
SHAPING AN OBAMA DOCTRINE OF PREEMPTIVE FORCE

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The election of President Obama presents an opportunity to assess, and, if necessary, adjust U.S. military policies on when war may be waged. President Bush asserted the Bush Doctrine of using preemptive force against putative enemies before they have the capability to attack the United States. After the wars in Iraq and Afghanistan, the time is ripe to evaluate whether the United States should continue the Bush Doctrine. Through statistical regressions of all attacks by or on the United States over sixty years, as well as field interviews of the Taliban, Islamic leaders, and foreign officials in Pakistan and Iran, this Article demonstrates that U.S. military action does not observably reduce aggregate attacks against the United States, and is likely to increase hostility against it. When the U.S. military responds to an actual attack, these considerations are secondary to preventing certain and immediate death and destruction that would occur if the United States did not act. Where there is clear evidence that a putative enemy will launch a devastating attack against the United States should the United States fail to preempt the attack with force, these considerations are also secondary. However, absent such clear and convincing evidence, the indeterminate effects of U.S. military action on aggregate national security and the risk of stoking global animus should tilt the balance against military preemption. This Article recommends that before President Obama—or any future U.S. President—authorizes preemptive military force, he or she should require U.S. policy makers to meet a high burden of proof that a putative enemy will attack or injure the United States if the United States does not strike first. As an alternative to preemptive attacks, this Article recommends five strategies that might better promote U.S. security.

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I. INTRODUCTION

After eight years of waging a “war on terror,”¹ invasions of Iraq and Afghanistan, and continuing troop deployments in those countries, the election of President Obama has provided an opportunity to review U.S. military policies. Within days of his inauguration, President Obama issued Executive Orders closing Guantanamo Bay,² reaffirming the United States’ commitment to Common Article 3 of the Geneva Conventions and treating detainees humanely,³ and reviewing detention policy options.⁴ These Orders address *jus in bello*, or law on the conduct of war. They do not address *jus ad bellum*, or law controlling when war may be waged. The time is ripe for

1. President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001) (transcript available at <http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/>).

2. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

3. 74 Fed. Reg. at 4897–99 (describing closure of Guantanamo Bay detention facilities); *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (describing humane treatment that contracting parties must afford noncombatants).

4. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009) (reviewing detention policy options).

an Obama Doctrine to refine the Bush Doctrine of using preemptive force against putative enemies before they have the capability to attack the United States.⁵

The threat of terrorism is real and continuing. The destruction of the World Trade Center in New York, the crash of American Airlines flight 77 into the Pentagon, and the loss of every passenger aboard United Airlines flight 93 in 2001 brought home the reality of terrorism to the United States.⁶ The threat of terrorism will continue well into the next decade. A November 2007 National Intelligence Estimate of Iran's nuclear intentions and capabilities reported that Iran probably halted its nuclear weapons program in 2003,⁷ but it could "[n]ot rule out that Iran has acquired from abroad—or will acquire in the future—a nuclear weapon or enough fissile material for a weapon."⁸ The northern provinces of Pakistan are now a hotbed of terrorists loosely affiliated with Al Qaeda and will likely remain a center for terrorism in the immediate future unless there is a dramatic shift in policies in Islamabad.⁹ With such continuing threats to security, the question of when international law should authorize the United States to use military force against terrorists and their sponsor states remains critically important.

Understandably, segments of the U.S. public believe that to combat terrorism the United States should more freely conduct military attacks against enemies.¹⁰ President Bush appeared to reflect national sentiment when he declared that the United States would use force preemptively against putative enemies, with multilateral authorization

5. See Vice President Dick Cheney, Remarks by the Vice President to the Veterans of Foreign Wars 103rd National Convention (Aug. 26, 2002) [hereinafter *Cheney Remarks to Veterans*] (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/08/20020826.html>) ("If the United States could have preempted 9/11, we would have, no question."); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 23 (2006), <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/nss2006.pdf> (noting that United States will act preemptively where necessary); U.S. Sec'y of Def. Donald H. Rumsfeld, Address at United States Air Force Academy Commencement Ceremony (May 29, 2002) [hereinafter *Rumsfeld Address at Air Force*] (transcript available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=244>) ("Prevention and preemption are the best, and indeed in most cases the only defense against terrorism. Our task is to find and destroy the enemy before they strike us."); Interview by Tim Russert with Vice President Dick Cheney, *NBC News' Meet the Press with Tim Russert* (MSNBC television broadcast Sept. 16, 2001) (transcript available at <http://www.emperors-clothes.com/9-11backups/nbcmp.htm>) ("[W]e will, in fact, aggressively go after these [terrorist-harboring] nations to make certain that they cease and desist from providing support for these kinds of organizations.").

6. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (describing how Sept. 11, 2001 signaled U.S. vulnerability to terrorist attacks); Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 GA. J. INT'L & COMP. L. 1, 7 (2001) ("The tragic events of Sept. 11, 2001 have shattered any remaining illusions as to U.S. vulnerability.").

7. NAT'L INTELLIGENCE COUNCIL, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES 6 (2007).

8. *Id.* at 5.

9. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-932T, U.S. OVERSIGHT OF PAKISTAN REIMBURSEMENT CLAIMS FOR COALITION SUPPORT FUNDS 4 (2008) (noting Pakistan was critical to combating Al Qaeda); INST. FOR CONFLICT MGMT., PAKISTAN ASSESSMENT 2009, <http://www.satp.org/satporgtp/countries/pakistan/index.htm> (last visited Feb. 12, 2010) (noting security risks emerging from Pakistan); Interview by Glenn Johnston et al. with Owais Ahmand Ghani, Governor of Nw. Frontier Province, Pak., in Peshawar, Pak. at 2 (May 17, 2008) (on file with Tai-Heng Cheng) (noting international terrorist networks in Pakistan's tribal areas and frontier province).

10. See John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. INT'L L. 341, 359 (2004) ("[I]n the aftermath of the 9/11 attack, public opinion in the United States has overwhelmingly supported the war against terrorism.").

if possible and alone if necessary.¹¹ A chorus of U.S. military and policy strategists has called for attacks on Iran, ostensibly to prevent it from ever becoming a viable military threat to the United States or its allies in the Middle East.¹² Even President Obama, during his presidential campaign, insisted on preserving the option of attacking Iran to protect vital national interests.¹³

Yet some policy makers have resisted calls for greater U.S. military activity overseas.¹⁴ The popular press has also sharply criticized U.S. preemptive military action.¹⁵ Even U.S. generals have questioned the wisdom of preemptive attacks.¹⁶

Discord within the legal academy has echoed the dissonance on the street and inside the Beltway. Scholars have debated whether international law should accommodate a doctrine of preemptive self-defense.¹⁷ Professor John Yoo, who previously authored the “torture memos” while serving at the U.S. Department of

11. President George W. Bush, State of the Union Address (Jan. 28, 2003) (transcript available at <http://www.nytimes.com/2003/01/29/politics/29BTEX.html?pagewanted=all>) (“[W]e’re asking [other nations] to join us. . . . Yet the course of this nation does not depend on the decisions of others. Whatever action is required, whenever action is necessary, I will defend the freedom and security of the American people.”).

12. See Michel Chossudovsky, Centre for Research on Globalization, *Planned US-Israeli Attack on Iran*, GLOBALRESEARCH.CA, May 1, 2005, <http://globalresearch.ca/index.php?context=va&aid=66> (“Vice President Dick Cheney dropped a bombshell. He hinted, in no uncertain terms, that Iran was ‘right at the top of the list’ of the rogue enemies of America”); *US “Iran attack plans” Revealed*, BBC NEWS, Feb. 20, 2007, <http://news.bbc.co.uk/2/hi/6376639.stm> (“US contingency plans for air strikes on Iran extend beyond nuclear sites and include most of the country’s military infrastructure”).

13. See Senator Barack Obama, Address to the B’nai Torah Congregation in Boca Raton, Florida (May 22, 2008) (transcript available at <http://votersforpeace.us/press/index.php?itemid=320>) (“I think we have to offer sticks [to Iran], like economic sanctions. And we should not take our military options off the table.”); see also Senator John McCain, Republican Presidential Debate (Oct. 9, 2007) (transcript available at <http://www.msnbc.msn.com/id/21309530/page/11/>) (“I believe that this [attacking Iran] is a possibility that is maybe closer to reality than we are discussing tonight.”).

14. See H.R. Con. Res. 33, 110th Cong. (2007) (noting that although “there are an increasing number of reports that preparations for war [with Iran] are underway,” “diplomacy is the preferred route”); Glenn Kessler, *U.S. Tries to Calm Fears in Europe on Using Bases*, WASH. POST, Apr. 28, 2006, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/27/AR2006042702058.html> (discussing Secretary of State Condoleezza Rice’s assurances that United States was committed to diplomatic discourse with Iran).

15. E.g., Ray Takeyh, *Taking Threats off the Table Before Sitting with Iran*, BOSTON GLOBE, May 3, 2007; Matthew Yglesias, *Beyond Preemption: Democrats Can’t Just Criticize Bush’s Foreign Policy, They Must Articulate Alternatives*, L.A. TIMES, Dec. 8, 2007, at A21.

16. See, e.g., Delinda C. Hanley, *General Zinni Examines U.S.-Mideast Defense Relations*, WASH. REP. ON MIDDLE E. AFF., July 2008, at 66, 66 (noting General Zinni opposes preemptive strikes against Iran); Wes Clark, *Wes Clark’s Ten Pledges*, <http://www.baylorfans.com/forums/archive/index.php/t-47361.html> (last visited Feb. 13, 2010) (pledging that Clark administration would not rely on preemptive force).

17. Compare Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 LAW & CONTEMP. PROBS., Autumn 2004, at 147, 166 (arguing that sovereignty permits states to assess seriousness of threats and to act preemptively), and David B. Rivkin, Jr., *The Virtues of Preemptive Deterrence*, 29 HARV. J.L. & PUB. POL’Y 85, 102 (2005) (arguing that “a preemptive option is the best way to assure U.S. security”), with Stéphanie Bellier, *Unilateral and Multilateral Preventive Self-Defense*, 58 ME. L. REV. 508, 513 (2006) (arguing against widening scope of self-defense), and Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 557 (2002) (noting impermissibility of preemptive self-defense under U.N. Charter without Security Council authorization).

Justice,¹⁸ has argued that international restrictions on force must permit preemptive military action against potentially destructive attacks, even if they are not imminent.¹⁹ In contrast, Professor W. Michael Reisman at Yale Law School has argued that, from the policy perspective, claims of the Bush administration to have the right of preemptive self-defense have produced unintended consequences of mimesis and free riding, in which other states have claimed a similar self-judging right to attack another state preemptively based on threat perceptions.²⁰ These unintended consequences imposed unacceptably high risks for global order.²¹

This Article aims to bridge the gap between those who support wider legal authorization to use force—the hawks—and those who oppose such authorization—the doves. It finds a middle ground by departing from conceptions of law as a corpus of technical rules in which requests for legal authorizations are either approved or denied through purportedly logical derivation of rules and their application to facts.²² Such formalism has limited utility when the issue at hand is not determining what the law is,²³ but what it ought to be.

An alternative approach is to study law from a social science perspective.²⁴ Professors Harold Lasswell and Myres McDougal pioneered this field in 1943²⁵ and refined it over the following half-century,²⁶ drawing from around the world successive generations of associates to New Haven, who have continued to use social science tools in contemporary legal problems.²⁷ This policy-oriented approach conceives of law as

18. Stephen Gillers, *The Torture Memo Scandal*, NATION, Apr. 13, 2008, <http://www.cbsnews.com/stories/2008/04/11/opinion/main4009440.shtml>.

19. John C. Yoo & Will Trachman, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379, 393 (2005); see also DAVID M. ACKERMAN, CRS REPORT FOR CONGRESS: INTERNATIONAL LAW AND THE PREEMPTIVE USE OF FORCE AGAINST IRAQ (2003), available at <http://www.au.af.mil/au/awc/awcgate/crs/rs21314.pdf> (discussing customary international law right of state to use preemptive force).

20. W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 525 (2006); see also W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 89 (2003) (arguing that there is greater resort to international violence where preemptive defense seems available); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 17 (1999) [hereinafter Reisman, *International Responses*] (acknowledging potential for misuse of preemptive strikes).

21. See Reisman & Armstrong, *supra* note 20, at 525 (noting that states other than United States, including some with nuclear weapons, have adopted preemptive self-defense claims).

22. See H.L.A. HART, *THE CONCEPT OF LAW* 79–91 (2d ed. 1994) (postulating that law is system of primary rules that are created, modified, destroyed, and recognized by secondary rules and rule of recognition).

23. *But cf.* Paust, *supra* note 17, at 533 (engaging in doctrinal analysis of U.S. military interventions).

24. See W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 575–76 (2007) (discussing adoption of analytical methods of social sciences to prescriptive purposes of law).

25. See Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 207 (1943) (“None who deal with law, however defined, can escape policy when policy is defined as the making of important decisions which affect the distribution of values.”).

26. Their last collaboration was HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992).

27. See, e.g., Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771, 778 (1958) (noting interstate coercion is

science, that is, “a systematic body of propositions verifiable by observation, all of which are not obvious to commonsense.”²⁸ This approach recommends itself to problems such as the one at hand, because it helps scholars systematically test and verify the intuitive—but contradictory—propositions of the hawks and doves.

Other scholars have confirmed the value of such an approach by using policy tools in support of their appraisals of the law of force.²⁹ But much of this prior scholarship, while invoking intuitions to support particular propositions about what the law on the use of force ought to be, has not systematically tested their policy assertions.³⁰

This Article methodically appraises the policy propositions relevant to military preemption. A core of the disagreement is that hawks think military preemption promotes U.S. security, while doves think that it damages global order and U.S. security within that.³¹

There are multiple social science methods of testing intuitions in general and the propositions here in particular. These include case studies, correlations, experiments, prototypes and anthropological interviews.³² These methods of inquiry are not mutually exclusive, and no method is necessarily sounder than the others. The scholar may select his method to suit the problem and the data available, as well as to complement prior studies that may have been conducted.³³

Professor Reisman has validated through detailed case studies his proposition that preemptive self-defense risks mimesis and retaliation, thereby threatening global order.³⁴ While Professor Reisman’s work has verified the policy concerns of the doves, no scholar has yet systematically tested the validity of the policy preoccupations of the hawks.

more complex than suggested, and more flexible and comprehensive method of analysis is needed); W. Michael Reisman & Monica Hakimi, *2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 562 (2003) (arguing that counterfeit compensation for victims of violations of international law will seriously injure international human rights); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 50 (2009) (suggesting that axiom of analytic independence of *jus in bello* and *jus ad bellum* is logically unsound, undertheorized, and misapplied).

28. LASSWELL & MCDUGAL, *supra* note 26, at 869 (emphasis omitted).

29. See Rivkin, *supra* note 17, at 89 (appraising preemptive deterrence by first explicitly identifying conflicting policy goals, a key intellectual task of policy-oriented approach).

30. See *id.* at 95 (failing to comprehensively and systematically test propositions in favor of military force). But see Reisman & Armstrong, *supra* note 20, at 531 (surveying systematically whether Bush Doctrine correlated to increase in threats to use force around world).

31. Compare Rivkin, *supra* note 17, at 87 (“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.”), with Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 176 (2004) (“Invoking a legal doctrine of preemptive self-defense could have invited an unraveling of norms on the use of force by creating a precedent for action by any number of states that purport to be threatened by acts of their neighbors that might occur in years hence.”).

32. See LASSWELL & MCDUGAL, *supra* note 26, at 887–941 (discussing social science methods used to observe and process data).

33. See Reisman et al., *supra* note 24, at 575–76 (“The jurisprudential school that they created at Yale adapts the analytical methods of the social sciences to the prescriptive purposes of the law.”).

34. Reisman & Armstrong, *supra* note 20, at 550.

This Article steps into the breach through doctrinal analysis, statistics regressions, and field interviews, all within a policy framework. Part II delimits the focus of inquiry.³⁵ It argues that the conventional inquiry into the legality of a doctrine of preemptive self-defense is too narrow. Instead, it frames the problem more broadly as whether the United States should attack an enemy preemptively under a doctrine of self-defense, some other legal justification, or even illegally.

Part III identifies the cause of the persistent disagreement about whether to authorize the use of force more widely:³⁶ the different prioritizations of fundamental policies by hawks and doves. Scholars hesitant to widen *jus ad bellum* tend to focus on international public order goals.³⁷ These goals include minimizing harm to people and property that accompany military operations and maximizing global order.³⁸ Scholars who, by comparison, advocate wider rights to use force tend to focus on the self-preservation of the United States and the dangers of not acting swiftly against a perceived threat before it is fully formed.³⁹ The domestic focus of U.S. hawks is antipodean to the global perspective of the doves.⁴⁰

Part IV attempts to move the dialogue forward. It accepts as paramount and legitimate the domestic concerns of hawkish U.S. security experts and scholars. It accepts that where there is an actual attack to be neutralized, concerns about unintended consequences of U.S. military action are secondary to prevent imminent death and destruction on U.S. soil or to U.S. persons. However, where there is no actual attack, and a putative enemy is simply believed to pose a threat in the future if the United States does not act preemptively at the present time, then considerations about the effect of U.S. military action on aggregate U.S. security should weigh more heavily in calculating whether to use preemptive force.⁴¹ Part IV examines the effect of military action on aggregate security using statistical analysis and field interviews.

35. See LASSWELL & McDUGAL, *supra* note 26, at 24–30 (discussing method of delimiting focus of inquiry through criteria of comprehensiveness and appropriate selectivity).

36. See *id.* at 32–34 (proposing societal values that must be included in analysis, lest it be incomprehensive or unrealistic).

37. See, e.g., Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 95 (2006) (arguing that international decision by Security Council on whether to invade Iraq, rather than unilateral one by United States, would have better supported international policy goals).

38. See Bellier, *supra* note 17, at 513 (recognizing that primary responsibility of U.N. Security Council is maintenance of international peace and security); Reisman, *International Responses*, *supra* note 20, at 60 (discussing problem of world order in relationship to terrorism and self-defense).

39. See Yoo & Trachman, *supra* note 19, at 383 (arguing that strict reading of U.N. Charter use of force authorization requirements would significantly constrain U.S. military options without any corresponding restraint on nonterrorist groups).

40. Compare Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2512 (2006) (arguing in favor of military force), with Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2374 (2006) (rejecting Nzelibe and Yoo's argument as "wrong-headed").

41. See Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677, 690 (2004) (stating that one important question to address in appraising wider rights to use force is "whether the increased tendency to use force might be more effective than not in reducing violence").

The authors first obtained data on every instance of the United States being attacked at home or abroad, and every instance of a U.S. attack on or in another state, from 1945 to 2006. The data used was obtained from documents by the Department of Defense, the State Department, and the Congressional Research Service. A “Force Index” was created, charting the use of force by the United States. A “Threat Index” charted the attacks against U.S. persons, property, or territory. The relationship between these two indices was examined using the frameworks of Granger causality and Vector Autoregression (VAR). This analysis compared U.S. military action against subsequent attacks on the United States, with time lags ranging from one year to six years. The results indicated that the United States increased its unilateral use of force within a year of increased attacks against the United States, but the increase in U.S. use of force would peter off within four years. The results also indicated that regardless of increases in the use of U.S. military force, there was no association between the United States’ military actions and how safe it is from attacks in aggregate. The statistical models provided a basis to hypothesize that wider uses of military force, including preemptive force, would not necessarily make the United States any safer in aggregate.

Statistical analysis may, however, risk suggesting false relationships, because empirical studies may not always account for human and social conditions that provide nuanced explanations for patterns of decision making.⁴²

Nuances were explored through field interviews designed to discover through the narratives of interviewees possible reactions to the use of U.S. military force. Field interviews flesh out human dimensions of and responses to policies,⁴³ and help researchers theorize about the potential consequences of policy changes.⁴⁴ Law & Society scholars refer to this human data as “stories” or narratives that help us better understand how abstract international laws or policies will be received and translated in the local vernacular.⁴⁵

One of the authors and his teams of field researchers conducted over fifty field interviews of terrorists, government officials, and Islamic leaders in Pakistan and Iraq. The interviews were conducted to determine whether U.S. aggression on foreign states could cause those states, groups within them, or other states to become more likely to attack the United States, or to support other groups that might. The interviews revealed that perceptions of U.S. aggression provoked varying degrees of antipathy towards the

42. See Brian D. Haig, *An Abductive Theory of Scientific Method*, 10 PSYCHOL. METHODS 371, 372 (2005) (noting criticism of empirical method as “confirmationally lax” because “any positive confirming instance of a hypothesis . . . can confirm any hypothesis that is conjoined with the test hypothesis, however plausible, or implausible, that conjunct might be”).

43. Cf. David M. Engel & Frank W. Munger, *Re-interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 285, 291 (2001) (describing use of interviews to understand how “interviewees incorporated legal concepts in their narratives”); Frank Munger, *Inquiry and Activism in Law and Society*, 35 LAW & SOC’Y REV. 7, 10 (2001) (acknowledging importance of forming understanding of research subjects from subjects themselves).

44. See Haig, *supra* note 42, at 372 (stating that “the scientist is typically portrayed as reasoning inductively by enumeration from secure observation statements about singular events to laws or theories in accordance with some governing principle of inductive reasoning,” and that “[s]ound inductive reasoning is held to create and justify theories simultaneously, so that there is no need for subsequent empirical testing”).

45. See Munger, *supra* note 43, at 11 (noting importance of understanding subject for development of meaning of present and future possibilities).

United States for various reasons that were often shaped in part by the personal backgrounds and the societies of those interviewed. These reactions ranged from sympathy for Islamist terrorists opposed to U.S. interests, to active support for terrorists, to actual participation in terrorist attacks. These interviews suggest that military attacks by the United States could provoke a range of responses, including retaliation from the target or other groups. Because of the unique and varied sociological factors of foreign communities observing U.S. aggression, foreign responses to U.S. military action may often be indeterminate, and correspondingly confer indeterminate benefits, if any, to aggregate U.S. security.

Part V evaluates the research and findings in Part IV. The facts on the ground obtained through field interviews are consistent with macroscale empirical testing indicating an absence of a significant relationship between the use of force by the United States and aggregate levels of U.S. safety. These results do not obviate the need to use force against an actual attack because such an attack is definite and would destroy U.S. lives and property if not promptly neutralized. These results also do not definitively exclude the necessity to attack preemptively where there is a preponderance of evidence removing any doubt that absent a U.S. preemptive attack, the putative enemy would operationalize an attack on the United States in the future that the United States could not then effectively parry.

However, absent such strong evidence, a preemptive attack would not necessarily save U.S. lives and property because it cannot be said with absolute certainty that the United States would have been attacked had it not attacked first. Instead, it merely mitigates a risk of attack by the identified enemy. This risk of attack, being only a risk and not a certainty, should be balanced against all other security risks that might emerge or intensify as a result of the attack. If a preemptive attack can be justified, it must be justified by facts that provide a basis to anticipate that it would in aggregate reduce U.S. security risks. The evidence gathered in this Article, however, does not provide such a basis.

The Article concludes by suggesting alternative strategies to promote U.S. security. To reduce the necessity for preemptive force, the Obama administration could pursue five broad strategies: (1) strong, targeted military responses to neutralize attacks or incipient attacks against the United States; (2) effective diplomacy to obtain Security Council Chapter VII authorization to use force; (3) measures addressing the root causes of terrorism; (4) promoting global controls over nuclear and other materials that could be used militaristically; and (5) strengthening international and national judicial control over states, entities, and individuals that commit or plan to commit acts of militaristic violence.

II. FRAMING THE INQUIRY

An antecedent task of the jurist studying law as a social science is to delimit the focus of inquiry.⁴⁶ Without focus, inquiry risks diffusion to the point of lacking practical application in real problems.

46. See LASSWELL & MCDUGAL, *supra* note 26, at 24 (discussing necessity of narrowing search inquiries).

International law regulates the varied aspects of military operations.⁴⁷ *Jus ad bellum* governs when a state may engage in warfare, that is, high levels of military violence inflicted on or in a foreign state, ranging from targeted and isolated air strikes to full-fledged invasions to destroy a foreign government.⁴⁸ *Jus in bello* governs how a state may conduct warfare, such as the use of chemical or biological weapons against civilians and the treatment of enemy combatants.⁴⁹ International law even governs covert military operations characterized by secrecy and minimal violence, such as kidnapping enemies in foreign states.⁵⁰

Jus in bello and the law of covert operations have been addressed in other scholarship.⁵¹ The foci of this Article are the questions of when states should execute preemptive attacks and if international law should accommodate preemptive force.

A. *Jus ad Bellum*

Within the topic of *jus ad bellum*, an excessively narrow focus risks inadequately addressing the entire scope of a policy problem. Such is the case with limiting the inquiry to a legalistic doctrine of preemptive self-defense. A formalistic examination of a purported legal doctrine could be tempting to law scholars. However, it neither adequately assists policy makers nor their counsel in the strategic calculus that they are required to undertake. When faced with a security threat, the foremost question is whether and how to respond to neutralize the threat. To be sure, any consideration of strategy is mediated by the legality of each option available. However, invoking a purported doctrine of preemptive self-defense is not the only option. An attorney to a policy maker may also consider interpreting existing Security Council resolutions, or seeking new Chapter VII resolutions. The policy maker must then decide whether to choose one of the legal options presented, or to act illegally. Thus, addressing only a

47. See SELECT COMMITTEE ON DEFENSE, THREAT FROM TERRORISM (SECOND REPORT), H.C. 348-I, reprinted in 74 BRIT. Y.B. INT'L L. 766 (2003) (emphasizing "the importance of international law" in regulating use of force).

48. See generally Sloane, *supra* note 27.

49. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3317, 972 U.N.T.S. 138; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 973 U.N.T.S. 290; see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (holding that alien detainees designated as enemy combatants have habeas corpus privileges); *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006) (explaining that when president determines there is reasonable belief that noncitizens are members of Al Qaeda, they will be tried in military commissions); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 450 (2007) (arguing that because war on terror differs from traditional war, there is need for effective conventions to govern such wars); Sloane, *supra* note 27, at 53–56 (defining *jus in bello* by reference to dualism with *jus ad bellum*).

50. See Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 784 (2003) (arguing that when national self-defense calls for assassination, assassination is no longer forbidden under international or U.S. law); Douglas Kash, *Abducting Terrorists Under PDD-39: Much Ado About Nothing New*, 13 AM. U. INT'L L. REV. 139, 155 (1997) (arguing that international right of self-defense regulates international abductions); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 647 (1992) (arguing that individual targeting is justified only to stop imminent attacks).

51. For an introduction to *jus in bello* and the law of covert operations, see *supra* notes 49–50 and accompanying text.

doctrine of preemptive self-defense does not provide a policy maker with the analysis required to make an informed decision about how to respond to a perceived security threat. The focus of inquiry should more fundamentally address whether and when a state should engage in preemptive force.

Through the evolution of *jus ad bellum* over the centuries, the world community has considered a wide range of strategies under its rubric and made some constitutive decisions about whether to accept or reject each of these strategies.

Jus ad bellum initially supported the widest discretion to go to war but has gradually become more restrictive over time. Aristotle asserted in *Politics* that inherent to state sovereignty was the power to declare war or peace.⁵² In the seventeenth century, Hugo Grotius stated: “In our discussions . . . of men who make war, we said and showed that by the law of nature everyone is the maintainer both of his own rights and of those that belong to others.”⁵³ This view was consistent with the view that sovereignty was absolute, and a state’s unfettered discretion to use its military instrument was an aspect of absolute sovereignty.⁵⁴

By the mid-nineteenth century, states began to articulate restrictions on the use of force. One watershed event was the *Caroline* affair. Great Britain attacked the U.S. vessel, the *Caroline*, when it was moored on the American side of the Niagara River, because it was bringing supplies to Canadian insurrectionists against the British.⁵⁵ Protesting the attack, U.S. Secretary of State Daniel Webster stated that the use of force was only ever justified when “the ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’”⁵⁶ Additionally, the use of force had to be proportional to the threat, and the burden of proof was on the aggressor.⁵⁷ Eventually, Great Britain apologized for its actions, indicating that it accepted that the use of military force where there had not been a prior attack was impermissible.⁵⁸

52. ARISTOTLE, THE POLITICS, BOOK SIX, CHAPTER XIV 69 (“The deliberative element has authority in matters of war and peace”); see also EDWARD SPELMAN, THE ROMAN ANTIQUITIES OF DIONYSIUS OF HALICARNASSUS, BOOK IV 331–33 (Earnest Cary trans., Harvard University Press 1937) (1767) (noting that Dionysius allocated to state the power to declare war).

53. HUGO GROTIUS, THE LAW OF WAR AND PEACE 260 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625).

54. See JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 25 (M.J. Tooley trans., Barnes & Noble 1967) (1576) (“Sovereignty is that absolute and perpetual power vested in a commonwealth . . .”).

55. See KENNETH R. STEVENS, BORDER DIPLOMACY: THE *CAROLINE* AND *MCLEOD* AFFAIRS IN ANGLO-AMERICAN-CANADIAN RELATIONS, 1837–1842, at 121 (1989) (arguing that New York supreme court was incorrect in determining that actions of individual involved in *Caroline* affair were acts of individuals and not of sovereign state); David B. Rivkin Jr., et al., *Remember the Caroline!*, NAT’L REV., July–Dec. 2002, at 17, 17 (“[T]he ‘*Caroline* incident’ spawned the modern international-law doctrine of ‘anticipatory self-defense,’ a doctrine on which the U.S. now intends to rely heavily to justify military action against terrorist states.”).

56. Letter from Daniel Webster, Secretary of State, United States, to Lord Ashburton, British Plenipotentiary, United Kingdom (Aug. 6, 1842), in 2 A DIGEST OF INTERNATIONAL LAW 412 (John Bassett Moore ed., 1906).

57. Letter from Daniel Webster, Secretary of State, United States, to Henry Fox, Minister, United Kingdom (Apr. 24, 1841), in 29 B.S.P. 1129, 1138 (1957), quoted in LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 923 (4th ed. 2001).

58. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 91 (1938) (“[T]he agreement of the two governments [addressed] the importance of the principle of non-intervention and the

The operational practices of two World Wars severely challenged the legal limits placed on the use of force; some states thoroughly ignored any purported international restrictions on their use of force.

These horrors eventually shocked states into reaffirming their commitment to prohibiting the unilateral use of force except in self-defense.⁵⁹ Article 2(4) of the U.N. Charter rejected the view that a sovereign state may use force unilaterally to advance national interests.⁶⁰ Only the Security Council could authorize the use of force pursuant to a resolution under Chapter VII of the U.N. Charter.⁶¹ Numerous Security Council Resolutions have since condemned the unilateral acts of aggression by one state against another.⁶² The replacement of a unilateral right to use force by international controls is, however, inoperative if a state consents to another state deploying force, such as to provide assistance in combating insurgents or terrorists,⁶³ or if a state needs to act in self-defense against an actual or imminent attack.⁶⁴

narrow limits of the exceptions.”); *Correspondence Between Great Britain and the United States, Respecting the Destruction of the Steamboat Caroline*, 30 B.S.P. 193, 201 (1858) (recording diplomatic letters accepting that force is only authorized in self-defense against attack).

59. See League of Nations Covenant pmbl. (outlining agreements of League of Nations’ members, including acceptance of obligation not to resort to war); Charles Hall Davis, *Preamble to Constitution of the League of Nations*, 5 VA. L. REG. NEW SERIES 14, 16 (1919) (stressing importance of preamble because citizens of all member nations are bound by agreement).

60. U.N. Charter art. 2, para. 4.

61. U.N. Charter art. 39; see also S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing force against Iraq for invading Kuwait); S.C. Res. 660, ¶ 2, U.N. Doc. S/RES/660 (Aug. 2, 1990) (determining that Iraq breached international peace by invading Kuwait).

62. See, e.g., S.C. Res. 686, ¶ 2, U.N. Doc. S/RES/686 (March 2, 1991) (demanding that Iraq return all Kuwaiti property, prisoners of war, and war dead, and that Iraq accept liability for injuries to Kuwait); S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing force against Iraq for invading Kuwait); S.C. Res. 660, ¶ 2, U.N. Doc. S/RES/660 (Aug. 2, 1990) (determining that Iraq breached international peace by invading Kuwait); S.C. Res. 501, ¶ 1, U.N. Doc. S/RES/501 (Feb. 25, 1982) (demanding immediate withdrawal of Israeli forces from Lebanese territory); S.C. Res. 384, ¶ 1, U.N. Doc. S/RES/384 (Dec. 22, 1975) (acknowledging territorial integrity of East Timor).

63. See S.C. Res. 384, ¶ 2, U.N. Doc. S/RES/384 (Dec. 22, 1975) (condemning Indonesian intervention in East Timor); 1 OPPENHEIM’S INTERNATIONAL LAW 435 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (discussing “[a]ssistance on request”).

64. U.N. Charter art. 51; see also Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 771, 790 (2003) (noting that “Article 51 may be read permissively to include a right to anticipatory self-defense”); Rex J. Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: “Star Wars” and Other Glimpses at the Future*, 18 N.Y.U. J. INT’L L. & POL. 73, 101 (1985) (arguing that “defensive measures in anticipation of an armed attack should be permissible” under U.N. Charter); High-Level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 188, U.N. Doc A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*] (noting that states facing imminent threat can take military action, but questioning use of military action when threat is not imminent); cf. Authorization for Use of Military Force, Pub. L. No. 107-40, S.J. Res. 23, 107th Cong. (2001) (enacted) (authorizing the President to “use . . . force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”).

The interpretation of the law governing the use of force is not without controversies.⁶⁵ Nonetheless, the authors are of the view that the U.N. Charter and customary law established three constitutive restrictions on when force may be used in actual or anticipatory self-defense. First, self-defense operates by a hair-trigger mechanism. Military force cannot be launched unless triggered by an actual or imminent attack. Second, self-defense is temporally restricted: the response to an actual attack must be close in time to the attack. It is clearly established that military force may be used only where it is necessary to repel an actual or imminent attack.⁶⁶ Third, the acts in self-defense must be proportionate to the attack.⁶⁷

The international constitutional structure regulating the use of force is designed to balance the need to restrict the use of force with the need to permit swift defensive action in the intervening period between an imminent attack and an international decision addressing that attack.⁶⁸ Because every state may legitimately perceive threats against its existence, permitting every state to act on its own threat assessment could lead to wars raging out of control and being declared in haste.⁶⁹ Individualized assessment was replaced by collective decision making at the Security Council, in the hope that the vote and veto structure of the Security Council would prevent the

65. See Matthew A. Myers, Sr., *Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?*, 162 MIL. L. REV. 132, 168 (1999) (“The opinions of legal scholars [about the law of force] extend from one end of the spectrum to the other . . .”).

66. E.g., JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 154 (2004); see also Report of the International Law Commission, art. 25, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) (detailing extenuating circumstances that create actual necessity and allow use of self-defense); S.C. Res. 487, ¶ 8, U.N. Doc. S/RES/487 (June 19, 1981) (condemning preemptive strike by Israel on Iraqi nuclear facilities); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 195 (July 9) (holding that Israel may not take defensive action of walling in Palestinian territory without sufficient showing of grave peril); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 179 (Nov. 6) (holding that United States had made necessary showing to be held not in breach of treaty for military attacks on Iranian oil platforms); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8) (allowing that in certain circumstances, threat of nuclear engagement is permissible under international law); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) (limiting right to self-defense to states that have “been the victim of an armed attack”); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY 178 (2002) (noting necessity may only be employed to protect from “grave and imminent peril”); Jennings, *supra* note 58, at 89 (discussing Daniel Webster’s call to demonstrate necessity prior to self-defense measures).

67. See Saad Gul & Katherine M. Royal, *Burning the Barn to Roast the Pig? Proportionality Concerns in the War on Terror and the Damadola Incident*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 49, 57 (2006) (noting that International Law Commission’s approach suggests that self-defense requires graduated response proportional to threat). *But cf.* Sloane, *supra* note 27 (arguing that proportionality is an *in bello* concept).

68. See U.N. Charter art. 51 (noting nations’ right to self-defense, and requiring defending nations to report immediately exercises of self-defense to Security Council).

69. See Olumide K. Obayemi, *Legal Standards Governing Pre-emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the U.N. Charter and General International Law*, 12 ANN. SURV. INT’L & COMP. L. 19, 41 (2006) (“To leave nations to use their individual *subjective* standards as a basis for carrying out armed counter-measures against other sovereign states would be a clear invitation to anarchy.”); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 494 (2006) (“By vesting broad discretion in states to determine unilaterally whether the conditions for using force have been met, the new doctrines greatly increase the dangers that force will be used in circumstances unrelated to the policy or principles that purportedly justify the doctrines . . .”).

authorization of force in a knee-jerk fashion or to promote national interests at the cost of global security and peace.⁷⁰ One key disadvantage of this collective decision-making process is the delay or inaction that necessarily accompanies deliberation.⁷¹ This constraint is overcome by permitting states to defend themselves until the Security Council completes its deliberations.⁷²

During the Cold War, states generally observed restrictions on the use of force.⁷³ There are several reasons for this compliance.⁷⁴ All states benefited from reducing military conflict,⁷⁵ and weaker states especially supported restrictions on the use of force because they benefited disproportionately under this international arrangement. Even absent those restrictions, their limited capacities to deploy force would have imposed constraints on their use of the military tool, and so legal restrictions had a stronger practical effect on powerful states.⁷⁶

Powerful states were persuaded to exchange wide rights of self-defense for collective decisions to use force pursuant to Chapter VII of the U.N. Charter.⁷⁷ Under this global allocation of authority to a council of the most powerful states, the five powers could control U.N. Security Council decisions to use force to protect their interests by exercising their veto power.⁷⁸

Perhaps most importantly, the balance of superpowers supported a restrictive law on the use of force. Soviet Premier Nikita Khrushchev explained in an article in *Foreign Affairs* in 1959 that peaceful coexistence was necessary because the

70. See Franck, *supra* note 37, at 102–03 (arguing that Security Council deliberations about not attacking Iraq were wiser than U.S. decision to invade Iraq in 2003); Obayemi, *supra* note 69, at 31 (noting that Security Council procedures are designed to facilitate peaceful resolutions).

71. See Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 98 (2003) (“[I]f the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow.”).

72. *Id.* (“The last part of the first sentence of Article 51 reads that states can only exercise their inherent right of self-defence (including anticipatory self-defence) ‘until the Security Council has taken the measures necessary to maintain international peace and security.’”).

73. See Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 23 (1996) (“The Cold War created a culture of intense but disciplined international tension. Nations recognized that decisions to use force carried grave consequences, and those nations made carefully measured decisions regarding escalation within conflicts.” (footnote omitted)).

74. See Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 23 (2000) (explaining several ways how, during Cold War, Charter’s restraints on use of force sought to align interests of both large and small states towards peace).

75. *Id.*

76. Cf. Rein Müllerson, *Jus ad Bellum: Plus Ça Change (le Monde) Plus C’est la Même Chose (le Droit)?*, 7 J. CONFLICT & SECURITY L. 149, 152 n.6 (2002) (“[W]eaker nations have historically been generally more peaceful only because of their inability to successfully carry out more aggressive foreign policy.”).

77. See Obayemi, *supra* note 69, at 32 (noting that through U.N. Charter, member states authorized Security Council to take measures to protect international peace and security).

78. See Mary Ellen O’Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT’L L. 473, 482 (1997) (“[T]he Cold War meant that a decision by the Council to use force was generally viewed as favoring or disfavoring one side or another. As so characterized, a veto was inevitable.”).

alternative—a “war in the rocket and H-bomb age [was] fraught with the most dire consequences for all nations.”⁷⁹ In order to avoid a catastrophic nuclear war, both superpowers had an overriding interest in creating barriers to deliberate or automatic uses of conventional or nuclear force that could trigger a nuclear reprisal.⁸⁰

B. *The Preemptive Self-Defense Doctrine*

Although the notion of preemptive force has entered the popular lexicon as the “Bush Doctrine,”⁸¹ its lineage runs through several U.S. presidencies. Throughout the twentieth century, the United States has challenged the international restrictions on the use of force by claiming that preemptive attacks or its analogs should be permitted. Unlike traditional self-defense, the purported right of preemptive self-defense may be triggered without an immediately antecedent or imminent attack.⁸² Instead, the putative defending state may launch a preemptive strike even if, according to the U.S. National Security Strategy of 2006, “uncertainty remains as to the time and place of the enemy’s attack.”⁸³ Preemptive self-defense is thus wider than self-defense against an actual attack, or anticipatory self-defense against an imminent attack.

In the early nineteenth century, the United States adopted the Monroe Doctrine.⁸⁴ This doctrine was used to justify military attacks on Central American and Caribbean states aimed at preventing other states from interfering with the U.S. influence in the Western Hemisphere.⁸⁵ So conceived, the Monroe Doctrine arguably extended further than protecting U.S. security interests.

The United States came close to acting preemptively in the Cuban Missile Crisis, but did not ultimately engage in military combat. In 1962, President Kennedy authorized a naval blockade around Cuba to prevent the Soviet Union from establishing missile bases in Cuba.⁸⁶ This preemptive action was designed to prevent the possibility

79. Nikita S. Khrushchev, *On Peaceful Coexistence*, 38 FOREIGN AFF. 1, 1 (1959).

80. See Jason Pedigo, Note, *Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?*, 32 GA. J. INT’L & COMP. L. 199, 217 (2004) (“The Cold War and its policy of Mutually Assured Destruction . . . played the key role in preventing the escalation of conflicts.”).

81. See Opinion, *The Bush Doctrine*, N.Y. TIMES, Sept. 22, 2002, <http://www.nytimes.com/2002/09/22/opinion/the-bush-doctrine.html> (outlining Bush administration responses and policies as consistent, coherent doctrine).

82. See Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-emption: International Law’s Response to Terrorism*, 12 J. CONFLICT & SECURITY L. 95, 112 (2007) (arguing that “requisite threshold . . . for anticipatory self-defence [is] ‘palpable and imminent threat of attack’” and that threshold for “pre-emptive self-defence [is] ‘conjunctural and contingent threats of possible attack’” (footnote omitted)).

83. THE WHITE HOUSE, *supra* note 5, at 23.

84. See David D. Carto, Note, *The Monroe Doctrine in the 1980’s: International Law, Unilateral Policy, or Atavistic Anachronism?*, 13 CASE W. RES. J. INT’L L. 203, 204 (1981) (“The Monroe Doctrine was announced by President James Monroe in a message to Congress on December 2, 1823.”).

85. Cf. Tom Madison, Note, *Re-shaping the “Monroe Doctrine”: United States Policy Concerns in Latin America Urgently Call for Ratification of the International Criminal Court*, 5 WASH. U. GLOBAL STUD. L. REV. 403, 405 (2006) (“[A]fter the Monroe Doctrine was adopted, military intervention, combined with a desire to dominate the region economically, shaped U.S. policy toward Latin America.”).

86. RICHARD F. GRIMMETT, CRS REPORT FOR CONGRESS: U.S. USE OF PREEMPTIVE MILITARY FORCE, at CRS-4 (2002), available at <http://fpc.state.gov/documents/organization/13841.pdf>.

of an attack on the United States by Cuba.⁸⁷ It did not, however, involve any attack on a foreign country; the Cuban Missile Crisis was diffused when the Soviet Union aborted its plans without any engagement by the United States in naval combat.⁸⁸

The Reagan administration, in National Security Directives 138 and 207, sanctioned preemptive self-defense “[w]henver we have evidence that a state is mounting or intends to conduct an act of terrorism against us.”⁸⁹ These directives stated that preemptive action could be taken to “protect our citizens, property, and interests,”⁹⁰ without stating further what these interests might be and whether they might extend beyond security interests.

On December 27, 1985, terrorists bombed airline offices in Rome and Vienna, killing U.S. civilians and other nationals. President Reagan quickly linked this attack to Libya.⁹¹ This incident was followed by exchanges of fire between U.S. and Libyan forces in the Middle East on March 24, 1986.⁹² On April 5, 1986, bombs exploded in a West German nightclub, La Belle discothèque, causing dozens of American casualties.⁹³ Senior U.S. officials again linked Libya to the attack.⁹⁴ Ten days after the attack, U.S. forces bombed Libya extensively, killing civilians and substantially destroying Libya’s military infrastructure.⁹⁵

87. *Id.*

88. See Curtis A. Utz, *Cordon of Steel: The U.S. Navy and the Cuban Missile Crisis*, in THE U.S. NAVY IN THE MODERN WORLD I (Naval Historical Ctr., The U.S. Navy in the Modern World Series No. 1, 1993), available at <http://www.history.navy.mil/Wars/cuban-mc.htm> (“The Navy, in cooperation with the other U.S. armed forces and with America’s allies, employed military power in such a way that the president did not have to resort to war to protect vital Western interests.”).

89. THE WHITE HOUSE, EXTRACT OF THE NATIONAL SECURITY DECISION DIRECTIVE 138 (1984) [hereinafter DIRECTIVE 138], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/nsdd138.pdf> (the full directive is still classified); THE WHITE HOUSE, NATIONAL SECURITY DECISION DIRECTIVE 207: THE NATIONAL PROGRAM FOR COMBATING TERRORISM 2 (1986) [hereinafter DIRECTIVE 207], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/nsdd207.pdf>.

90. DIRECTIVE 138, *supra* note 89; DIRECTIVE 207, *supra* note 89, at 2.

91. THE WHITE HOUSE, NATIONAL SECURITY DECISION DIRECTIVE 205: ACTING AGAINST LIBYAN SUPPORT OF INTERNATIONAL TERRORISM 1 (1986), available at <http://www.fas.org/irp/offdocs/nsdd/23-2710a.gif> (“Evidence of Qadhafi’s support of terrorism, to include the December 27 attacks in Rome and Vienna, is indisputable.”).

92. RICHARD F. GRIMMETT, CRS REPORT FOR CONGRESS: INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2009, at 14 (2010), available at www.fas.org/sgp/crs/natsec/RL32170.pdf (“Libya. On March 26, 1986, President Reagan reported to Congress that, on March 24 and 25, U.S. forces, while engaged in freedom of navigation exercises around the Gulf of Sidra, had been attacked by Libyan missiles and the United States had responded with missiles.”).

93. See President Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm>) (“On April 5th in West Berlin a terrorist bomb exploded in a nightclub frequented by American servicemen. Sergeant Kenneth Ford and a young Turkish woman were killed and 230 others were wounded, among them some 50 American military personnel.”).

94. See U.S. DEPT OF STATE, SIGNIFICANT TERRORIST INCIDENTS, 1961–2003: A BRIEF CHRONOLOGY (2004) (“Berlin Discothèque Bombing, April 5, 1986: Two U.S. soldiers were killed and 79 American servicemen were injured in a Libyan bomb attack on a nightclub in West Berlin, West Germany. In retaliation U.S. military jets bombed targets in and around Tripoli and Benghazi.”).

95. *Id.*

In reporting his actions to the nation on April 14, 1986, President Reagan stated: “[W]e have done what we had to do. If necessary, we shall do it again.”⁹⁶ Although this statement referred to necessity and implied that U.S. attacks were undertaken in self-defense, the United States did not disclose any evidence that on April 14, 1986 there was any actual or imminent attack by Libya or Libyan-sponsored terrorists.⁹⁷ The absence of evidence suggests that the U.S. attacks could have exceeded the rubric of actual or anticipatory self-defense.

President Clinton neither explicitly sanctioned preemptive force nor ruled out that possibility. In 1998, President Clinton’s *National Security Strategy for a New Century* stated that the “United States must act to deter [and] prevent . . . attacks [by adversaries].”⁹⁸ Two years later, in the *National Security Strategy for a Global Age*, the Clinton administration reiterated that “[o]ur strategy requires us to both prevent and, if necessary, respond to terrorism.”⁹⁹

These statements should be interpreted in light of the U.S. bombardment of Iraqi intelligence headquarters in 1993 in response to an aborted attempt to assassinate former President Bush when he visited Kuwait.¹⁰⁰ The U.S. cruise missile attack could not have been in self-defense, because there was no actual or imminent attack. Quite to the contrary, Baghdad had abandoned its plans to attack the former U.S. President. Further, launching missiles in response to an aborted assassination of a former U.S. President who was by then only a civilian fell short of the proportionality test. Under this analysis, the U.S. attack was not in self-defense. It was retaliation against an aborted assassination plan, a show of strength to deter other attacks, and an effort to weaken a state hostile to U.S. interests. These motivations might have subsequently found their way into President Clinton’s national security strategy.

President George W. Bush’s National Security Strategy of September 2002 claimed the right to attack a foreign state believed to pose a threat of “harm against our people and our country,”¹⁰¹ even if there is no imminent or immediately antecedent attack and without first obtaining the consent of foreign states or international

96. President Ronald Reagan, *supra* note 93.

97. Michael C. Bonafede, Note, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 175 (2002) (“[T]he U.S. government[] refus[ed] to disclose to the public the details of the terrorist attacks that it claimed Libya was planning . . .”).

98. THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 7 (1998), available at <http://www.au.af.mil/au/awc/awcgate/nss/nssr-1098.pdf> (“The United States must act to deter or prevent such attacks and, if attacks occurs [sic] despite those efforts, must be prepared to limit the damage they cause and respond decisively against the perpetrators.”).

99. THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE 29 (2000), available at <http://www.globalsecurity.org/military/library/policy/national/nss-0012.pdf>.

100. See GRIMMETT, *supra* note 92, at 16 (“On June 28, 1993, President Clinton reported that on June 26 U.S. naval forces had launched missiles against the Iraqi Intelligence Service’s headquarters in Baghdad in response to an unsuccessful attempt to assassinate former President Bush in Kuwait in April 1993.”).

101. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002), <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf> (“While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists . . .”).

authorization.¹⁰² This approach, which has since acquired a colloquial appellation, the “Bush Doctrine,”¹⁰³ is sympathetically termed preemptive self-defense.¹⁰⁴ More accurately, it is a preemptive attack because the U.S. would in fact be an aggressor against another state that was not yet ready to strike us.

In 2001 and 2003, respectively, the United States invaded Afghanistan and Iraq even though there was no known planned attack by either of these two countries against the United States.¹⁰⁵ Statements by the President,¹⁰⁶ the Vice President,¹⁰⁷ and the Secretary of Defense¹⁰⁸ all indicated that the United States was putting into practice the U.S. policy of using military force to preempt future terrorist threats. Notably, the Bush administration claimed that these two invasions were sanctioned by the U.N. Security Council Chapter VII resolutions.¹⁰⁹

Some key U.S. allies have supported the extension of the right to self-defense to include deterrence and strikes against potential aggressors. A military operations manual of the Australian Air Force states that air strikes may be conducted

102. See Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 7 (2003) (discussing three conditions for preemptive self-defense, which do not include impending attack or international approval).

103. See Jeffrey Record, *The Bush Doctrine and War with Iraq*, PARAMETERS, Spring 2003, at 4, 4 (defining “Bush Doctrine” as administration’s attitude toward use of force, as discussed in first National Security Strategy).

104. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 702 (6th ed. 2003) (describing Bush Doctrine as “claim[ing] a right of ‘pre-emptive action’ against States who are seen as potential adversaries”); Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 700 (2005) (attributing President Bush’s declared rights to “preemptive self-defense” to events of September 11, 2001).

105. See GRIMMETT, *supra* note 92, at 23, 26 (“President George W. Bush reported to Congress . . . that on October 7, 2001, U.S. Armed Forces ‘began combat action in Afghanistan’ . . . President Bush reported to Congress . . . that he had ‘directed U.S. Armed Forces . . . to commence operations on March 19, 2003, against Iraq.’”).

106. President George W. Bush, Address Regarding Iraq (Oct. 7, 2002) (transcript available at <http://www.johnstonsarchive.net/terrorism/bushiraq.html>) (“Understanding the threats of our time, knowing the designs and deceptions of the Iraqi regime, we have every reason to assume the worst, and we have an urgent duty to prevent the worst from occurring.”); President George W. Bush, Remarks to the United Nations General Assembly (Sept. 12, 2002) [hereinafter *Bush Remarks to U.N.*] (transcript available at <http://www.johnstonsarchive.net/terrorism/bushiraqun.html>) (“The first time we may be completely certain he has a—nuclear weapons [sic] is when, God forbids [sic], he uses one. We owe it to all our citizens to do everything in our power to prevent that day from coming.”).

107. See *Cheney Remarks to Veterans*, *supra* note 5 (“If the United States could have preempted 9/11, we would have, no question. Should we be able to prevent another, much more devastating attack, we will, no question. This nation will not live at the mercy of terrorists or terror regimes.”).

108. See *Rumsfeld Address at Air Force*, *supra* note 5 (“Prevention and preemption are the best, and indeed in most cases the only defense against terrorism. Our task is to find and destroy the enemy before they strike us.”).

109. See J.M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L L. 47, 83 (2006) (“The Bush Administration attempted to justify the Iraq invasion by arguing that since Gulf War I had not really ended, the 2003 Iraq invasion was merely to [sic] an action to enforce prior Chapter VII resolutions requiring disarmament and compliance with a host of UN resolutions.”); *Bush Remarks to U.N.*, *supra* note 106 (“In 1991, the U.N. Security Council, through Resolution 687, demanded that Iraq renounce all involvement with terrorism, and permit no terrorist organizations to operate in Iraq. Iraq’s regime agreed. It broke this promise.”).

preemptively to “deter[] an aggressor before major conflict erupts,” and “demonstrate national resolve.”¹¹⁰ The United Kingdom Strategic Defence Review of 2002 explained that a preemptive attack by the United Kingdom against a potential aggressor was not only “more effective than waiting to be attacked . . . but it can have a deterrent effect.”¹¹¹

Scholars have also attempted to articulate a doctrinal basis for preemptive attacks. Some U.S. researchers have now claimed that the formulation of the law of self-defense in the *Caroline* incident permits preemptive self-defense.¹¹² However, statements from the *Caroline* affair do not go that far.¹¹³ Preemptive self-defense, being the use of force prior to any attack by a putative enemy even becoming operational,¹¹⁴ requires both deliberation and the conscious rejection of other strategic options, such as diplomacy. The requirement that necessity must be overwhelming and leave no other choice of means and no moment for deliberation thus precludes preemptive action.

Indeed, the resolution of the *Caroline* incident was a paradigmatic rejection of claims of preemptive self-defense. Great Britain had attacked a U.S. ship carrying supplies to insurgents, absent an imminent or ongoing attack, in order to prevent a future attack. This would be similar to the United States today attacking a ship of a Middle Eastern state carrying supplies to Islamist terrorists, absent an imminent or ongoing attack by those terrorists, to prevent them from operationalizing plans to attack the United States. Under the precedent of the *Caroline* incident, such an attack would be unlawful.

C. *Loose Interpretations of International Authorization*

The United States’ efforts to justify or explain its military adventures overseas exhibit an interesting duality. The United States has long claimed to have the right to act in self-defense when addressing domestic constituencies.¹¹⁵ Whenever the time

110. Reisman & Armstrong, *supra* note 20, at 539 (quoting Royal Australian Air Force, Military Operations Index: Strike (n.d.)).

111. MINISTRY OF DEFENCE, THE STRATEGIC DEFENCE REVIEW: A NEW CHAPTER, 2002, Cm. 5566, at 9; see also Reisman & Armstrong, *supra* note 20, at 541 (discussing U.K. strategy of preemption).

112. See ACKERMAN, *supra* note 19, at CRS-2 (describing *Caroline* affair as “[t]he classic formulation of the right of preemptive attack”).

113. For example, although a high-ranking Bush administration official found that “[a]nticipatory self-defense is not a new concept” based on Daniel Webster’s defense of the practice, international lawyers “recognize this as a patently misleading version of Secretary of State Daniel Webster’s statement in the *Caroline* affair.” Richard N. Gardner, *Neither Bush nor the “Jurisprudes,”* 97 AM. J. INT’L L. 585, 586–87 (2003).

114. See GRIMMETT, *supra* note 86, at CRS-1 (“[W]e consider a ‘preemptive’ use of military force to be the taking of military action by the United States against another nation so as to prevent or mitigate a presumed military attack or use of force by that nation against the United States.”).

115. See THE WHITE HOUSE, *supra* note 101, at 4 (stating that when threatened by enemies, United States will defend itself “as a matter of common sense and self-defense”); President George W. Bush, *supra* note 11 (“Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy, and it is not an option.”); President George W. Bush, Radio Address (Mar. 8, 2003) (transcript available at http://bulk.resource.org/gpo.gov/papers/2003/2003_vol1_

came to actually act on those claims, however, the justification that the United States provided for its actions differed depending on whether the audience was principally international or domestic. To its domestic audience, the United States has claimed that it was acting preemptively to protect its interests, even going so far as claiming that there was a legal right to do so.¹¹⁶

When speaking to an international audience, the story changed. The justification provided to other states and international organizations was that the United States was acting pursuant to a Chapter VII authorization or in actual self-defense.¹¹⁷ The Reagan administration justified its mining of the harbors around Nicaragua by invoking Article 51 of Chapter VII, claiming Nicaragua's support of cross-border military raids into Costa Rica and Honduras, and military aid to rebel factions in El Salvador allowed for American "collective self-defense."¹¹⁸ During former President Clinton's terms in office, his administration invoked Article 51 of the U.N. Charter to justify its use of military force against Iraq in response to the assassination plot of former President George H.W. Bush, against Slobodan Milosevic's regime in Kosovo to protect ethnic Albanians from Milosevic's human rights violations, and against the terrorist outposts of Osama bin Laden in Afghanistan and Sudan in response to the bombings of the American embassies in Kenya and Tanzania.¹¹⁹

The United States used similar rhetorical tactics when justifying its invasion of Iraq in 1998 and 2003. On December 16, 1998, President Clinton, together with the United Kingdom, launched Operation Desert Fox against Iraq on the basis that it had violated no-fly zones established by Security Council Resolution 687,¹²⁰ and that Security Council Resolution 1154 stated that "any violation [of Resolution 687] would

257.pdf) ("We will not wait to see what terrorists or terror states could do with weapons of mass destruction. . . . [W]e must be willing to use military force.").

116. *Bush Remarks to U.N.*, *supra* note 106; *Cheney Remarks to Veterans*, *supra* note 5; *Rumsfeld Address at Air Force*, *supra* note 5.

117. See Letter from John D. Negroponte, Permanent Representative of the United States to the United Nations, to the President of the Security Council (Oct. 7, 2001) ("In accordance with Article 51 of the Charter of the United Nations, I . . . report that the United States of America . . . has initiated actions [against Afghanistan] in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001."); Bellier, *supra* note 17, at 508 (discussing overbroad U.S. interpretations of Chapter VII resolutions).

118. Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT'L L.J. 207, 211–12 (2001) (discussing invocations of Article 51 to justify military action during Reagan administration).

119. *Id.* at 212–23 (discussing invocations of Article 51 to justify military action during Clinton administration).

120. See S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); President William J. Clinton, Remarks of the President on Iraq (Dec. 19, 1998) (transcript available at <http://clinton2.nara.gov/WH/New/html/19981219-2655.html>) ("Our objectives in this military action were clear: to degrade Saddam's weapons of mass destruction program . . . as well as his capacity to attack his neighbors."); Sec'y of Def. William S. Cohen, Briefing on Military Operations in the Gulf (Dec. 16, 1998) (transcript available at <http://www.defense.gov/link.mil/transcripts/transcript.aspx?transcriptid=1787>) ("President Clinton's decision to strike Iraq has clear military goals. We want to degrade Saddam Hussein's ability to make and to use weapons of mass destruction[,] . . . diminish his ability to wage war against his neighbors[,] . . . [and] demonstrate the consequences of flouting international obligations.").

have [the] severest consequences.”¹²¹ Resolution 1154 did not, however, specify what these consequences might be.¹²² Had the Security Council intended to authorize war for violations of Resolution 687, it could have done so explicitly in Resolution 1154. The absence of such explicit authorization suggests that the Security Council was unable to achieve sufficient support among its members for military action when Resolution 1154 was adopted. The unwillingness of the United States to subsequently seek such an explicit Chapter VII authorization prior to commencing Operation Desert Fox indicates that it believed the Security Council might not have granted such authorization.

On March 20, 2003, President George W. Bush invaded Iraq to depose its government in Operation Iraqi Freedom. When addressing the nation, George W. Bush indicated that the United States was acting preemptively.¹²³ In contrast, the Permanent Representative of the United States to the United Nations, by a letter to the President of the Security Council, made no mention of any doctrine of preemptive self-defense.¹²⁴ Instead, the U.S. Ambassador stated that the Security Council had authorized such action under Resolutions 678 of 1990 and 687 of 1991, which resolved that Iraq would disarm.¹²⁵

It was true that Iraq had violated those resolutions, as indeed the Security Council itself determined in Resolution 1441 of 2002.¹²⁶ However, the Security Council also decided in Resolution 1441:

to afford Iraq . . . a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council.¹²⁷

Resolution 1441 did not explicitly authorize the use of force should Iraq fail to disarm.

The United States took the view, however, that Resolution 1441 did not prohibit the use of force, and that it provided sufficient leeway for it to invade Iraq. This broad

121. S.C. Res. 1154, ¶ 3, U.N. Doc. S/RES/1154 (Mar. 2, 1998); *see also* S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991) (setting terms for which Iraq was to comply after Gulf War).

122. *See* S.C. Res. 1154, *supra* note 121, ¶ 3 (including no repercussions for failure to comply with resolution).

123. Specifically, he stated that “we will do everything to defeat [the threat posed by Saddam]. Instead of drifting along toward tragedy, we will set a course toward safety. Before the day of horror can come, before it is too late to act, this danger will be removed.” President George W. Bush, Remarks by the President in Address to the Nation (Mar. 17, 2003).

124. *See* Letter from John D. Negroponte, Permanent Representative of the United States to the United Nations, to the President of the Security Council (Mar. 21, 2003) (“The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.”).

125. *Id.* (“The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991).”).

126. S.C. Res. 1441, para. 4–6, at 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (“Recalling that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 Deploring the fact that Iraq has not provided an accurate, full, final, and complete disclosure, as required by resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction and ballistic missiles . . .”).

127. *Id.* ¶ 2.

reading of a Chapter VII resolution once again ignored the fact that the Security Council had explicitly considered Iraq's violation of its disarmament obligations, and had the Security Council wished to authorize force, it could have done so explicitly. In fact, the United States knew that the majority of the permanent members of the Security Council intended just the opposite with Resolution 1441. On the day Resolution 1441 was passed, France, China, and Russia issued a joint statement explicitly stating:

Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. . . . In case of failure by Iraq to comply with its obligations, . . . [s]uch failure will be reported to the Security Council It will be then for the Council to take a position on the basis of that report.¹²⁸

This pattern of invoking preemptive self-defense when explaining attacks to domestic constituencies, but relying on broad interpretations of Security Council resolutions when speaking to an international audience, reveals several insights. The U.S. government perceives, rightly or not, that the electorate supports or even demands preemptive action by the United States. However, the government believes that there is insufficient support internationally for a doctrine of preemptive self-defense, in spite of the United States' sustained claim that such a doctrine exists. Hence, when attempting to veneer over its military action with legal justifications, the United States relies on actual self-defense or loose interpretations of Chapter VII resolutions.

These trends raise significant policy concerns. By interpreting Security Council resolutions loosely, the United States has undermined the international constitutional structure restricting the use of force and reserved for itself broad unilateral powers to act without clear international authorization. Where the Security Council authorizes the use of force, such authorization must be explicit and specific.¹²⁹ There were good reasons for this practice: the grave and irreparable consequences of using military force; the ability of the Security Council to explicitly mandate the use of force if that was its intention; and the risks of deploying force contrary to the collective decision of the Security Council if states were permitted to read implicit authorizations into the language of Chapter VII resolutions. If the Security Council wished to mandate the use of force, it would do so explicitly and unambiguously under its Chapter VII powers.

The United States' sustained claims to have a right to attack enemies preemptively, coupled by its overbroad interpretations of Security Council Chapter VII resolutions, sound an alarm that jurists need to reconsider whether the current legal

128. Press Release, French Embassy, Iraq/UNSCR 1441—Joint Statement by the People's Republic of China, France and the Russian Federation (Aug. 11, 2002), <http://www.ambafrance-uk.org/Iraq-UNSCR-1441-Joint-statement-by.html>.

129. See U.N. Charter art. 42 (asserting that Security Council shall determine existence of threats as well as specific measures that will be taken to "maintain or restore international peace and security" and providing examples of specific measures that Security Council may allow); PHILIPPE SANDS, *LAWLESS WORLD* 196–97 (2005) (stating that judge might find use of force to be illegal if Security Council did not explicitly authorize that use of force); John Morss and Mirko Bagaric, *If We Can't Have Global Democracy, Let's All Be Americans: Injecting Principle into the International Lawmaking Process*, 15 *TRANSNAT'L L. & CONTEMP. PROBS.* 217, 230 (2005) ("[T]here are two circumstances under the U.N. Charter in which it [use of force] is permitted. . . . The second is *specific* authorization of the use of force by the Security Council . . ." (emphasis added)).

restrictions on the use of force are outdated. The pattern of behavior by the United States reveals its deep dissatisfaction with the restraints on the use of force in international law. It suggests that dominant decision makers within the U.S. government believe that U.S. security interests would be better served if the country is permitted to use its powerful military more freely. Research is thus needed to determine the extent to which this belief should be accommodated.

III. CLARIFYING STANDPOINTS

Although questions about whether to accommodate U.S. demands for wider authorization to use force are pressing, scholars and policy makers have failed to reach a consensus about the right answer. As discussed earlier, their disagreements stem from fundamentally different prioritizations of policies.¹³⁰ Doves that oppose military preemption tend to express an international perspective favoring global order. Many hawks favoring preemption emphasize U.S. national security. This Article will ultimately attempt to reconcile the two observational standpoints. Preliminarily, each of these perspectives needs further elaboration.

A. *An International Perspective*

From an international perspective, global public order is a top priority.¹³¹ Global public order favors lower aggregate levels of violence through four policies: (1) discouraging new incidents of violence by addressing the causes of violence and deterring aggressors; (2) when violence does erupt, rapidly terminating it with a view to protecting lives and property; (3) policing the peace after the termination of violence through military and judicial supervision; and (4) ensuring that actions taken to advance the prior three policies do not precipitate further violence through reprisals and copycat actions.

Any demand by a state for broader authorization to use force internationally should be appraised against these global public order policies. Scholars have pointed out that the U.S. claim over the right to use force preemptively risks undermining global order by encouraging other states to similarly reserve for themselves, without ex ante international supervision, the right to attack their enemies preemptively.¹³²

The U.S. strategy of interpreting Security Council Chapter VII resolutions to permit the use of force even without explicit authorization creates similar risks. Other states with powerful militaries, such as Israel, Russia, Iran, or China, may follow the U.S. example and attack their enemies based on tenuous interpretations of Security Council resolutions. So long as the aggressor state is, or has an ally, among the

130. See *supra* Part I for a discussion of the differing policies of hawks and doves.

131. See *A More Secure World*, *supra* note 64, ¶ 191 (“[I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention . . . is simply too great for the legality of unilateral preventive action . . .”).

132. See Reisman & Armstrong, *supra* note 20, at 525 (“[V]arious other states (including some with nuclear weapons) have adopted the preemptive self-defense claim as their own. If the U.S. claim posed potentially destabilizing consequences for world order, how much more so would proliferation of the claim?”).

Security Council's permanent members willing to exercise its veto powers, the Security Council may be unable to restrain the aggressor or rectify the situation.

B. The National Perspective

Although the international concerns are valid and pressing, they may not be a priority from the domestic perspective. Jurists and policy makers adopting a domestic perspective may instead prioritize the self-interests of the United States over all other global policies.¹³³

One of the key requirements for sustainable statehood is the monopolization of military power by the central controlling authority of the state. The state deploys force as an instrument of both internal and external policy. Internally, when the governed population rejects the constitutional structure of the state and its government, and all other means of suasion have failed to temper the revolutionary claims of the governed, the deployment of security forces internally may be the last hope against state or government succession.¹³⁴ Externally, security forces are a key element of power for the state and its government. Military force is used to resist and deter threats and violence by other states and terrorists, and may be used to support other foreign policy objectives.¹³⁵ These essential functions of the military have supported states for as long as they have existed.¹³⁶

With the national interests of the United States as the foremost policy consideration, the infliction of high levels of military violence against or in another state may serve at least three different and ever-broader goals. First, and most narrowly, force may be used defensively to protect a state's citizens and territory from an attack by a foreign enemy.¹³⁷ This is a reactive policy that limits the use of force to

133. See THE WHITE HOUSE, *supra* note 5, at 18 (“[T]he first duty of the United States Government remains what it always has been: to protect the American people and American interests.”); Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 836–37 (1970) (“National self-interest, particularly the national self-interest of the super-Powers, has usually won out over treaty obligations. . . . So long as there are nations . . . their pursuit of the national interest will continue; and where that interest habitually runs counter to a stated international legal norm, it is the latter which will bend and break.”); Yoo & Trachman, *supra* note 19, at 383–84 (“A strict reading of the UN Charter would prevent the United States from taking action to protect its national security . . .”).

134. See, e.g., LISA CURTIS, MUSHARRAF’S EMERGENCY RULE WILL ONLY FUEL PAKISTAN CRISIS (2007), <http://www.heritage.org/Research/Reports/2007/11/Musharrafs-Emergency-Rule-Will-Only-Fuel-Pakistan-Crisis> (“Musharraf’s imposition of emergency rule on November 3 appears aimed at avoiding the potential for an unfavorable Pakistani Supreme Court ruling that could invalidate the legitimacy of the October 6 presidential election.”).

135. See Mark Totten, *Using Force First: Moral Tradition and the Case for Revision*, 43 STAN. J. INT’L L. 95, 95 (2007) (discussing need to use military force in absence of imminent threat to provide states with security they require).

136. See GROTIUS, *supra* note 53, at 36 (noting that Livy and Florentinus stated that under law of nations, force may be used to repel violence and injury and to protect persons).

137. Letter from William M. Evarts, U.S. Attorney Gen., to the U.S. Marshal of the N. Dist. Fla. (Aug. 20, 1868), reproduced in FREDERICK T. WILSON, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787–1903, at 124 (Robert M. Fogelson & Richard E. Rubenstein eds., Arno Press & The N.Y. Times 1969) (“[T]he authority and duty of the President . . . in the specific cases of the Constitution and under the regulations of the statutes, [is] to protect the States against domestic violence, or with his authority and duty, under special statutes to employ military force in subduing combinations in resistance to the laws of the United States.”).

neutralizing an actual or imminent attack, and follows the classical formulation of the right to self-defense.

Second, a defensive policy may favor a broader proactive strategy to eliminate a known enemy before it operationalizes plans to attack. This is the Bush Doctrine.¹³⁸ Such a policy may have the collateral benefit of deterring known and unknown enemies.¹³⁹

Third, force may also be used offensively to expand a state's sphere of influence abroad.¹⁴⁰ It may be used to advance national interests not necessarily related to physical security, such as access to oil, or weakening potential economic competitors.¹⁴¹ It might even be used to advance the interests of certain constituencies within a state, such as protecting the interests of specific business sectors, defending the prior "homeland" of naturalized immigrants and their offspring, or promoting the political-religious views of certain religious groups.¹⁴²

It may be tempting to take the view that every one of the policies discussed above could supply a sufficient reason to use military force overseas. Luminous minds and leaders have long supported this expansive approach to the use of force. George Washington, in his Farewell Address in 1796 stated: "[W]e may choose peace or war, as our interest, guided by justice, shall counsel."¹⁴³ This approach may be particularly attractive to certain U.S. policy makers who believe that the United States, with the mightiest military among all nations, stands to gain most from what President Eisenhower described as the "rule of force in the affairs of nations."¹⁴⁴ The next part of this Article examines whether this intuition is supported by evidence.

138. See THE WHITE HOUSE, *supra* note 101, at 6 ("[W]e will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country. . . .").

139. See Reisman & Armstrong, *supra* note 20, at 539 (noting that preemptive attacks can have deterrent effect).

140. See *supra* Part II.B for a discussion of how, under the Monroe Doctrine, force was used to expand the U.S. sphere of influence.

141. See Michael T. Klare, *The Bush/Cheney Energy Strategy: Implications for U.S. Foreign and Military Policy*, 36 N.Y.U. J. INT'L L. & POL. 395, 397 (2004) ("Given Washington's historical inclination to view oil dependency as a national security matter and employ military force when deemed necessary to protect overseas supplies, the nation's growing reliance on energy imports from conflict-prone regions could result in expanded American involvement in oil-related conflicts abroad.").

142. Cf. Andrew Mihalik, *The Cuban Embargo: A Ship Weathering the Storm of Globalization and International Trade*, 12 CURRENTS: INT'L TRADE L.J., Winter 2003, at 98, 104 (discussing protection of Cuban-American real and personal property abroad through Cuba embargo).

143. President George Washington, Washington's Farewell Address (1796) (transcript available at http://avalon.law.yale.edu/18th_century/washing.asp).

144. President Dwight D. Eisenhower, State of the Union Address (Jan. 9, 1959), as reprinted in 40 DEP'T ST. BULL. 115, 118 (1959); see also CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 166-67 (2d ed. 1947) (discussing idea that states that are unable to resolve their differences diplomatically may end up going to war); Herbert W. Briggs, *The United States and the International Court of Justice: A Re-examination*, 53 AM. J. INT'L L. 301, 301 (1959) (discussing President Eisenhower's State of Union address in which he referred to rule of force in affairs of nations); Klare, *supra* note 141, at 397 (noting that United States may use force to advance energy interests abroad).

IV. EVALUATING THE STANDPOINTS

As mentioned in the Introduction, there are different ways to reconcile the differing standpoints of the use of force.¹⁴⁵ Some scholars have tried to persuade other scholars and policy makers to favor a particular prioritization of goals. This approach does not appear to have yet succeeded.¹⁴⁶ It may not, however, be necessary for hawks and doves to insist on their respective prioritizations of goals. An alternative approach could be to accept the goals preferred by the other side in a disagreement, and test whether the tactics favored by the other side support their policies.

To provide guidance on whether and when the United States should use preemptive force, this Article accepts that the foremost responsibility of U.S. policy makers is the advancement of U.S. interests over global and foreign needs. This operational responsibility should only justify preemptive military action if the benefits of the attack outweigh its costs.¹⁴⁷

A. *Costs and Benefits*

Every use of force by the United States, whether in self-defense or preemption, incurs immense costs. Every military operation is expensive in dollar terms¹⁴⁸ and risks the lives of U.S. military personnel.¹⁴⁹ Substantial diplomatic costs may also be incurred if the world judges U.S. action as ill-advised or unnecessarily belligerent.¹⁵⁰ Cost assessments of the use of force must account for the financial, human, and diplomatic costs not only of the initial U.S. attack, but of a prolonged occupation if

145. See *supra* Part I for an outline of these differing standpoints.

146. See *supra* notes 37–40 and accompanying text for examples of approach by persuasion.

147. See Michael Franklin Lohr, *Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 26 (1985) (“It also requires anticipating the consequences of the use of force in self-defense so that the use of force does not result in a greater destruction of interests or values than the interests or values threatened.”); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 807 (2004) (“Error here is bringing the United States into a war where the costs outweigh the benefits, on an expected basis, or failing to wage a war where the opposite is true.”).

148. See David Allen Larson, *Understanding the Cost of the War Against Iraq and How That Realization Can Affect International Law*, 13 CARDOZO J. INT’L & COMP. L. 387, 387 (2005) (“Moderate estimates predict that the United States will spend \$236.5 billion on the war in Iraq.”).

149. See Robert H. Reid, *U.S. Deaths in Iraq War at 4,000*, CHARLESTON-GAZETTE, Mar. 24, 2008, at A1 (“Military deaths rose above 100 for three consecutive months for the first time during the war: April 2007, 104; May, 126 and June at 101.”); Sheryl Gay Stolberg & Michael R. Gordon, *Bush Invokes the Fallen, Past and Present*, N.Y. TIMES, May 30, 2006, at A12 (“Nearly 2,500 Americans have died in Iraq, according to Pentagon statistics, and more than 18,000 have been wounded there since the invasion in March 2003.”); Calvin Woodward, *Toll in War on Terror Equals That of 9/11*, J. GAZETTE (Ft. Wayne, Ind.), Sept. 23, 2006, at 5A (“U.S. military deaths from Iraq and Afghanistan now match those of the most devastating terrorist attack in America’s history, the trigger for what came next. Add casualties from chasing terrorists elsewhere in the world, and the total has passed the Sept. 11 figure.”).

150. See, e.g., Ronald Brownstein, *U.S. Image Abroad Falls, Poll Finds*, CHI. TRIB., Mar. 19, 2003, at 12 (“The march to war with Iraq has severely tarnished America’s image abroad, even in countries whose governments have joined President Bush’s ‘coalition of the willing’ . . .”); Christopher Marquis, *World’s View of U.S. Sours After Iraq War, Poll Finds*, N.Y. TIMES, June 4, 2003, at A19 (“Favorable views of the United States have declined in nearly every country since last summer.”).

such occupation may become necessary to stabilize the attacked state, such as the ongoing U.S. adventures in Iraq and Afghanistan.¹⁵¹

Just as significant as the costs to the United States of a mistaken assessment to attack another state are the costs to the victim of that attack. An attack causes destruction to a foreign state's persons, infrastructure, and property. It is inherent to a unilateral attack that the attacker's justifications for invasion are self-judging, and there is no *ex ante* accountability to any international body.¹⁵² Even if reparations are eventually paid for a mistaken attack, they can never fully ameliorate the losses for family members killed and homes destroyed.¹⁵³ While these costs may not be directly borne by the United States, it would be contrary to our constitutional commitments to human rights to inflict destruction on any human being without the strongest justifications for doing so.¹⁵⁴

U.S. military engagements also risk global instabilities. This is a primary concern from the international perspective and should also concern policy makers focused on U.S. interests. Although weaker states may not have the prowess to deliver an attack of the same magnitude as the United States, their actions imitating the United States would also cause destruction and provoke countermeasures by the attacked state or terrorists.¹⁵⁵ These instabilities may result in U.S. casualties and property damage among our citizens traveling overseas and our businesses operating internationally.¹⁵⁶ They may also disrupt the world economy, increase the price of oil, and interrupt the

151. See NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 86 (2004) ("Foreign troops . . . will undoubtedly have to remain in Iraq for some time. . . . The United States should be prepared, if necessary, to intervene in Iraq's internal affairs to preserve the arrangements that Iraqis themselves have democratically reached.").

152. See Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 *CARDOZO J. INT'L & COMP. L.* 1, 34-35 (2003) ("Under the banner of 'defensive armed reprisal,' a state may actually go on the offensive and is free from the strict constructionist requirement to launch a counter-attack after each and every strike. Finally, this doctrine makes it relatively easy to justify the total destruction of an aggressor as cumulative 'payback' for an attack or series of attacks."); Jeffrey C. Tuomala, *Just Cause: The Thread That Runs So True*, 13 *DICK. J. INT'L L.* 1, 12 (1994) ("The classical international law commentaries discuss several additional legal and prudential requirements . . . to insure that they waged war justly. . . . [A]uthorities must have proper motives for waging war and not do so upon pretext.").

153. See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 *HASTINGS INT'L & COMP. L. REV.* 157, 158 (2004) ("There is a basic paradox at the heart of reparations: they are intended to return the victim to the position he or she would have been in had the violations not occurred—something that is impossible to do.").

154. See Harold Hongju Koh, Dean, Yale Law Sch., *Repairing Our Human Rights Reputation*, Speech at the Midwest Light of Human Rights Awards in Chicago, Illinois (June 10, 2008) (transcript available at <http://www.immigrantjustice.org/midwestlight/midwestlight/kohspeech.html>) (stating that human rights protections "are not about [our enemies] and who they are. It is about us and who we are").

155. See John Yoo, *Using Force*, 71 *U. CHI. L. REV.* 729, 787 (2004) ("The use of force might itself have a destabilizing effect on the international system. Such effects might arise simply from excessive use of force by the great powers, which could cause uncertainty and opposition from weaker nations worried about their own political independence and territorial integrity.").

156. See Ismael Hossein-Zadeh, *Origins of the Recent Wars of Choice and Their Impact on U.S. Global Markets*, 13 *ILSA J. INT'L & COMP. L.* 67, 71 (2006) (noting that U.S. "unilateral aggressions abroad . . . tend to create instability in international markets, subvert long-term global investment, and increase energy or fuel costs").

global supply and distribution of goods and services. Because of the interconnectedness of markets, the U.S. economy cannot escape unharmed when global instabilities erupt.¹⁵⁷

Additionally, the use of force abroad risks reprisals.¹⁵⁸ Henry Kissinger warned that while “[t]here will . . . always exist a powerful incentive to anticipate this eventuality by launching a preëemptive attack, . . . [a]ll countries should be concerned with preventing a war which might break out simply because of the automatism of the retaliatory forces.”¹⁵⁹ Even if reprisals do not come immediately, they may occur at some future point when the attacked state has recovered sufficiently to operationalize its grudge.

The risk of reprisals against U.S. invasions exists whether the invasion was carried out in self-defense, under the banner of Security Council authorization, or with the consent of the state in which U.S. forces are deployed. The risk of reprisal might increase if the attacked state assesses our claim of preemptive self-defense as nothing more than a thinly veiled justification for an act of aggression.¹⁶⁰ The risk might also increase if the U.S. attack was ostensibly conducted pursuant to a Chapter VII resolution, but the United States was the prime decision maker on the Security Council or chose to interpret a nonspecific Resolution as authorizing force.

Even where a state consents to the deployment of U.S. forces within its territory, such as to assist the government in eradicating terrorists or stabilizing a conflict zone, there may be risks of reprisals. Although the host government itself is likely to be a U.S. ally, the militias and terrorists against which U.S. military force is used certainly would not be.¹⁶¹ They may seek opportunities to attack U.S. citizens or military personnel abroad or in the United States through transnational networks of like-minded paramilitary forces, such as Islamist terrorists.

Although the costs of U.S. military action are immense, they are often justified when military action is carried out in self-defense against an actual or imminent attack. The United States must deploy force without hesitation to neutralize any actual or imminent attack against U.S. citizens or property at home or abroad. Although acting in

157. See Reuven Glick & Alan M. Taylor, *Collateral Damage: Trade Disruption and the Economic Impact of War* 11 (Fed. Reserve Bank of S.F., Working Paper Series, Paper No. 2005-11, 2005) (“Moreover, war creates negative externalities on trade . . .”).

158. See G.A. Res. 2625 (XXV), at 122, U.N. Doc. A/8082 (Oct. 24, 1970) (“States have a duty to refrain from acts of reprisal involving the use of force.”); Lohr, *supra* note 147, at 26 (“It also requires anticipating the consequences of the use of force in self-defense so that the use of force does not result in a greater destruction of interests or values than the interests or values threatened.”).

159. Henry A. Kissinger, *Arms Control, Inspection and Surprise Attack*, 38 FOREIGN AFF. 557, 558 (1960); see also Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT’L L. & POL’Y 1, 13 (2003) (“[R]ecent trends in state practice indicate a continued resort to reprisals in peace-time, euphemistically referred to as ‘counter-measures.’” (citation omitted) (internal quotation marks omitted)).

160. See Brown, *supra* note 152, at 34 (noting that banner of self-defense may provide veil for offensive strikes).

161. See, e.g., F.M. Lorenz, *Rules of Engagement in Somalia: Were They Effective?*, 42 NAVAL L. REV. 62, 66 (1995) (discussing attack on U.S. soldiers deployed to Somalia to restore peace in Olympic Hotel incident of 1993).

such self-defense carries risks,¹⁶² failure to act in such self-defense will almost certainly result in the immediate loss of lives and destruction of property within our borders.¹⁶³ It is therefore necessary to neutralize immediate or actual attacks, in spite of the costs of such actions.

At the other end of the policy options spectrum, non-security-related interests, such as economic or diplomatic goals, should not justify going to war.¹⁶⁴ Other less costly or dangerous policy options exist to promote these interests. For example, the economic and legal rights of our multinational corporations may be protected through bilateral treaty arbitration or the World Trade Organization.¹⁶⁵ These international mechanisms are enforceable in domestic courts.¹⁶⁶ Gun boat diplomacy was relinquished after the Second World War and there is no reason to return to that long-abandoned policy.¹⁶⁷

B. Statistical Regressions and a Hypothesis That U.S. Military Action Does Not Reduce Security Risks in Aggregate

It is more difficult to determine whether one should support a policy of using preemptive force against a putative enemy that has not yet operationalized any plans it may have to attack. The calculus that justifies actual self-defense may not always apply to preemptive attacks.

In a narrow set of circumstances, the United States could have clear and convincing evidence that if it did not strike a putative enemy first, that putative enemy would eventually operationalize an attack that the United States could not parry. In such situations, the calculus as to whether or not to attack may come close to the calculus of self-defense, and the United States could use preemptive force with caution.

However, when considering whether to launch a preemptive attack in most other circumstances, U.S. lives and property are not in any definite danger because the putative attacker is not yet ready to execute an attack on the United States and its intentions may change. The earlier the preemption, the greater the uncertainty of

162. Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 54 (1988) ("The state claiming self-defense clearly does so at its own risk.").

163. See Matthew L. Sandgren, *War Redefined in the Wake of September 11: Were the Attacks Against Iraq Justified?*, 12 MICH. ST. J. INT'L L. 1, 14 (2003) (noting that under "the present state of armaments," an attack "may well destroy the state's capacity for further resistance and so jeopardize its very existence" (quoting D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 191-92 (1958)) (internal quotation marks omitted)).

164. Cf. THE WHITE HOUSE, *supra* note 5, at 18 ("And no country should ever use preemption as a pretext for aggression.").

165. See Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 NW. J. INT'L L. & BUS. 95, 101 (2005) (discussing regulation of foreign investment).

166. *Id.* at 123.

167. See Gabriel Egli, Comment, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1048-49 (2007) (discussing decline of gunboat diplomacy in light of more modern alternatives).

whether the putative enemy would eventually launch an attack if left alone.¹⁶⁸ There are many variables, including the possibility of a *détente*, a change in administrations in the foreign state, and shifts in that state's foreign policy goals. Consequently, the determination of whether a putative enemy would attack the United States at some point in the future might be an informed guess at best, and unknowable at worst. Until Caesar crosses the Rubicon, the die of war has not been cast.

Even where the U.S. government believes with high confidence that a putative enemy will attack or aid an attack on the United States, its deliberations may be fatally flawed. The invasion of Iraq in 2003 has shown that the executive branch may make fatal errors. The invasion of Iraq was predicated, in policy if not legal terms, on a belief by the Bush administration that Saddam Hussein had weapons of mass destruction and that he would use them against the United States if it did not depose him preemptively.¹⁶⁹ This belief has now turned out to be entirely wrong.¹⁷⁰ U.S. intelligence reports were inaccurate: Saddam Hussein did not have weapons of mass destruction by the time the United States attacked him in 2003, nor was he anywhere close to assembling such weapons.¹⁷¹

Absent proof of a certain future attack, the benefit of preemptive force is not parrying certain destruction of U.S. persons or property, but merely mitigating a risk of a future attack. It is therefore appropriate to account for this risk in the context of aggregate risks against U.S. security and to anticipate whether the preemptive attack against one risk might result in increasing or decreasing the overall risks to U.S. security.¹⁷² If a preemptive attack is expected to increase U.S. security in aggregate, which also accounts for the security risk posed by the target of our preemptive attack, then the preemptive attack could be an appropriate course of action. If, however, a preemptive attack cannot be shown likely to increase U.S. security in aggregate, then it may be difficult to justify a preemptive strike against another state believed to pose merely a risk of an attack.

It may not be possible to fully predict the direct and consequential effects of any future military action, let alone preemptive military action. However, past trends concerning the use of force might provide an indication of the possible impact of future U.S. military action. If previous military actions have been successful in reducing overall threats to U.S. security, this trend would provide a basis for anticipating that the use of force going forward might increase U.S. security. Conversely, if previous military actions have had no effect on overall threats to U.S. security even though they

168. See Jeanne M. Woods & James M. Donovan, "Anticipatory Self-Defense" and Other Stories, 14 KAN. J.L. & PUB. POL'Y 487, 489 (2005) (noting that preemption is purportedly "justified by perceptions not susceptible to objective verification").

169. See Sandgren, *supra* note 163, at 39 ("Iraq's demonstrated capability and willingness to use weapons of mass destruction . . . , and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.") (quoting H.R. 114, 107th Cong. (2002)).

170. See *U.N. Sanctions, Iran Influenced Leader's Moves*, L.A. TIMES, Oct. 7, 2004, at A11 (stating Iraq Survey Group found no evidence of WMD program revival after sanctions).

171. See generally *id.*

172. Cf. *A More Secure World*, *supra* note 64, ¶ 207(e) (recommending Security Council account for likely aggregate impact of force in global security before mandating use of force under Chapter VII).

might have neutralized a specific attack, that trend would not provide grounds to predict that preemptive force would generally increase U.S. security.

This Article studied past trends using empirical modeling for some such indication. It constructed and examined two indices spanning the time period 1945 to 2006. The first index was a Force Index of all instances in which the United States has overtly used military force overseas.¹⁷³ The second index was a Threat Index of all instances in which U.S. persons or property were attacked in the United States or overseas by a non-U.S. entity.¹⁷⁴ The Threat Index was constructed as a proxy for U.S. security levels, since the protection of property and persons are key, if not the most crucial security concerns.

The relationship between indices was analyzed using Granger causality and Vector Autoregression (VAR). Granger causality regression is a statistical method of determining whether increases in U.S. use of force can be used to forecast changes in U.S. security levels over time, ranging from a one- to six-year time period after any increase in U.S. military armed engagements. The VAR approach is generally used to model the evolution of and interdependencies among indices over time.

Granger causality analysis indicated no association between the changes in the Threat and Force Indices existed contemporaneously or using time-lagged data. VAR analysis also did not show that increases in force had any effect on the Threat Index measuring U.S. security levels.

1. Data Sets

One criticism of legal-empirical scholarship is the inappropriate selection of data.¹⁷⁵ If the data is gathered inappropriately, or if the inclusion parameters for observation are too narrow or wide, then regardless of how sophisticated the modeling is, the results may have limited utility.¹⁷⁶

To minimize such criticisms, the authors relied principally on attacks by or against the United States documented by the U.S. House of Representatives, Department of Defense, State Department, U.S. National Counterterrorism Center, and Congressional Research Service.¹⁷⁷ This data was further corroborated in some

173. TAI-HENG CHENG & EDUARDAS VALAITAS, THE FORCE INDEX DATA: ATTACKS BY THE UNITED STATES 1945–2006 (unpublished index, on file with authors).

174. TAI-HENG CHENG & EDUARDAS VALAITAS, THREAT INDEX DATA: ATTACKS AGAINST THE UNITED STATES 1945–2006 (unpublished index, on file with authors).

175. See Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171, 171 (2006) (“Empirical researchers face many hazards. One of these is selection bias: the data sample the researcher examines may not be representative of the larger population about which the researcher is trying to draw conclusions.”).

176. See D.J. Finney, *Numbers and Data*, 31 BIOMETRICS 375, 375 (1975) (“Observational data are subject to many requirements of internal consistency, and of plausibility in relation to previous information. Though such requirements are not necessarily absolute constraints, departures from them should be detected and examined thoroughly before a definitive statistical analysis begins.”).

177. H. COMM. ON GOV'T REFORM, 106TH CONG., THE FALN AND MACHETEROS CLEMENCY: MISLEADING EXPLANATIONS, A RECKLESS DECISION, A DANGEROUS MESSAGE (Comm. Print 1999); STEVEN R. BOWMAN, CRS ISSUE BRIEF FOR CONGRESS: BOSNIA: U.S. MILITARY OPERATIONS (2003), available at www.au.af.mil/au/awc/awcgate/crs/ib93056.pdf; ANDORRA BRUNO ET AL., CRS REPORT FOR CONGRESS:

instances by triangulating information from public sources, including reports by the Centre for Defence and International Security Studies and major newspapers.¹⁷⁸ Thus, the veracity of the information should not be in doubt. Additionally, because U.S. policy makers and defense officials would be the relevant decision makers to decide whether to attack another state preemptively, it is appropriate to use sources of data that they would regard as having accurately characterized a military incident as an attack on the United States or an attack by the United States.

The authors departed from the way the government coded its data in three regards. First, the Force Index excluded government data on instances of U.S. military evacuations from conflict zones not otherwise involving the United States, such as the evacuation of U.S. civilians from Alexandria in the Suez Canal in 1956,¹⁷⁹ the U.S. naval evacuation of civilians from Cyprus in 1974 during the Turkish-Cypriot conflict,¹⁸⁰ and the military evacuation of U.S. civilians from Liberia during its civil unrest in 2003.¹⁸¹

Second, the Force Index excluded government data on instances of U.S. military deployments without armed engagement. These instances include the deployment of troops to Panama in 1988 to protect U.S. interests as pressure mounted for Noriega to resign,¹⁸² and the deployment of troops to Cambodia in 1997 during a period of domestic conflict.¹⁸³ All such instances of evacuations or troop deployment without armed engagement were marginal offensive incursions, if at all. They were thus excluded from the Force Index.

Third, the authors elected to include in the Threat Index not only instances in which U.S. persons or property were the targets of attacks, but also instances in which the United States was not the target but its citizens or property were nonetheless collaterally damaged. Examples of such attacks include the bombing of an Air India aircraft in 1985 by Sikh and Kashmiri terrorists, in which twenty-two Americans on

IMMIGRATION LEGISLATION AND ISSUES IN THE 108TH CONGRESS (2004), available at <http://fpc.state.gov/documents/organization/35429.pdf>; AUDREY KURTH CRONIN, CRS MEMORANDUM FOR THE HOUSE GOVERNMENT REFORM COMMITTEE: TERRORIST ATTACKS BY AL QAEDA (2004), available at www.fas.org/irp/crs/033104.pdf; DICK K. NANTO, CRS REPORT FOR CONGRESS: NORTH KOREA: CHRONOLOGY OF PROVOCATIONS, 1950–2003 (2003), available at www.fas.org/man/crs/RL30004.pdf; OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, SIGNIFICANT TERRORIST INCIDENTS, 1961–2003: A BRIEF CHRONOLOGY (2004), available at http://www.fas.org/irp/threat/terror_chron.html; Press Releases, Office of the Assistant Sec'y of Def., U.S. Dep't of Def. (on file with author); Office of the Coordinator for Counterterrorism, U.S. Dep't of State, Country Reports on Terrorism, <http://www.state.gov/s/ct/rls/crt/>; U.S. Nat'l Counterterrorism Ctr., Worldwide Incidents Tracking System, <https://wits.nctc.gov/FederalDiscoverWITS/index.do?N=0>.

178. TIM RIPLEY, CTR. FOR DEF. & INT'L SEC. STUDIES, CDISS TERRORISM PROGRAMME, THE CDISS DATABASE: TERRORIST INCIDENTS 1945 TO 2004 (2004), available at <http://www.timripley.co.uk/terrorism/>. The news reports used were published in the *Boston Globe*, *Chicago Tribune*, *Christian Science Monitor*, *L.A. Times*, *N.Y. Times*, *Washington Post*, *CNN News Network*, *Time Magazine*, *The United Press International News Service*, and *Xinhua General Overseas News Service*.

179. GRIMMETT, *supra* note 92, at 11.

180. *Id.* at 12.

181. *Id.* at 26.

182. *Id.* at 14.

183. *Id.* at 19.

board were killed;¹⁸⁴ a HAMAS bomb attack on a bus in Jerusalem in 1995 killing several U.S. citizens;¹⁸⁵ and a bomb explosion at the Marriott Hotel in Islamabad injuring one U.S. diplomat.¹⁸⁶ By including such attacks, the statistical study avoids difficult evidentiary issues concerning the real intentions of the attackers. Inclusion was also appropriate because a comprehensive U.S. security analysis should account for all instances of harm to U.S. citizens or property, regardless of whether this harm was intended or collateral.

Out of an abundance of caution, the authors also ran regressions using an alternative Force Index that included U.S. military evacuations and deployments without armed engagement, and an alternative Threat Index that excluded instances of collateral damage to the United States. These alternative regressions produced remarkably similar results in the analyses of the relationship between the Force and Threat Indices. More specifically, no association between the two indices was found.¹⁸⁷

2. Constructing Indices

There exists a multitude of ways to construct an index tracking the evolution of a variable over time. Regardless of the construction method employed, the Force Index should reflect the frequency of the use of armed forces by the United States outside its borders. The Threat Index should reflect the frequency of attacks against U.S. interests such as military and civilian installations abroad as well as any attacks on U.S. soil.

a. *Measuring the Duration of Events*

The two constructed indices needed to be measured on a comparable scale. Yet, the original data is not usable directly. Consider the following example:

- Event A: The U.S. is at war with country A from September 1980 to November 1982.
- Event B: A U.S. embassy is attacked in country B on the nineteenth of August 1981.

Events A and B each correspond to a single occurrence of an event that force and threat indices should include respectively. Yet, in general, attacks against foreign countries or entities last much longer than any attacks against the United States. Hence, to ensure the comparability of the events, the authors assigned each event a minimum duration of a year. That is, each event is measured as a pair of random variables $y = (x, t)$ where x denotes the year in which the event first occurred and t is the number of years during which the event occurred. So for our example above, the $y_A = (1980, 2)$ and $y_B = (1981, 1)$.

184. OFFICE OF THE HISTORIAN, *supra* note 177.

185. *Id.*

186. See U.S. Nat'l Counterterrorism Ctr., *supra* note 177 (listing injuries from incident number 200461548 at Islamabad hotel).

187. See ALTERNATIVE REGRESSIONS USING ALTERNATE FORCE AND THREAT INDICES (on file with authors).

b. Binary Indices

One of the simplest and least biased ways to construct an index is to use a binary index. Each event was assigned a weight of 1 for each year of its duration and a weight of 0 for all other years. Then, for each year, the index was simply the count (or sum) of all the events taking place during that year. Since all the weights were equal to 1 or 0, this presented an unbiased way to construct an index. At the same time, however, this binary index raised some concerns as vastly disproportionate events may be assigned the same weight: an attack against a U.S. physician in Saudi Arabia in 2001¹⁸⁸ was weighted as heavily as the 2001 attack on the World Trade Center.¹⁸⁹

Figure 1.1 shows the evolution of the Binary Force Index. It shows three peak activity periods: mid-1960s to mid-1970s, early 1980s to early 1990s, and late 1990s to today. In addition, the Force Index appears to be fairly stationary over time in its mean and variance.

Figure 1.1: Use of Force Binary Index

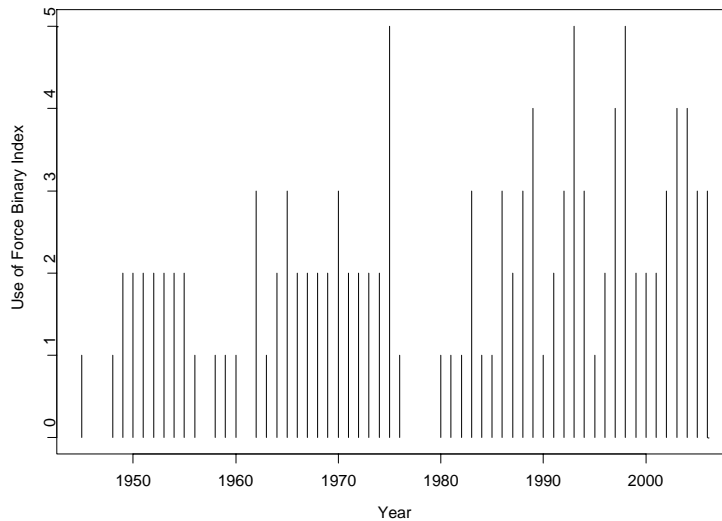


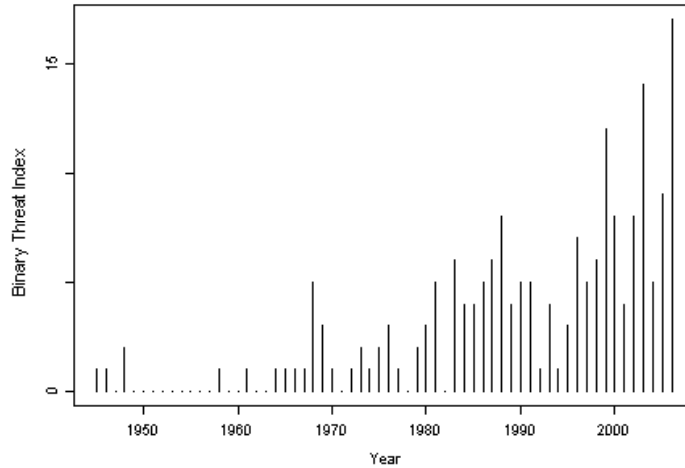
Figure 1.2 shows the evolution of the Binary Threat Index. This Index shows an overwhelming rise over the sample period. This trend might reflect the limited military engagements during the Cold War, which were followed by the explosion of military conflicts in the post-Cold War era. Because the Threat Index is highly nonstationary—

188. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2001 app. A (2002), available at <http://www.state.gov/s/ct/rls/crt/>.

189. See generally CRONIN, *supra* note 177.

as it has a clearly increasing trend—changes in the index instead of the levels of the original index were used in the subsequent statistical analysis.

Figure 1.2: Binary Threat Index



In addition to the Binary Force Index, the authors also constructed two separate indices of use of force conditional upon the type of action: unilateral or multilateral. It was conceivable that these two indices may exhibit different relationships with the Threat Index. Figures 1.3 and 1.4 exhibit these indices over time while Figure 1.5 shows the unilateral use of force by the United States as a proportion of the total use of force. The use of unilateral force dominates throughout the 1950s and into the early 1960s, with a resurgence in the late 1970s and then again in the late 1990s. The United States was engaged in mostly multilateral efforts in the late 1960s and early 1980s.

Figure 1.3: Unilateral Use of Force Index

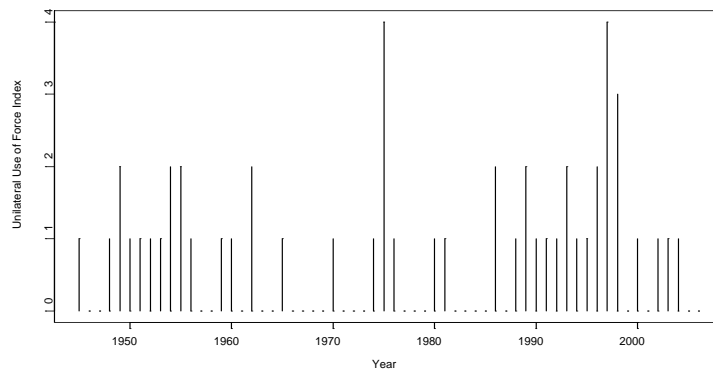


Figure 1.4: Multilateral Use of Force Index

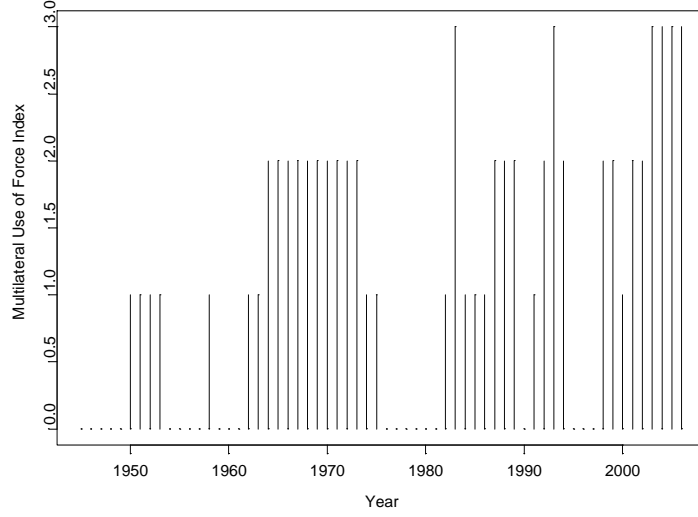
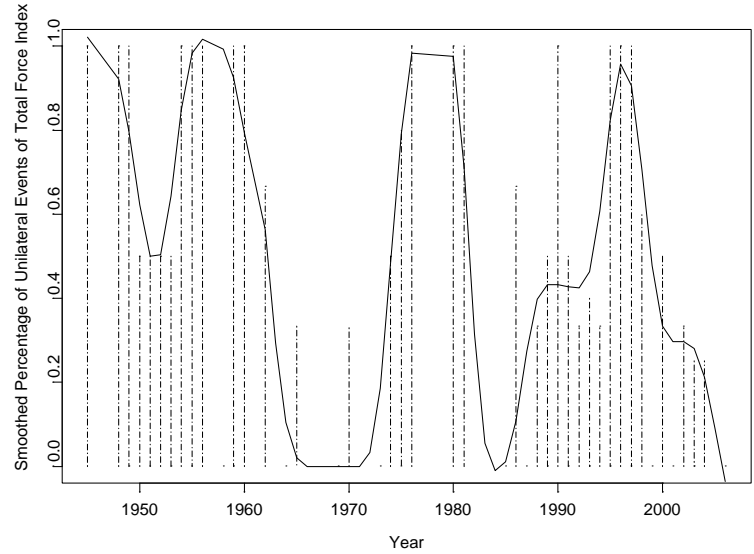


Figure 1.5: Smoothed percentage of unilateral events of total force index. (The punctuated lines are the actual percentages while the solid line is a smoothed percentage.)



3. Relationships Between Indices

To study the relationships between the Binary Threat Index and the three Binary Force Indices, the ordinary least squares (OLS) regression and methods based on OLS were not suitable. When dealing with time series data, OLS regression coefficients do not follow customary t distributions when some of the variables used are not stationary. Table 1.1 shows that while the force indices were all stationary as the unit root (nonstationarity) assumption is rejected, the Binary Threat Index was indeed not stationary as it had a p -value much larger than 0.05.

Table 1.1: Results of the unit root tests using the ADF test; the p -value for the threat index is above the 5% threshold, hence the authors fail to reject the unit root assumption. That is, the Binary Threat Index is not stationary.

Null Hypothesis: Unit root (individual unit root process)
 Date: 07/20/08 Time: 15:00
 Sample: 1 62
 Series: FCOMP, FMULTI, FUNI, TCOMP
 Exogenous variables: Individual effects, individual linear trends
 Automatic selection of maximum lags
 Automatic selection of lags based on SIC: 0 to 2
 Total number of observations: 242
 Cross-sections included: 4

Method	Statistic	Prob.**
ADF - Fisher Chi-square	45.0205	0.0000
ADF - Choi Z-stat	-4.39984	0.0000

** Probabilities for Fisher tests are computed using an asymptotic Chi-square distribution. All other tests assume asymptotic normality.

Intermediate ADF test results (UNTITLED)

Series	Prob.	Lag	Max Lag	Obs
FCOMP	0.0001	0	10	61
FMULTI	0.0348	0	10	61

FUNI	0.0001	0	10	61
TCOMP	0.7087	2	10	59

A way to rectify the problem of nonstationarity is, instead of working with the levels of the variables (in our case these are the original Threat and Force Indices), to use the first order differences of the variables. Therefore, the authors explored the relationships between the changes in indices. By doing so, the authors were able to answer questions such as: Can one claim that the change in the threat index is positively associated with the changes in any of the force indices? Table 1.2 shows that the first order differences in the four indices all reject the null hypothesis of unit root with great evidence; that is, the once differenced series are all stationary.

Table 1.2: Results of the unit root tests using the ADF test for the once differenced indices; all the *p*-values are virtually zero, implying stationarity of the four differenced series.

Null hypothesis: Unit root (individual unit root process)

Date: 07/20/08 Time: 16:53

Sample: 1 62

Series: FCOMP, FMULTI, FUNI, TCOMP

Exogenous variables: Individual effects, individual linear trends

Automatic selection of maximum lags

Automatic selection of lags based on SIC: 1 to 3

Total number of observations: 231

Cross-sections included: 4

Method	Statistic	Prob.**
ADF - Fisher Chi-square	140.277	0.0000
ADF - Choi Z-stat	-10.8138	0.0000

** Probabilities for Fisher tests are computed using an asymptotic Chi-square distribution. All other tests assume asymptotic normality.

Intermediate ADF test results (UNTITLED)

Series	Prob.	Lag	Max Lag	Obs
D(FCOMP)	0.0000	3	10	57
D(FMULTI)	0.0000	2	10	58
D(FUNI)	0.0000	3	10	57
D(TCOMP)	0.0000	1	10	59

To start analyzing the relationship between the variables, the authors first explored the contemporaneous (same year) association between the pairs of indices. That is, the authors fitted the following OLS models:

$$x(t) = \alpha + \beta y(t) + \varepsilon(t)$$

where $x(t)$ and $y(t)$ are the changes in the values of two indices from year $(t - 1)$ to t . That is, in the context of our data, the authors analyzed the contemporaneous association between the changes in the Threat and one of the Force indices. Table 1.3 summarizes the results obtained from the univariate OLS regressions. There was no contemporaneous relationship between the changes in the Force Index and changes in the Threat Index (all p -values are higher than the customary 0.05 and the marginal 0.10 thresholds).

Table 1.3: Results of univariate OLS regressions for studying the relationship between pairs of variables, where the dependent variable is the change (Δ) in threat index, and the independent variable is the change in one of the force indices.

Dependent variable: Δ (Threat Index)

Independent variable:	Coefficient	Std. Error	t-Statistic	Prob.
Δ (Force Index)	.03	.28	.12	.91
Δ (Unilateral Force Index)	-.18	.33	-.56	.58
Δ (Multilateral Force Index)	.47	.47	1.00	.32

Although the results of the univariate OLS regressions did not uncover any statistically significant relationships, this result was expected. There is no reason why

the relationship between the Force and Threat Indices should be instantaneous. It is, however, quite likely that an increase in Force Index may be associated with the decrease in the Threat Index two years later. To study such a relationship, the authors employed the Granger causality method. The Granger (1969) approach answers the question of whether x (Granger-) “causes” y by examining how much of the current value of the variable y can be explained by its own past values and then seeing whether adding time-lagged values of x can improve the explanation. When working with pairs of variables, the Granger-causality examines whether the lagged values of x are associated with the current value of y and vice versa. Tables 1.4 through 1.6 show the results of the tests for Granger-causality in which the authors assess the relationship between the Threat and Force indices.

Table 1.4: Results of the Granger-causality study between changes in Threat Index and changes in Force Index using 3, 4, or 6 lagged values of the explanatory variable as suggested by Akaike information, Schwarz information, and Hannan-Quinn information criteria.

Pairwise Granger Causality Tests

Sample: 1 62

Lags: 4

Null Hypothesis:	Obs	F-Statistic	Probability
Δ in Force Index does not Granger Cause Δ in Threat Index	57	0.53967	0.70729
Δ in Threat Index does not Granger Cause Δ in Force Index		0.42028	0.79320

Table 1.5: Results of the Granger-causality study between changes in Threat Index and changes in Multilateral Force Index using 3 lagged values of the explanatory variable as suggested by Akaike information, Schwarz information, and Hannan-Quinn information criteria.

Pairwise Granger Causality Tests

Date: 07/20/08 Time: 16:25

Sample: 1 62

Lags: 3

Null Hypothesis:	Obs	F-Statistic	Probability
Δ in Threat Index does not Granger Cause Δ in Multilateral Force Index	58	0.96341	0.41720
Δ in Multilateral Force Index does not Granger Cause Δ in Threat Index		0.64787	0.58791

Table 1.6: Results of the Granger-causality study between changes in Threat Index and Unilateral Force Index using 6 lagged values of explanatory variable as suggested by Akaike information, Schwarz information, and Hannan-Quinn information criteria.

Pairwise Granger Causality Tests

Sample: 1 62

Lags: 6

Null Hypothesis:	Obs	F-Statistic	Probability
Δ in Threat Index does not Granger Cause Δ in Unilateral Force Index	55	2.40579	0.04344
Δ in Unilateral Force Index does not Granger Cause Δ in Threat Index		0.87843	0.51897

The results presented in Tables 1.4 through 1.6 establish three findings. First, the change in any Force Index does not Granger-“cause” changes in the Threat Index. Second, the change in the Threat Index is not associated with changes in the Force Index. Yet, changes in the Threat Index do however Granger-“cause” changes in the Unilateral Force Index as the p -value is lower than 0.05.

4. Modeling Systems of Indices

The preceding Granger-causality analyses do not provide coefficients needed to interpret the relationship between the changes in the force and threat indices. To analyze that relationship in greater detail, and especially the one between the Unilateral Force Index and Threat Index, the authors employed Vector Autoregression (VAR) methodology. VAR models are used to forecast systems of interrelated time series and to analyze the impact of random shocks on the system of variables. VAR(p) models treat every endogenous variable in the system as a function of the number p of lagged values of all of the endogenous variables in the system.

The authors fit a VAR(4) model to study the relationship between the changes in Threat, Multilateral, and Unilateral Force Indices simultaneously (see Appendix A, Section A.1 for coefficients, standard errors, *t*-statistics, and other measures of significance of the model). The choice to use up to four years of past data in the model was dictated by statistical lag length criteria and was not chosen by the authors subjectively. Equation 1 summarizes the model findings by leaving out parameters that were deemed to be statistically insignificant at 0.10 significance level. Equation 1 shows that the changes in Threat Index *do not* depend on the changes in Unilateral and Multilateral Force Indices, but rather are autoregressive. To be more precise, a current change in the Threat Index is best explained by change in the Threat Index from the previous two years. Since both significant coefficients for these past values are negative, the changes in the Threat Index are mean-reverting: rises in the Threat Index are more likely to be followed by an immediate fall, and vice versa.

As an aside, Equation 1 also shows that the changes in the Unilateral Force Index are dependent on the four previous years of changes in itself and changes in the Threat Index one and four years prior. Notice that the coefficients for the Threat Index that predict changes in the Unilateral Force Index are positive for the one-year lag, and negative for the four-year lag. To paraphrase, a large increase in the Threat Index positively impacts changes in the Unilateral Force Index a year later. By year two and three, there is no significant impact. And by year four, the large increase in the Threat Index actually has a negative impact on the Unilateral Force Index. This observation is broadly consistent with changes in military activity under the Bush administration. Following the attacks on the United States on September 11, 2001,¹⁹⁰ the United States invaded Afghanistan in 2001 and Iraq in 2003.¹⁹¹ These invasions have not resulted in quick successes, and the authors have increasingly observed a retreat towards multilateralism in U.S. military and foreign policy. To summarize the result, the United States “reacts” to an increase in the Threat Index by increasing the unilateral use of force one year immediately thereafter. This increase subsides (ebbs) by year four.¹⁹²

190. See Donald H. Rumsfeld, Sec’y, Dep’t of Def., Statement of the Secretary of Defense (Oct. 7, 2001) (describing U.S. military operations in Afghanistan).

191. See Anthony DePalma, *Threats and Responses: An Overview: March 19–20, 2003; Starting a War, Appealing for Surrender and Pulling Out the Networks*, N.Y. TIMES, Mar. 20, 2003, at A15 (describing start of U.S. invasion of Iraq).

192. To the extent, however, that statisticians disagree with this analysis that increases in historical threats are followed by temporary increases in the use of military force by the United States, such criticism does not affect the central statistical conclusion that there is no relationship between the use of military force by the United States and aggregate security threats to the United States.

Equation 1: VAR(4) system with $\Delta T(t)$ the change in the Threat Index value from year $(t - 1)$ to t , $\Delta UF(t)$ the change in the Unilateral Force Index from year $(t - 1)$ to t , and so on. Only the coefficients significantly different from 0 at the 10 percent significance level are exhibited.

$$\begin{cases} \Delta UF(t) \approx -.58\Delta UF(t-1) - .57\Delta UF(t-2) - .38\Delta UF(t-3) - .40\Delta UF(t-4) + .11\Delta T(t-1) - .16\Delta T(t-4) \\ \Delta MF(t) \approx -.46\Delta MF(t-3) \\ \Delta T(t) \approx -.66\Delta T(t-1) - .63\Delta T(t-1) \end{cases}$$

This statistical analysis supports a hypothesis that the past deployment of force has not made us safer in aggregate. It is true that the statistical analysis does not explicitly account for other variables that might have influenced U.S. threat levels, such as the end of the Cold War, the rise of Islamist terrorism, the proliferation of weapons of mass destruction, and regional instabilities. Without isolating each variable to observe the relationship between that variable and U.S. threat levels, the statistical analysis cannot fully account for such variables. It might therefore be tempting for a skeptic to conjecture that U.S. threat levels might well have been higher absent U.S. use of force, or that threat levels might have been lower if only the United States had fully operationalized a policy of preemptive attacks.

Such speculation is unproven, and perhaps unprovable. The consistent lack of correlation between the U.S. deployment of force and aggregate levels of security threats to the United States over almost sixty years in which the geopolitical climate has varied considerably strongly suggests that the lack of correlation is more than just a coincidence caused by political factors that have not been isolated in the methodology.

C. Field Research in Iran and Pakistan That Supports the Hypothesis

The statistical analysis showing that the use of military force does not have an observable impact on aggregate U.S. security is formulated as a hypothesis to avoid overstating the results. While it may be possible to design other empirical tests to validate the hypothesis, the authors opted instead to further examine the issue from a different methodological standpoint. The authors decided to use field research to determine whether human narratives might corroborate or explain the high-level statistical research.

There were methodological and practical difficulties to conducting a field study of responses to U.S. aggression. An ideal survey would include thousands of interviews in every state attacked or threatened with attack by the United States. This is often impossible within budgetary and manpower constraints. Access to key officials was also difficult to obtain in less open societies. As an alternative, interviews were conducted of subjects drawn from categories of decision makers and participants in two states attacked or threatened with attack by the United States: Iran and Pakistan.

Collecting representative samples of interviewees in foreign countries posed other challenges. Unlike controlled laboratory environments, where questions could be scripted in advance, interviewing subjects *in situ* often required permitting them to express their own narrative and responding with further questions. The purpose of the interviews was to understand their individual perspectives, which, when pieced

together, might help explain the statistical observation that U.S. attacks did not have an observable impact on aggregate U.S. security.

In November 2006, one of the authors led a delegation of Network 20/20, a foreign policy think tank, to conduct interviews in Iran to better understand Iran and Iranians in the current geopolitical climate.¹⁹³ A second delegation was dispatched a few weeks later to conduct more interviews.¹⁹⁴ The interviews in both fact-finding missions included specific questions about reactions to U.S. threats of aggression against Iran, and the U.S. invasion of Iraq in 2003.¹⁹⁵ Over the two separate ten-day trips, over fifty interviews were conducted.¹⁹⁶ These took place in six cities and several villages, in offices, tea houses, on the street, and in ancient bazaars.¹⁹⁷ The interviewees represented a cross section of Iranian society, including government officials, mullahs, military officials, academics, youths, businessmen, dissidents, and reformers.¹⁹⁸ Because many of those interviewed spoke to one of the authors at considerable personal risk to themselves, their identities have been kept confidential in this Article except where the interviewees consented to being identified publicly.

Several relevant themes emerged across these interviews. Many, though not all, Iranians had sympathized deeply with the United States when the attacks of September 11, 2001 occurred. A young Zoroastrian computer engineer in an interview in the city of Esfahan recounted:

When 9/11 happened, many Iranians felt profound sadness and unity with the American people. . . . Young people all over Iran—in Tehran, Esfahan, Yazd—shed tears and even expressed themselves in public by holding candlelight vigils in public squares. They condemned the senseless acts of the terrorists and demanded justice. Many chanted, “Death to the terrorists!”¹⁹⁹

A shopkeeper in a bazaar in the city of Yazd expressed his affection for the United States more pithily. When he learned that the delegation had come from the United States, he mocked his government’s characterization of the United States as the devil: “Oh, you’re from the Great Satan. I wish I had moved there decades ago!”²⁰⁰

However, almost every Iranian interviewed reported that U.S. threats of regime change, which they understood to include change by military invasion, have since strengthened the hardliners and right-wing clergy who were more likely to support terrorist groups against the United States. Such threats concurrently weakened the influence of moderate reformers in government and the clergy who would seek peaceful relations with the United States. A manufacturer in Yazd stated: “‘America’s

193. See PATRICIA S. HUNTINGTON ET AL., REFRAMING IRAN: VIEWS FROM THE FIELD 2–4 (Andrew McCord ed., 2007) (describing past, present, and potential future American-Iranian relationship).

194. *Id.*

195. *Id.* at 17–18.

196. See *id.* app. E at 34 (providing complete list of interviews).

197. *Id.* at 2.

198. *Id.* at 2.

199. *Id.* at 17.

200. Interview by Shahab Ghalambor with shop owner, in Shiraz, Iran (Nov. 7, 2006) (on file with Tai-Heng Cheng).

threats of regime change, bombing, and UN sanctions fuel our hardliners.”²⁰¹ A former Iranian government official told the interviewer that when President Bush included Iran in the “Axis of Evil” in his 2002 State of the Union address, “the U.S. pulled the carpet out from under the Iranian internationalists who had supported outreach to America.”²⁰² Massoumeh Ebtekar, the first female vice president of Iran who left office when President Ahmadinejad came to power and now campaigns for reform, echoed this sentiment. She explained that every time the United States threatens Iran, it only strengthens support for hardliners opposed to U.S. interests (and, implicitly, security interests) because nationalist pride against a perceived external threat swells.²⁰³

The U.S. invasion of Iraq angered Iranians and has also caused animosity against the United States. A young wife and mother told the interviewer: “In the past three years, the botched invasion [of Iraq] has resulted in a serious loss of political capital for the United States, and the sort of sympathies that brought Iranians out in protest to the September 11 attacks do not exist today.”²⁰⁴

These narratives from the field suggest that U.S. military aggression and threats of aggression may increase animosity against the United States from those who are the target of that aggression. They may also increase animosity from those who are not the target of that aggression. One consequence of such animosity is that foreign opposition to terrorist groups and states that would attack the United States might decrease, and even result in sympathy or active support for such actors.

The data gained from Iran was supplemented with a fact-finding mission to Pakistan in 2008. One of the authors traveled with a Network 20/20 delegation to Pakistan to conduct interviews with the purpose of evaluating U.S. foreign and military policies towards Pakistan.²⁰⁵ Over fifty interviews were conducted with political leaders, senior government officials, military officers, lawyers, businessmen, academics, and the Pakistani Taliban.²⁰⁶ The majority of the interviews occurred in Islamabad, Lahore, Karachi, and Peshawar, the capital of the Northwest Frontier Province contiguous to the lawless tribal regions next to Afghanistan.

Several interviews revealed that U.S. military action in one country could provoke retaliation against the United States from groups in a neighboring country because terrorist groups in different countries had close affiliations. Brigadier Muhammad Tariq Ali, Director of the Military Inter Services Public Relations department, explained that the border between Pakistan and Afghanistan was highly porous, with over two

201. HUNTINGTON ET AL., *supra* note 193, at 8.

202. *Id.* at 7; *see also* President George W. Bush, State of the Union Address (Jan. 29, 2002) (stating that North Korea, Iran, and Iraq comprised “axis of evil”).

203. Interview by Tai-Heng Cheng and Shahab Ghalambor with Dr. Massoumeh Ebtekar, in Tehran, Iran (Nov. 5, 2006) (on file with Tai-Heng Cheng).

204. HUNTINGTON ET AL., *supra* note 193, at 17.

205. *See* ANDY MCCORD ET AL., A DIFFERENT KIND OF PARTNER: A PARADIGM FOR DEMOCRACY AND COUNTER-TERRORISM IN PAKISTAN 1–3 (2008) (summarizing effects of U.S. war on terrorism on Pakistani social, economic, and political environment).

206. *See id.* app. D at 35 (providing complete list of interviews).

hundred unguarded crossing points. It was impossible to isolate terrorists in Afghanistan from those in Pakistan.²⁰⁷

In a different interview, General Hamid Gul, the former Director of the Inter Services Agency (the Pakistan Intelligence), who had worked with the United States to build up the Taliban as a force against the Soviet Union during the Cold War, explained the close relationship between the Taliban in Pakistan and in Afghanistan.²⁰⁸ He said that the border between the two states had been established arbitrarily, bisecting tribes situated between the two states. General Gul joked, “in the tribal areas, your living room could be in Pakistan and your bedroom in Afghanistan.”²⁰⁹

Owais Ahmand Ghani, the Governor of the Northwest Frontier Province, echoed this sentiment. In an interview conducted in his mansion decorated with stags’ heads, tiger skins, swords, and with magnificently attired attendants everywhere, Mr. Ghani reported that jihadi organizations in the Northwest Frontier Province have links across the tribes, across the border in Afghanistan, and internationally.²¹⁰

There was physical evidence corroborating the comments of these interviewees about the international nature of terrorist organizations that could retaliate from one country when a cell in another country was attacked. The researchers witnessed Islamist terrorist recruitment DVDs on display at the “Smugglers Market” located at the Pakistani end of the Khyber Pass, the historic land route into Afghanistan.²¹¹

The postulation that attacks by the United States in one country could cause terrorists in other countries to attack the United States in response was most directly confirmed in an interview with Neik Mohammed, a spokesman for the Taliban. While driving between Lahore and Peshawar at night, one of the authors contacted Mr. Mohammed on the telephone through an interlocutor who translated Mr. Mohammed’s comments from Pashtun and Urdu to English. His location was unknown, but he could have received the call while in the lawless tribal areas beyond the Northwest Frontier Province. Mr. Mohammed’s tone of voice was warm, and he said “Welcome to Pakistan. May God be with you.”²¹² He was, however, firm in his convictions. In response to the question: “What is the relationship between the Afghan and Pakistan Taliban?” he stated: “The Afghan Taliban are our brothers. We will do everything we can to help them.”²¹³

Other interviews supported a related postulation that attacks by the United States could anger the people of the attacked state and increase support for politicians opposed to U.S. interests and security. Asma Jahangir, the Chairperson of the Pakistan Human Rights Commission, said that with respect to political rhetoric in Pakistan:

207. Interview by Tai-Heng Cheng with Brigadier Muhammad Tariq Ali, Dir. of the Military Inter Servs. Pub. Relations Dep’t, in Islamabad, Pak. (May 16, 2008).

208. Interview by Tai-Heng Cheng et al. with General Hamid Gul (Ret.), Former Dir. of the Inter Servs. Agency, in Islamabad, Pak. (May 16, 2008) (on file with Tai-Heng Cheng).

209. *Id.*

210. Interview with Owais Ahmand Ghani, *supra* note 9.

211. Notes of Visit by Tai-Heng Cheng, George Billard & Glenn Johnston to Khyber Pass and Smugglers Market, Peshawar, Pak. (May 17, 2008) (on file with Tai-Heng Cheng).

212. Telephone Interview by Tai-Heng Cheng with Neik Mohammed, Spokesman for the Taliban, Peshawar, Pak. (May 16, 2008) (on file with Tai-Heng Cheng).

213. *Id.*

“There is nothing on sale here but Islam.”²¹⁴ She described the terrorists in Pakistan as “Islamic terrorists.”²¹⁵ One of the interviewers asked her why she used the word “Islamic,” in contrast to some moderate Muslims who disassociate terrorists from Islam by labeling them as “Islamist terrorists.”²¹⁶ She responded that this was a struggle within the Muslim world, and she was not qualified to judge what is or is not Islam.²¹⁷ This information and analysis from Ms. Jahangir suggests that whenever the United States attacks an Islamist terrorist group, this could create opportunities for ideologues sympathetic to *jihadists* in Pakistan to drum up political support for their anti-American agenda, and correspondingly weaken moderates who would assist the United States in protecting our security interests.

In a different interview, a Pakistani ambassador to a NATO state commented in his personal capacity on the U.S. drone missile attacks on suspected terrorists within Pakistan. He stated that if such attacks occurred without the prior consent of the Pakistan government that would incur the resentment of Pakistan.²¹⁸ Indeed, contemporaneous Pakistan newspapers reported that Pakistanis were angry at the United States for the attacks.²¹⁹ This data supports a hypothesis that U.S. military action tends to diminish support for the United States and U.S. security in the states that it attacks.

Both the Iran and Pakistan fact-finding missions revealed that there are varied responses overseas to U.S. military action, but they often include frustration, fear, anger, and even hatred towards the United States. It seems reasonable to surmise that U.S. military action could increase animus towards the United States in the state attacked as well as in third states. This animus could potentially harm U.S. security interests if it strengthens hardliners in foreign states that would directly attack the United States or sponsor terrorists who would. Additionally, because of the international nature of terrorist networks, attacks on terrorist cells in one state risk reprisals not only from those terrorist cells but also from their affiliates in other states. While the field interviews do not conclusively or exhaustively establish reasons for the absence of a positive impact of U.S. attacks on aggregate U.S. security, they provide some understanding of the varied human responses overseas to U.S. aggression that could limit the benefits of such aggression on aggregate U.S. security.

214. Interview by Tai-Heng Cheng et al. with Asma Jahangir, Chairperson of the Pak. Human Rights Comm’n, in Lahore, Pak. (May 12, 2008) (on file with Tai-Heng Cheng).

215. *Id.*

216. See James Brandon & John Thorne, *Struggle for a British Islam*, CHRISTIAN SCI. MONITOR, July 28, 2005, at 1 (“[M]any moderate Muslims . . . insist that Islamic terrorism arises from a distorted interpretation of Islam.”).

217. Interview with Asma Jahangir, *supra* note 214.

218. Interview by Tai-Heng Cheng with Pakistani Ambassador to a NATO state [identity withheld at request of interviewee], in Islamabad, Pak. (May 15, 2008) (on file with Tai-Heng Cheng).

219. See *Students Federations, Political Organizations Condemn Bajaur Attack*, PAK. NEWSWIRE, May 17, 2008 (“[P]olitical organizations staged protest demonstrations, while strongly condemning the air strikes of US drone aircraft on Damadola, Bajaur agency outside the Peshawar Press Club here on Friday. The activists were carrying banners and placards inscribed with slogans anti-US slogans [sic] against the American Bush administration.”).

V. APPRAISAL AND RECOMMENDATIONS

The research in Part IV supports a hypothesis that increases in U.S. military force do not affect aggregate U.S. security threats, which may in part be because U.S. military actions engender negative feelings among foreign officials, militant groups, and electorates and encourage reprisals and third-party attacks on the United States.

Importantly, if this hypothesis is correct, it would not undermine the use of force in actual self-defense because considerations of aggregate threats and the costs of war are often secondary to the necessity of parrying an attack, which if not neutralized would cause certain death and destruction. A similar calculus could apply to the use of preemptive force where there is a high level of proof that absent an attack by the United States the putative enemy would eventually operationalize a planned attack on the United States that it could not neutralize. The preemptive military option should not be immediately taken off the table in such situations.

However, in many other situations where there is insufficient proof, or a risk of false assessments, that absent a U.S. first strike a putative enemy would eventually launch a devastating attack, all that is parried by preemptive force against the putative enemy is a risk of a future attack by the enemy. In these situations, preemptive force should not generally be used because of the indeterminate effect on aggregate security and because of the certain costs of war described in Part IV.

If President Obama adopted this approach as part of an Obama Doctrine, how would it apply to actual security problems? Assume that North Korea has nuclear warheads, but that it does not have and is unlikely to acquire ballistic missiles capable of reaching the United States. Even if U.S. intelligence discovers evidence that North Korea desired to attack the United States, preemptive force would not be justified because there is no practical ability to deploy missiles that reach the United States. However, if U.S. intelligence services have gathered strong evidence that the nuclear warheads will be used against the U.S. Pacific Fleet, the option of preemption must be considered, although only after exhausting other less extreme possibilities such as multilateral diplomacy or sanctions involving China.²²⁰

Because the proposed Obama Doctrine would not absolutely rule out preemptive force, it is important to strengthen U.S. intelligence gathering and checking procedures to avoid falsely identifying a putative enemy as having both the definite intention and certain future ability to attack the United States. It is especially crucial to double check evidence on possible future attacks against the United States before deploying preemptive force because there is no international organization to prevent the United States from acting in error and causing irreparable harm to another state. The Bush administration made this mistake in invading Iraq; the Obama administration must not repeat it.

The Obama administration should also consider long-range strategies that could help reduce the need for preemptive force. Each of these strategies should be as rigorously appraised as the examination of preemptive attacks in this Article, but such

220. A further scenario could be imagined where North Korea did not plan to attack the United States, but instead planned to attack a U.S. ally such as Japan. The limits of using force in collective security are, however, the subject of a future paper.

appraisals will have to be conducted in future research. For now, the five strategies are recommended here in thumbnail form to point out options to decision makers and to encourage other scholars to join in discussions on ways to promote U.S. security.

First, the United States should fully exercise its right to self-defense under the current international legal framework for the use of force. Its military infrastructure must be set up to neutralize actual or imminent attacks. While this policy may appear self-evident, the numerous operational failures documented by the 9/11 Commission indicate that insufficient attention may have been given to ensuring that our defensive strategies are fully and effectively coordinated.²²¹

Second, the United States should exercise leadership in the Security Council by seeking and obtaining explicit Chapter VII authorization to deploy multilateral force against threats to global security and peace. Security Council authorization, shared leadership of military operations with other Security Council members, and participation of a broad and meaningful coalition of other states could help diffuse the risk of reprisals against the United States if it acted alone. Effective diplomacy at the United Nations involves maintaining good relations with other states, avoiding abrasive signals that might incur unanticipated and unnecessary diplomatic costs, and a willingness to find common ground acceptable to multiple parties. A failure to secure Chapter VII authorization for use of force may be as much a failure of the Security Council as it is a failure of U.S. diplomacy. These failures should not be accommodated by simply interpreting prior Chapter VII resolutions loosely to authorize force. Such an approach damages U.S. credibility and risks increasing animus against us.

Third, the United States should devote resources to addressing the root causes of terrorism, including helping foreign states stabilize their lawless regions in which terrorists reside, addressing poverty and lack of education in poor countries to reduce their vulnerability to terrorist recruitment. In an interview with Liaqat Baloch, the Vice President of the Pakistan Islamic political party Jamaat-e-Islami, he explained that poor families who cannot afford to feed their children often send them to madrasas, who board them and provide them with religious education.²²² U.S. State Department reports suggest that some madrasas are recruiting grounds for Islamist terrorists.²²³ Mr. Ghani, the Governor of the Pakistan Northwest Frontier Province who faces terrorist threats in his territory daily, has stated that the strategy to eradicate terrorism in tribal areas has to be a combination of military pressure and political measures.²²⁴

221. See generally NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 18 (2004) ("On the morning of 9/11, the existing protocol was unsuited in every respect for what was about to happen.").

222. Interview by Tai-Heng Cheng with Liaqat Baloch, Vice President, Jamaat-e-Islami, in Lahore, Pak. (May 13, 2008) (on file with Tai-Heng Cheng).

223. See *FY 2005 Appropriations for the State Department: Hearing Before the Subcomm. on Foreign Operations, Export Financing and Related Programs of the H. Comm. on Appropriations*, 108th Cong. (2004) (statement of Colin Powell, Secretary, Department of State) (Lexis, FDCH Political Transcripts) ("[W]e have talked to those countries that were a principal source of funding for the madrasas . . . to end their support for those madrasa programs that . . . prepare youngsters to be fundamentalists and to be terrorists.").

224. Interview with Owais Ahmand Ghani, *supra* note 9.

Fourth, the United States should continue to work with allies to strengthen global controls over materials that may be used to assemble destructive weapons. The International Atomic Energy Agency (“IAEA”) provides infrastructure for monitoring the creation and acquisition of weapons-grade nuclear material,²²⁵ and the United States should continue to play a leadership role in the IAEA.

Fifth, the United States should support and strengthen international and national judicial control over states, entities, and individuals that commit or plan to commit acts of militaristic violence. Such an approach would be consistent with prior U.S. actions in response to attacks. President Reagan did not respond to the bombing of Pan Am Flight 103 with military force. Instead, he supported judicial dispute resolution.²²⁶ Today, the United States could strengthen international enforcement against state sponsors of terrorists by ratifying the Rome Statute of the International Criminal Court.²²⁷

The world faces prolonged global instability. Various political groups and disfranchised individuals are frustrated by their inability to promote their interests within the current world order. Some among them will be tempted to address asymmetries of power through terrorist attacks designed to have maximum disruptive impact. These concerns are real and persistent. It is accordingly necessary to retain the option of preemptive force for extreme situations. However, the statistical studies and field interviews in this Article indicate that using military force may not make the United States safer in aggregate and may provoke animus against the United States. These consequences are grave and long lasting. It is accordingly necessary to verify evidence of future plans to attack the United States, and pursue strategies short of force, before deploying preemptive force.

APPENDIX A: VECTOR AUTOREGRESSION OUTPUT

Table A.1: Results of the VAR(4) model with coefficients that are statistically significant at the 10 percent significance level in bold. The (-t) in the left-most column in the table indicates the time lag; that is (-1) stands for one year ago, (-2) two years ago, etc. Each column corresponds to a regression equation and the results are summarized in Equation 1.

Vector Autoregression Estimates

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225. International Atomic Energy Agency, About the IAEA, <http://www.iaea.org/About/index.html> (last visited Apr. 1, 2010).

226. See Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 114, 122 (Apr. 14) (“[C]harges [were] brought by a Grand Jury of the United States District Court for the District of Columbia against the two Libyan nationals in connection with the destruction of Pan Am flight 103 . . .”), available at <http://www.icj-cij.org/docket/files/89/7213.pdf>.

227. See Stephen J. Rapp, *Achieving Accountability for the Greatest Crimes—The Legacy of the International Tribunals*, 55 DRAKE L. REV. 259, 284 (2007) (noting that member states of ICC “do not include the United States”).

Sample (adjusted): 6 62

Included observations: 57 after adjustments

Standard errors in () & t-statistics in []

	DFUNI	DFMULTI	DTCOMP
DFUNI(-1)	-0.580540 (0.12529) [-4.63353]	-0.090074 (0.10642) [-0.84641]	0.011914 (0.32127) [0.03708]
DFUNI(-2)	-0.571539 (0.13389) [-4.26870]	-0.128415 (0.11372) [-1.12920]	0.116696 (0.34332) [0.33991]
DFUNI(-3)	-0.383346 (0.13333) [-2.87524]	-0.009213 (0.11324) [-0.08136]	0.068194 (0.34187) [0.19947]
DFUNI(-4)	-0.403976 (0.12388) [-3.26109]	-0.151633 (0.10522) [-1.44113]	-0.284630 (0.31764) [-0.89607]
DFMULTI(-1)	-0.050578 (0.17229) [-0.29357]	-0.185312 (0.14634) [-1.26636]	-0.182501 (0.44177) [-0.41311]
DFMULTI(-2)	-0.197736 (0.16120) [-1.22666]	-0.244549 (0.13692) [-1.78610]	0.207670 (0.41334) [0.50241]
DFMULTI(-3)	-0.174842 (0.16444) [-1.06323]	-0.464195 (0.13967) [-3.32344]	-0.315917 (0.42166) [-0.74922]
DFMULTI(-4)	0.314716 (0.17839) [1.76423]	-0.198809 (0.15152) [-1.31213]	-0.121629 (0.45742) [-0.26590]
DTCOMP(-1)	0.105636 (<.10) (0.06075)	-0.032807 (0.05160)	-0.656534 (0.15576)

	[1.73899]	[-0.63586]	[-4.21498]
DTCOMP(-2)	0.018015	0.064643	-0.626410
	(0.07517)	(0.06385)	(0.19276)
	[0.23965]	[1.01242]	[-3.24974]
DTCOMP(-3)	-0.058543	0.064461	0.070305
	(0.07771)	(0.06601)	(0.19926)
	[-0.75335]	[0.97661]	[0.35282]
DTCOMP(-4)	-0.156604	0.027823	0.182194
	(0.06969)	(0.05919)	(0.17869)
	[-2.24719]	[0.47005]	[1.01959]
C	0.000739	0.087737	0.411947
	(0.12432)	(0.10559)	(0.31878)
	[0.00595]	[0.83090]	[1.29228]

R-squared	0.507353	0.306107	0.506300
Adj. R-squared	0.372995	0.116863	0.371654
Sum sq. resids	35.43598	25.56450	232.9919
S.E. equation	0.897420	0.762241	2.301145
F-statistic	3.776126	1.617526	3.760242
Log likelihood	-67.33278	-58.02686	-121.0061
Akaike AIC	2.818694	2.492171	4.701970
Schwarz SC	3.284653	2.958130	5.167929
Mean dependent	-0.035088	0.052632	0.298246
S.D. dependent	1.133341	0.811107	2.902984

Determinant resid covariance (dof adj.)	2.434288
Determinant resid covariance	1.119710
Log likelihood	-245.8610
Akaike information criterion	9.995122
Schwarz criterion	11.39300