many critics, the so-called Bush Doctrine, announced in a series of speeches following the September 11, 2001, attacks and most articulately expressed in the *National Security Strategy of the United States*,<sup>1</sup> is their favorite target. It vigorously advocates strategic preemption—the use of military force against threats that have not yet fully matured, but nevertheless endanger American security—as a core component of American statecraft in the Twenty-First Century.

The Bush Doctrine was prominently featured in the 2004 presidential campaign. Senator John Kerry argued that the President's formulation was overly zealous and weakened the Atlantic alliance and that preemption, while an option in the case of dire necessity, was not to be bandied about in public and certainly not cast as a centerpiece of America's post-Cold War security strategy. These counter-preemption criticisms, although embraced by many pundits and public officials, both in the United States and abroad, are grounded in fundamental misconceptions about the nature of deterrence and the reasons for the transatlantic discord about core security issues. Even more fundamentally, they manifest a dangerous failure to ap-

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1. See, e.g., THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), <http://www.whitehouse.gov/nsc/nss.pdf>.

preciate the strategic predicament the United States faces in today's world and the corresponding need to adjust the American strategic doctrine and declaratory policy to cope with the new threats.

## II. PREEMPTION'S VENERABLE PEDIGREE

The United States has long relied upon preemption to assure its national security; indeed, the Bush Administration's embrace of the doctrine is nothing new.<sup>2</sup> President John F. Kennedy's 1962 decision to forestall Soviet installation of short and intermediate range offensive nuclear missiles in Cuba by declaring a "quarantine" of the island stands as the most prominent modern example of U.S. strategic preemption.<sup>3</sup> Although carefully characterized by the United States as an act of self-defense, the quarantine, directed at Soviet ships carrying nuclear missiles to Cuba, indisputably constituted a belligerent act under international law.<sup>4</sup> Significantly, neither the Soviet Union nor Cuba had attacked the United States, nor was there any imminent threat that the missiles would be launched at the United States once they were deployed. Clearly, President Kennedy acted to preempt an attenuated and distant threat.<sup>5</sup>

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2. See generally JOHN LEWIS GADDIS, *SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE* (2004).

3. For an excellent general description of American policymaking during the Cuban missile crisis, see GRAHAM T. ALLISON & PHILIP D. ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (2d ed. 1999).

4. For a more detailed discussion of this episode, see David B. Rivkin, Jr. et al., *Preemption and Law in the Twenty-First Century*, 5 *CHI. J. INT'L L.* 467, 481-83 (2005).

5. I have previously articulated this point:

Kennedy's real objection to Khrushchev's attempt to place short- and intermediate-range ballistic missiles in Cuba was that the missiles would have enabled Moscow to shift the US-Soviet strategic balance precipitously, in a matter of months, rather than gradually, over decades [as Moscow was certain to do in order to implement its military doctrine]. In the context of Iraq, an appropriate analogy [with the set of strategic choices as seen by Kennedy Administration] would have been between accepting the basic proposition that Saddam Hussein could have created (or recreated) a WMD arsenal, provided he did so gradually, and holding that what was really unacceptable was only a precipitous WMD acquisition. The reason it is worthwhile dwelling on these distinctions is to underscore that, as far as the Kennedy Administration was concerned, it could legitimately invoke the anticipatory self-defense doctrine [that is, preemption] when dealing with a comparatively attenuated and highly nuanced threat.

*Id.* at 482 n.45.

In the post-September 11 geopolitical environment, the imperatives recommending preemption have grown even stronger. Neither toppling the Taliban regime nor killing Osama bin Laden during the summer of 2001 could have reliably prevented the 9-11 attacks. By that point, al Qaeda operatives had already infiltrated the United States and could have proceeded without further assistance. The only way to avert (with a sufficient degree of certainty) clandestine terrorist attacks by pan-national Islamist organizations is to act against them months, or even years, in advance.

Even if preemptive U.S. action cannot destroy the pan-national terrorist threat entirely, taking the battle to the enemy still offers considerable advantages: the U.S. operations against al Qaeda, in addition to killing or capturing numerous operatives, have disrupted the organization's plans and put it on the defensive. In the future, even before the United States actually uses force against a potential adversary, credible preemptive threats can disrupt that adversary's plans, force him to take extra precautions, and diminish his ability to launch new attacks. Moreover, requiring that the United States wait to respond until an attack occurs will often prove ineffectual, given that terrorists routinely relocate their facilities and stand down many of their ongoing activities just before an attack, thereby diminishing their vulnerability to anticipated counterattacks.

Today, preemption's necessity is further reinforced by Islamist terrorists, who, unlike America's Cold War enemies, cannot be reliably deterred. Traditional deterrence fails because of the messianic nature of Islamist terrorists' aspirations, the willingness and even eagerness of their leaders and footsoldiers alike to die for their cause,<sup>6</sup> as well as the more prosaic fact that these groups seldom have valuable assets that may be easily identified and targeted. Even the most robust deterrence "means nothing against shadowy terrorist networks with no nations or citizens to defend."<sup>7</sup>

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6. Unfortunately, by discounting the impact that enemies' strategic cultures have on their warring, the United States often commits a mistake common to most states that practice the "rational" decisionmaking style.

7. President George W. Bush, Remarks at the 2002 Graduation Exercises of the United States Military Academy (June 1, 2002), <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

Despite preemption's palpable necessity, its opponents tend to focus on the Bush Administration's candid embrace of preemption as a doctrine,<sup>8</sup> rather than as an acknowledgment of its past record and possible future utility. These same pundits also fret that preemption has taken too prominent a place in the administration's strategic thinking. They prefer to treat preemption like the crazy aunt in the attic: always looming in the background but rarely mentioned.<sup>9</sup> Unfortunately, to extol deterrence sans preemption, or even to claim that preemption ought not to be a component of one's declaratory strategy, is to betray a profound misunderstanding of the logic of deterrence itself.

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8. While some critics have questioned whether preemption can even be considered a doctrine, as distinct from a combat tactic, history is replete with examples of states choosing preemption as an organizing strategic principle. The Romans employed strategic preemption, perhaps most famously in the Third Punic War (149–146 B.C.). Convinced that a resurgent Carthage threatened Rome, Roman statesman Marcus Porcius Cato (Cato the Elder) tirelessly advocated preemptive war, supposedly ending every speech to the Senate with the same words: "Also, Carthage, methinks, ought utterly to be destroyed." In due course it was. Legend has it that the Romans salted the fields of Carthage so that no living thing, and no rival, might grow there again. See 2 PLUTARCH, *Marcus Cato*, in LIVES 516, 541 (John Dryden trans., J.M. Dent & Sons 1962) (1683). The British also employed strategic preemption when other countries threatened the naval dominance upon which their empire depended. Perhaps the most famous example of British strategic preemption was Admiral Horatio Nelson's 1801 destruction of the Danish fleet at Copenhagen to forestall the possibility that an as-yet-unrealized Danish alliance with Napoleonic France could tip the balance of power against Britain. See ARTHUR HERMAN, *TO RULE THE WAVES: HOW THE BRITISH NAVY SHAPED THE MODERN WORLD* 366 (2004).

9. To be sure, there is a diversity of views among the critics, with some arguing that the United States should never publicly articulate the preemptive doctrine, and others claiming that the problem is not the public articulation as such, but only the excessive emphasis on the verities of preemption.

## III. THE DELICATE LOGIC OF DETERRENCE

A. *Balancing the Goals*

Deterrence, a venerable concept,<sup>10</sup> was greatly refined at the dawn of the nuclear era by a number of brilliant American strategists.<sup>11</sup> Notably, none of these expositors of modern deterrence theories would have disagreed with the proposition that the American strategic doctrine, together with the associated force structure and the weapons employment policies, has always meant to advance multiple goals. An ideal strategic policy, both at the declaratory and operational levels, should provide the highest possible level of dissuasion of one's enemies and ensure their defeat if deterrence fails, while simultaneously enjoying the warmest reception from one's allies, even when they cannot be overtly identified with the understood policies of their patron.

Unfortunately, the inherent tension between and among these goals often makes them incapable of being achieved simultaneously. We seem to have forgotten this; even during the Cold War, the United States and its European allies had long-standing, contentious disagreements over deterrence requirements. At the risk of oversimplifying several decades' worth of transatlantic debates, it can be said that the United States generally displayed much greater preoccupation with the survivability of its own nuclear forces,<sup>12</sup> targeting and employment flexibility, and continuous refinement of declaratory policy than did its European allies.<sup>13</sup>

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10. One of the earliest and most concise expositions of deterrence theory was given by the fourth-century Roman strategist Flavius Vegetius: "Igitur qui desierat pacem, praeparet bellum . . ." ("Therefore, he who desires peace, let him prepare for war . . .") FLAVIUS VEGETIUS RENATUS, *EPITOMA REI MILITARIS* 121–23 (Leo F. Stelten ed. & trans., Peter Lang Publ'g, Inc. 1990). Indeed, the gist of Vegetius's maxim, that one is safest when one can frighten one's enemies through demonstrating strength, explains a caveman's brandishing a spear at a threatening Cro-Magnon as easily as it does the deployment of nuclear ballistic missile submarines.

11. See, e.g., BERNARD BRODIE, *STRATEGY IN THE MISSILE AGE* (1959); HERMAN KAHN, *ON THERMONUCLEAR WAR* (2d ed., Free Press 1969) (1960); THOMAS C. SCHELLING, *ARMS AND INFLUENCE* (1966); Albert Wohlstetter, *The Delicate Balance of Terror*, 37 *FOREIGN AFF.* 211 (1959).

12. See generally Wohlstetter, *supra* note 11.

13. For an excellent discussion of intra-allied tensions arising out of diverging theories of deterrence, see HENRY KISSINGER, *DIPLOMACY* 594–619 (1994).

During the last two decades of the Cold War, a number of U.S. strategists (American civilian and military strategists were also not always in accord) tended to argue that the best way to deter the Soviets, who believed that nuclear war was winnable, was to anchor deterrence within the context of a credible nuclear war-fighting posture and doctrine capable of threatening the military and political control centers of the Soviet Communist Party and its satellites.<sup>14</sup>

In contrast, European strategists clung stubbornly to the “mutual assured destruction” theory of deterrence and rejected war-fighting approaches, especially the use of tactical nuclear weapons, as dangerously destabilizing. They countered American efforts to buttress deterrence through war fighting by arguing that, in all circumstances, the best way to deter was to make nuclear war as horrible and, therefore, unthinkable, as possible. Europeans also tended to find the U.S. government’s public emphasis on nuclear war fighting unsettling. Meanwhile, even those European strategists who did not denigrate American advocacy of war-fighting options as inherently destabilizing displayed a kind of doctrinal ennui, arguing that any efforts to refine one’s nuclear force posture or employment options were essentially futile.<sup>15</sup>

Thus, even during deterrence’s Cold War “golden age,” successive American administrations chose to espouse their preferred approach to deterrence, even at the cost of unsettling European allies and diminishing the reassurance value of the U.S. policies. In general, for more than fifty years, transatlantic disagreement on strategic issues—ranging from the proper strategy to relieve Berlin, to the Reagan Administration’s deployment of cruise and Pershing II missiles to Western Europe—was the rule rather than the exception.

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14. See, e.g., Leon Sloss & Marc Dean Millot, *U.S. Nuclear Strategy in Evolution*, STRATEGIC REV., Winter 1984, at 19.

15. Thus, for example, one of Britain’s best-known nuclear policy pundits, Lawrence Freedman, opined in the late 1980s:

[T]he nuclear strategists had still failed to come up with any convincing methods of employing nuclear weapons should deterrence fail that did not wholly offend common sense, nor had they even reached a consensus on whether or not the discovery of such methods was essential if deterrence was to endure.

Lawrence Freedman, *The First Two Generations of Nuclear Strategists*, in *MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE* 735, 778 (Peter Paret ed., 1986).

*B. Enhancing Deterrence Quality*

America's current strategic predicament is that at least some of our enemies both hate us and discount greatly our ability to resist.<sup>16</sup> Indeed, the only tenet of Islamic fascism—whose cargo numbers religious intolerance, theocracy, sexual apartheid, and political repression—that resonates with the world is its belief that an affluent West either cannot or will not defend its culture and is therefore particularly undeserving of the global stature it enjoys.

Presented with these challenging new deterrence requirements, the Bush Administration properly opted to enhance the ability of our declaratory policy to deter our enemies, even at the cost of diminishing its reassurance aspects. As Walter Russell Mead observed: “[T]here is little doubt that the administration believed that it was more important to frighten and deter potential enemies than to reassure friends. If the good guys had to be scared in order to make sure the bad guys knew you were serious, so be it.”<sup>17</sup>

Although terrorist groups such as al Qaeda are beyond deterrence, maintaining robust deterrence remains a vital task for American statecraft because state sponsors of terror still have much to lose. Convincing these states' rulers that embarking on a particular course of action will trigger a swift regime change may well dissuade them from supporting terrorism.<sup>18</sup> Even rogue regimes that do not exercise full control over their territory will probably try to cooperate if sufficiently persuaded that the United States will not tolerate their support for terrorism.

Thus, an explicitly preemptive American strategic doctrine is not antithetical to deterrence. Rather, the threat of U.S. preemption broadens the range of conduct that may be deterred. Such broadening is particularly desirable given the nature of mod-

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16. U.S. deterrence is not as consistently effective or as uniform in quality as it was during the Cold War. While some enemies, such as North Korea, continue to fear the United States and credit it with considerable resolve and staying power, others—most prominently Islamic terrorists—appear to believe that the United States is fundamentally weak.

17. WALTER RUSSELL MEAD, *POWER, TERROR, PEACE, AND WAR: AMERICA'S GRAND STRATEGY IN A WORLD AT RISK* 115 (2004).

18. One wonders if even the Taliban's Supreme Leader, Mullah Omar, would have played along had he known that indulging Osama bin Laden's homicidal dreams would bring about a regime change in Kabul, Afghanistan.

ern terrorist threat scenarios, in which seemingly benign activities, such as supporting religious charities or pursuing “peaceful” nuclear activities, seamlessly morph into terrorist attacks and Weapons of Mass Destruction (WMD) programs.

Significantly, preemption robs terrorist patrons of their greatest asset: deniability of culpability, or the ability to offer and later deny aid to terrorists. In response, the new salutary strategic arithmetic created by the U.S. preemptive posture is deliberately somewhat hazy to potential enemy states, nudging them toward demonstrating that they do not harbor terrorists, rather than forcing the United States to prove beyond a reasonable doubt that they do.

To be sure, seeking to shift the burdens of production and persuasion onto the enemy is not entirely new in statecraft. Traditional deterrence theory always envisioned a role for so-called confidence-building measures (CBMs), whether practiced in the context of an arms-control regime or unilaterally. For example, the so-called CFE Treaty,<sup>19</sup> dealing with conventional forces in Europe, featured a wide range of CBMs, including restrictions on the numbers of forces that could be deployed in close proximity to the inter-German border, notification of military exercises and maneuvers, and so on, designed to alleviate NATO’s perennial Cold War-era concern about a clandestine attack by the Warsaw Pact forces.

Similarly, the Clinton Administration’s announcement that it was de-targeting Russian military, political, and economic assets represented a CBM designed to reassure the Russian leadership that it was no longer viewed as an enemy.<sup>20</sup> In the post-September 11 environment, the threat of U.S. preemption serves as a potentially potent CBM-inducing tool, oriented toward rogue states that have flirted with WMD programs or supported terrorist organizations or both. Indeed, given the inherent difficulty, or some would even say impossibility, of devising balanced intelligence analysis procedures that neither

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19. Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, S. TREATY DOC. NO. 102-8, 30 I.L.M. 6.

20. The U.S. de-targeting announcement came in the context of a broader U.S.-Russian agreement to cease targeting nuclear missiles at one another. While easily reversible, the agreement was widely viewed as a positive step. See Jurek Martin & John Lloyd, *Clinton Signs Three-Way N-Missile Agreement: Ukraine Nuclear Arsenal to Go as US and Russia End Mutual Targeting*, FIN. TIMES, Jan. 15, 1994, at 1.

“under-connect” the dots, as before 9-11, nor “over-connect” them, as with the Iraqi WMD stockpile estimates,<sup>21</sup> any strategy that is capable of prompting the rogue states to assume compliance burdens has much to recommend. The Libyan decision, prompted at least in part by Mohammar Khaddafi’s absorption of the “regime change” lessons of Iraq, to go public with its WMD efforts and renounce them, while inviting an intrusive weapons inspection, is a good case in point.

### C. *Dealing with a “Weak Horse” Problem*

The Bush Administration’s public articulation of the preemption doctrine has performed another indispensable function: dispelling an impression of American weakness. For most Americans, ingrained with the belief that the United States is the world’s strongest military and economic power, the notion of American weakness likely seems laughable. Unfortunately, this has not been the view of our enemies, at least some of whom question our will to fight and, most importantly, our staying power (or even believe that America’s very wealth and leisure have robbed it of its old muscularity and tragic acceptance of the occasional utility of war).

This disdain for America’s staying power is not particularly surprising. Several decades’ worth of American retreats under fire in Vietnam, Lebanon, and Somalia; our failure to respond, except through ineffectual law enforcement methods, to Hezbollah and al Qaeda attacks on American assets in the 1990s; and our seeming toleration of the kidnapping and torture of American personnel in the Middle East have all fostered the impression that, in Osama bin Laden’s own words, America is a “weak horse.”<sup>22</sup> Properly erasing this impression has become

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21. For an example of a discussion about this issue, see David B. Rivkin, Jr. & Lee A. Casey, *Intelligence as Usual: The Flawed 9/11 Commission Report*, NAT’L REV. ONLINE, Aug. 24, 2004, [http://www.nationalreview.com/comment/rivkin\\_casey\\_200408240839.asp](http://www.nationalreview.com/comment/rivkin_casey_200408240839.asp).

22. Bin Laden’s actual words were: “[W]hen people see a strong horse [Islamic fundamentalism] and a weak horse [the United States], by nature, they will like the strong horse.” These remarks were part of a tape released by the U.S. Department of Defense shortly after the attacks of September 11, 2001. For a transcript of bin Laden’s remarks, see CNN.com, Transcript of Osama bin Laden Videotape (Dec. 13, 2001), <http://archives.cnn.com/2001/US/12/13/tape.transcript/>. The Islamists’ belief that America was a “weak horse” was all the more dangerous because the Soviet defeat in Afghanistan encouraged the conceit that Islamic

a paramount U.S. policy priority, critical to reclaiming a credible deterrence posture.

*D. Domestic and Bureaucratic Politics*

There are also at least two additional important domestic reasons for the Administration's public embrace of preemption. To begin with, as the 9-11 Commission has pointed out, one key reason why both Democrat and Republican Administrations failed to take the battle to al Qaeda was bureaucratic resistance by the Central Intelligence Agency (CIA) and the Department of Defense against engaging in what they believed to be difficult and uncertain paramilitary operations on foreign soil. This institutional foot dragging was reinforced by the peculiarly debilitating legal regime that grew out of various prior investigations of alleged CIA abuses.<sup>23</sup> A public affirmation that the U.S. government, at its highest levels, embraced the legitimacy of strategic preemption, combined with the well accepted view that wartime operations are subject to a distinctly different legal regime than covert actions, can do much to lift this pernicious bureaucratic fog.

There are also a number of important benefits that would accrue from an explicit articulation by the U.S. government of a preemptive strategy, including the provision of a proper doctrinal context for operational planning and force development, with particular emphasis on the development of both conventional and nuclear long-range strike capabilities. Finally, and perhaps most vitally, comes the problem of public opinion: simply put, in any strategic environment in which preemption can be expected to be used, the U.S. government will have to justify doing so publicly and in advance. Launching preemptive attacks in the face of adverse public opinion might have been an option for a Julius Caesar or even a Benjamin Disraeli,

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fighters were a "strong horse." See generally GILLES KEPPEL, *JIHAD: THE TRAIL OF POLITICAL ISLAM* (Anthony F. Roberts trans., Harvard Univ. Press 2002).

23. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 90, 113, 131-33 (authorized ed. 2004). The Report details how the CIA was particularly obsessed by the impact, real and exaggerated, of the Executive Order Against Assassinations on the various U.S. government plans to apprehend or eliminate Osama bin Laden, whether carried out by U.S. operatives or third parties. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981). Excessive concern about collateral damage was another paralyzing factor. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra*, at 131.

but it is not an option available to an American President of the Twenty-First Century. This proposition is fully validated by the continuing political fallout from the Iraq war, which was justified primarily, albeit not exclusively, as a way to deal with Iraq's WMD threat, rather than as a preemptive response to the grave geopolitical threat posed by the Hussein regime (to say nothing of the regime's barbarity).

*E. Preemption's Many Alleged Sins*

*1. Destabilization: Real or Imagined?*

Despite these ample justifications, the Bush Administration's public embrace of preemption has been roundly condemned. To begin, preemption foes opine, in an argument eerily reminiscent of Cold War-era lamentations over deterrence rooted in a viable nuclear war-fighting posture, that preemption is dangerously destabilizing and will result in more, not fewer, conflicts. The reasoning here appears to be that allowing states to use force in advance of an actual attack would make them more prone to use force promiscuously—hypothetically, that the U.S. regime change in Baghdad might induce Argentina to invade the Falklands again.

Regurgitating this old action-reaction argument makes even less sense today than it did fifty years ago.<sup>24</sup> Few foreign policy analysts now believe a country that wishes to go to war with another nation, for whatever domestic ideological or foreign policy reasons, has somehow been "set free" by the Bush Doctrine. That some countries may find it expedient to justify their military exploits by referring to the U.S. strategy, as Vladimir Putin's Russia routinely does when trying to justify its brutal conduct in Chechnya, does not mean that they would not have behaved in exactly the same way in the absence of the Bush Doctrine. Even fewer maintain that, but for the Bush Doctrine, these conflicts would not occur. This criticism ignores the realities of international relations and ascribes to the United States an unrealistic degree of doctrinal influence.

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24. Even during the Cold War, the argument that some force postures generated great crisis instability was considerably overblown. Moreover, to the extent that the crisis instability logic had any validity at all, it was the vulnerability of one's forces to an enemy's preemptive attack, rather than one's commitment to a war-fighting employment policy, that was most consequential.

There is, of course, no doubt that a “rush” to military action, inherent in a hair-trigger preemptive strategy, can result in a miscalculation. Ultimately, the wisdom of preemption will be judged post hoc. The Anglo-French-Israeli effort in 1956 to retake the Suez Canal is mostly remembered for its failure, which has obscured the original and otherwise defensible reasons for which the effort was launched. These dangers, however, must be weighed against the nature and scope of the threats present in today’s world, along with the terrible danger of inaction. The September 11 attacks and the deaths of more than three thousand Americans is the archetypal case in point.

## 2. *Upsetting the Allies*

Another set of anti-preemption arguments is based on the claim that the Bush Administration’s embrace of preemption has dramatically impaired the reassurance aspect of our policy, by alienating the international community in general, and Europe in particular. Upsetting one’s allies does carry a heavy price, both internationally and domestically; if at all possible, it is to be avoided. At its founding, America expressed a desire to respect the “opinions of mankind,”<sup>25</sup> and the United States clearly wants to be viewed favorably by the rest of the world. Given the compelling arguments that support the Administration’s policy, however, the United States has no choice but to proceed.

Moreover, European criticism of American policies would not appreciably abate even if the Bush Doctrine was never publicly unveiled. Rather, those criticisms reflect a fundamental dissonance between the Bush Administration and most Western European elites over the root causes of the threat faced in the post-September 11 world and on how to combat this threat. The United States has been advocating the promotion of democracy and freedom as the key Western foreign policy goals in the Greater Middle East, while Western Europe has stressed economic development and stability.<sup>26</sup>

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25. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

26. In a vivid demonstration of this dichotomy, President Bush used the word “freedom” over a dozen times in his second inaugural address, but German Chancellor Schroeder’s speech at the 2005 *Werkunde* conference contained half a dozen references to “stability” without a single invocation of freedom. See Fred Hiatt, Editorial, *A Few Words Between Friends*, WASH. POST, Feb. 15, 2005, at A17.

Of course, these profound transatlantic differences are not new. They reflect longstanding differences in our origins and values,<sup>27</sup> which were largely obscured by the imperatives of the Cold War.<sup>28</sup> As argued by Max Boot, among others, the carnage of the World Wars produced a generation of myopic pacifists in Europe who feel that nothing is worth fighting and dying for and act as if war itself (rather than the failure to reject appeasement and to provide credible military deterrence against aggressive, undemocratic regimes) accounted for millions of European dead.<sup>29</sup> Not only do Europeans and Americans disagree about the root causes of our current problems, but virtually all Europeans, whether the elites or ordinary citizens, exhibit an enormous aversion to the use of military force. European distaste for Israel's efforts to defend itself during the most recent round of the intifada demonstrates that this aversion extends to all uses of military power, whether preemptive or reactive.<sup>30</sup>

Pacifism aside, Europe's current and projected shortfall in military capabilities is also responsible for shaping European aversion to the use of force in general and preemption in particular.<sup>31</sup> Europe's ability to project military power, or even to

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27. For an excellent discussion of the differences between the United States and Europe regarding a broad range of international issues, see ROGER REED, UNCOMMON VALUES: THE UNITED STATES AND EUROPE AT THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS (2003).

28. See Lee A. Casey & David B. Rivkin, Jr., *Europe in the Balance*, POL'Y REV., June & July 2001, at 41, 41–43; Rivkin, Jr. et al., *supra* note 4, at 493–94. See generally FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY (2004); ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003).

29. Max Boot, Editorial, *Risky Path for Pacifist Europe*, L.A. TIMES, June 3, 2004, at B11.

30. The *Washington Post's* Jim Hoagland observed that Europeans opine both that Europe's core post-World War II project—the creation of the European Union—“is a peace process in itself” and that Europeans “believe fundamentally that war can never again serve any useful purpose.” Jim Hoagland, Editorial, *The Limits of Reconciliation*, WASH. POST, Feb. 20, 2005, at B7.

31. One of the best pieces of evidence of this aversion is the embrace by all European powers, including even Britain, of an extremely crabbed view of the existing international law strictures that govern recourse to force. This point is vividly demonstrated in the recently declassified and released legal opinion by Britain's Attorney General, Lord Goldsmith, prepared to advise Prime Minister Blair on the legality of the Iraq war. The fact that Lord Goldsmith does not countenance the use of preemption is not particularly surprising. However, even when it comes to analyzing the legal status quo in Iraq prior to the initiation of combat operations

make a meaningful contribution to those military ventures of which it does approve, such as the deployments to Bosnia and Kosovo, has decreased to the point of embarrassment. Indeed, Europe has been so strained by the comparatively modest requirements of the Afghan mission, involving the deployment of fewer than nine thousand troops, that it is difficult to envision how Germany or France could have contributed much to the additional military operations, whether in Iraq or elsewhere, even if they supported the U.S. policy.<sup>32</sup>

To be sure, not so long ago, most of the United States' European allies supported the preemptive uses of military force for

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in 2003 by the Coalition Forces, his observation that "as the [2001] cease-fire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred" is highly troubling. Memorandum from Lord Goldsmith, Att'y Gen., Gr. Brit., to Tony Blair, Prime Minister, Gr. Brit., (Mar. 7, 2003), available at <http://image.Guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf>. The first Gulf War was primarily predicated upon the exercise of individual and collective self-defense rights by the Coalition parties, having been launched in a response to a clear-cut aggression against Kuwait by Saddam Hussein. The Security Council did not authorize the use of force against Iraq under its Chapter VII authority; it merely acknowledged and endorsed the exercise of collective self-defense rights by the Coalition partners. The cease-fire agreement, referred to by Lord Goldsmith, was negotiated by the Coalition military officers and signed by them as well as by representatives of Saddam Hussein. That the Security Council blessed this cease-fire agreement in resolution 687 did not detract from the agreement's independent legal status. In short, to take the view that sovereign states, like the United States and Britain, which have been exercising since 1990 their collective self-defense rights engaging in combat against Saddam Hussein's forces on dozens of occasions between 1991 and 2003, have somehow abdicated to the Security Council their right to reach an indisputable conclusion that Saddam Hussein has repeatedly violated his cease-fire obligations, is nothing short of remarkable. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 50-53 (3d ed., Cambridge Univ. Press 2001) (1988). To underscore that Lord Goldsmith's opinion reflected more than his own legal idiosyncrasies, it is worth recalling that "Goldsmith's legal opinion was drawn up in part to answer the demands of Adm. Michael Boyce, then chief of the [British] defense staff. He wanted assurances that soldiers could not be prosecuted either by the international court or in the British justice system for taking part in an illegal war." Glenn Frankel, *Blair Releases Memo Questioning Legality of Iraq War*, WASH. POST, Apr. 29, 2005, at A16. John Keegan, one of Britain's preeminent military historians, publicly complained that the legal requirements and procedures imposed on the British military by their political masters are greatly undermining unit cohesion and combat effectiveness of British forces. See, e.g., John Keegan, *Bad Law is Making a Just War So Much Harder to Fight*, DAILY TELEGRAPH, June 2, 2005, at 20. A related problem is that the existing and growing divergence between the United States and other countries concerning the legal imperatives bearing on the rules of engagement renders effective coordination of warfare virtually impossible.

32. See Rivkin, Jr. et al., *supra* note 4, at 492.

humanitarian interventions, for example, in Bosnia and Kosovo, provided that the United States was willing to lead the way. Their enthusiasm was shared by much of the international law professoriate and the UN mandarins, who coined the term “duty to prevent” to describe the obligation to use military force to stop genocidal despots—even though President Clinton’s deployment of American arms was sanctioned neither by the U.S. Congress nor the UN Security Council.<sup>33</sup> Their enthusiasm for U.S.-led humanitarian interventions faded when it dawned on them that the preemption doctrine was not inherently limited to those ventures that they favored, and that the United States was the most obvious beneficiary and user of the preemption doctrine.

Unfortunately, as most recently manifested by the European Union’s apparent interest in lifting the arms embargo against China, despite Beijing’s atrocious human rights record and destabilizing policies in Asia, many of our erstwhile allies seem to believe that managing and disciplining American power is the only imperative of their statecraft.<sup>34</sup> At the same time, they discount the threats posed by Iran, North Korea, Syria, and other rogue countries, and display little concern with deterring and defeating the forces of radical Islam. Thus, opposing the Bush Doctrine was something they felt they had to do, especially when even silent opposition to radical Islam can trigger either a terrorist attack or increased unrest among unassimilated Muslim populations of Europe. By contrast, strident invective against the United States resonates with at least a portion of American elites and elicits no meaningful consequences from the American government.

#### IV. THE LEGACY OF IRAQ

There is, of course, another wrinkle to the preemption debate, and it concerns Iraq. Unfortunately, the broader public

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33. For a useful discussion of this issue, see Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFF. 136 (2004). See also INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

34. In a recent discussion, the author was told by a mid-level European defense official that some of his colleagues were quite happy with the notion of having China improve its military capabilities to the point where it can “contain” American power, or at least limit Washington’s freedom of action in future crises.

debate over preemption has become heavily intertwined with the legal and policy discourse about the Iraq war. These arguments are not concerned with preemption as such, but rather relate to the broader issue of when and how American military power is to be used in the Twenty-First Century.

Not surprisingly, since legal issues these days often dominate policy debates, there are some critics, who, not particularly concerned with the policy merits of the Bush Doctrine, argue that preemption is illegal as a matter of international law and specifically single out U.S.-led military operations in Iraq as an illegal war. The critics' legal arguments reflect an improper parsing of the UN Charter that not only renders nugatory part of the Charter, but also strips legal protections from non-signatories. These legal arguments amount to a strained attempt to proscribe all uses of force, except those which are in response to an armed attack on one's territory or pursuant to explicit Security Council authorization.<sup>35</sup> The notion that the Charter somehow vitiated centuries-old norms of customary international law, which expressly authorized anticipatory defense, borders on the ridiculous. In any case, since the Charter was adopted in 1945, dozens of states, including the United States, Britain, France, Israel, Sweden, Russia, and China, have used force in a preemptive mode while claiming that their behavior was fully consonant with international law.<sup>36</sup>

Legal issues aside, the Iraq war has become a poster child for the preemption foes in two distinct ways. The first is that, given our failure to find WMD stockpiles in Iraq, the United States should not use force preemptively, absent perfect, or near-perfect, information; a frequent companion observation is that any intelligence relating to distant or emerging threats will inevitably be wrong. It is indeed very difficult to penetrate a closed, repressive society, or to estimate reliably the pace of development for complicated and secret weapons. Further, as the United States has learned from its experience with Saddam

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35. For an extensive discussion of this issue, see Rivkin, Jr. et al., *supra* note 4, at 474-79.

36. Quite aside from the legality of preemption, the Iraq war was perhaps the most legally justified war of all time. Numerous Security Council Resolutions provided the legal basis for the use of force, as did Saddam's default of his cease-fire obligations. Legally, the 1991 Gulf War was still alive and well in 2003. The past decade has featured repeated U.S. and British enforcement of no-fly zones and intermittent combat.

Hussein, this task becomes virtually impossible in the face of deliberate strategic deception: U.S. analysts underestimated, prior to 1990, the extent of Iraq's nuclear weapons program, while, in 2001, they overestimated the extent to which Iraq had retained its WMD stockpiles.<sup>37</sup>

Significantly, it is often easier to predict, based on an analysis of the long-term trends, what is *eventually* going to happen rather than what will happen tomorrow because the quality of strategic threat forecasts, which involve broad shifts in the balance of power driven by the overarching goals of various geopolitical actors, tends to be better than the assessment of near-term tactical threats.<sup>38</sup> Accordingly, preemption against medium and long-term threats makes more sense than preemption against near-term threats.<sup>39</sup>

Another frequently invoked Iraq-related "lesson" is that it is not easy to bring the preemptive use of force to a successful conclusion. It is true that the Iraq war has proven difficult, protracted, and costly, with currently more than two thousand Americans killed, thousands wounded, reserves stretched, hundreds of billions of dollars spent, and the bulk of U.S. fighting forces tied up in Iraq and not available for deployment elsewhere. To advocate for preemption, however, is not the same as to promise that its execution would lead to easy and painless military campaigns.<sup>40</sup> Whether the costs and the sacrifices involved were and are worth it is something about which reasonable men can disagree; much depends upon the success

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37. For an example of a discussion about this issue, see David B. Rivkin, Jr. & Lee A. Casey, *Saddam, Nikita and Virtual Weapons of Mass Destruction: A Question of Threat Perception and Intelligence Assessment*, IN THE NAT'L INTEREST, June 12, 2003, <http://www.inthenationalinterest.com/Articles/Vol2Issue23/Vol2iss23RivkinCasey.html>.

38. To demonstrate the validity of this proposition, it would suffice to recall that while U.S. intelligence at first underestimated Iraq's nuclear weapons program and later overestimated it, there is no serious doubt that Saddam's long-term ambitions included the possession of a large diversified WMD arsenal, featuring chemical, biological, and nuclear devices and their delivery systems.

39. Even a threat that is far from certain merits a strong U.S. response if the consequences of inaction could be extremely grave. Conversely, of course, a trivial or minor threat does not merit the use of preemption, unless there is compelling evidence that it is certain to arise.

40. It is unfortunate that a number of erstwhile supporters of the Iraq war fling unjustified criticisms at the way in which the Bush Administration has prosecuted the war, all in an effort to rehabilitate the notion that perfect wars, low in blood and treasure expended, are feasible and therefore, preemption is not that big of a deal.

of the end game in Iraq, which is yet to be fully played.<sup>41</sup> To be sure, preemption, because it can lead to a well planned military campaign prosecuted at the time and in the manner of one's choosing, can be more discriminating and successful than a campaign fought in response to an enemy's first strike.

## V. CONCLUSION

Public articulation of strategic preemption doctrine broadens deterrence, updating it to fit the exigencies of American statecraft. And, if deterrence, however buttressed, is unavailing, the execution of a preemptive option is the best way to assure U.S. security. The arguments against preemption are fundamentally flawed. Rarely consistently or uniformly applied, they are hardly directed at preemption as such, but, rather, are driven by underlying differences between the United States and its allies over the question of how and when to use force in today's world. Significantly, the United States' allies' criticism, far from revealing any superior wisdom, demonstrates instead their opposition to U.S. power and their willingness to abdicate responsibility for dealing with the gravest threats of the Twenty-First Century—a convenient stance that will persist until either they themselves fall victim to a terrorist attack similar to the magnitude of September 11, or so alienate the United States that it at last withdraws its military protection from an otherwise mostly defenseless European continent.

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41. Survival of a viable and democratic Vietnam, rather than televised 1975 images of helicopters overflowing with American soldiers and Vietnamese refugees, would have given rise to radically different popular wisdom concerning American strategic preemption in the early 1960s.