Use of Force after 9/11

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The events of September 11, 2001, revealed to America and the world a new threat, qualitatively different than the dangers that have faced us in the past. This new threat has required us to adopt new policies to confront it. President Bush eloquently described the threat and the Administration's policy response in an address delivered at the National Defense University on February 11 of this year. He stated:

In the Cold War, Americans lived under the threat of weapons of mass destruction but believed that deterrents made those weapons a last resort. What has changed in the 21st century is that in the hands of terrorists, weapons of mass destruction would be a first resort, the preferred means to further their ideology of suicide and random murder. These terrible weapons are becoming easier to acquire, build, hide, and transport. Armed with a single vial of a biological agent or a single nuclear weapon, small groups of fanatics or failing states could gain the power to threaten great nations, threaten the world peace.

America and the entire civilized world will face this threat for decades to come. We must confront the danger with open eyes and unbending purpose. I have made clear to all the policy of this Nation: America will not permit terrorists and dangerous regimes to threaten us with the world's most deadly weapons.1

This policy has many elements, including multilateral efforts to control exports of sensitive goods and technologies, interdiction of shipments of such goods and technologies to regimes seeking weapons of mass destruction through the Proliferation Security Initiative, threat reduction activities under the Nunn-Lugar program, and the deployment of missile defenses. The most controversial element, however, has been the idea of preemption laid out in the September


2002 National Security Strategy of the United States. The National Security Strategy explains preemption as follows:

Given the goals of rogue states and terrorists, the United States can no longer rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons do not permit that option. We cannot afford to let our enemies strike first.

... The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.2

Preemption should not be viewed separately, but as part of the larger mix of elements that comprise the overall policy. When it comes to dealing with dangerous regimes, the objective of this policy is not, as the critics claim, to encourage US military intervention every time we become concerned that such a regime is seeking weapons of mass destruction. Rather, the objective is to change the calculus of proliferation for such regimes and to cause them to reconsider their operating assumption that efforts to acquire and maintain weapons of mass destruction will make them safer and stronger.

In a very basic sense, this policy is similar to the doctrine of deterrence that preceded it during the Cold War. The objective of deterrence was never to bring about a thermonuclear exchange with the Soviet Union. Rather, it was to prevent such an exchange by raising doubts in the minds of the Soviets that they could benefit by using or threatening to use nuclear weapons against us. Only if deterrence failed would we find ourselves locked in a thermonuclear exchange, and fortunately, nuclear deterrence never failed during the Cold War.

Similarly, cases in which we have to actually use force against emerging state-sponsored weapons of mass destruction ("WMD") threats should be regarded not as successes of our policy, but rather as failures. The real measure of the policy's success will be the number of regimes that abandon WMD programs or decide not to pursue such programs in the first place. The key to achieving this kind of success will lie in persuading potential proliferators that the costs of seeking to acquire and maintain WMDs will outweigh the benefits.

Our policy in Iraq must be considered in this light. It is today a commonplace criticism of preemption that the failure so far to find weapons of

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2 President George W. Bush, Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction, Address at West Point, New York (June 1, 2002), in National Security Strategy of the United States of America 13, 15 (Sept 2002).
mass destruction in Iraq means that the policy was misapplied there and is a failure. This criticism misses the point of our military efforts in Iraq.

It is important to recall that the Bush Administration was not alone in believing that Saddam Hussein was actively developing weapons of mass destruction. The Clinton Administration was also convinced of this, as was our Congress. After considering all available intelligence, the House of Representatives voted 296-113 to authorize military operations against Iraq, and the Senate voted in favor by a margin of 77-23. Before Operation Iraqi Freedom, this same assessment was shared by virtually every other government with a well-established intelligence service.

And the reasons are obvious. Saddam Hussein was acting like a man with something to hide. To the very end, he persisted in defying pertinent Security Council resolutions and obstructing the work of United Nations weapons inspectors, even when we made it clear to him that the price of continued defiance would be his removal from power.

The chief United Nations weapons inspector, Hans Blix, was never able to say that Iraq was free of weapons of mass destruction. He never favored the war, however, and since the war he has written a book in which he confronts the question of why Saddam Hussein refused to cooperate with the United Nations if he had nothing to hide. Blix offers several theories, the most plausible of which is that Saddam was “like someone who puts up a sign warning BEWARE OF DOG without having a dog . . . .” In other words, Blix speculates that Saddam thought he would be safer if he persuaded the rest of the world that he had weapons of mass destruction, even if he did not in fact have such weapons.

Most countries with weapons of mass destruction programs try to conceal those programs. Blix’s theory, therefore, raises the interesting question of whether we should have figured out in the case of Iraq that the deception ran in the opposite direction; that Saddam was concealing from us not weapons of mass destruction, but rather the absence of such weapons. But the larger point is

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that Saddam believed that appearing to seek or have weapons of mass destruction would make him safer. This is not an approach the world community can prudently allow to gain currency. Applying the preemption policy to Iraq therefore made eminent sense—irrespective of whether weapons of mass destruction were actually there—and this explains why the Security Council authorized the use of force against Iraq if it failed to cooperate with the inspectors, rather than waiting to find out for sure that Saddam had WMDs or, worse, that he had used WMDs.

Iraq became a case in which we were willing to use preemptive force in the appropriate circumstances. That itself can have a beneficial effect on the calculations countries make about whether to pursue WMD programs. If we want to assess the success of the policy after Iraq, we must consider the test I have already suggested: Are other regimes abandoning weapons of mass destruction programs, or not adopting such programs in the first place?

For example, last December, Colonel Qadhafi of Libya stepped forward and volunteered to abandon his nuclear, chemical, biological, and missile programs. It is clear that the example of Iraq was a critical factor in this decision. There were other factors as well—including a desire to end Libya's international isolation and to come out from under US bilateral sanctions—at a time when the successful interdiction under the Proliferation Security Initiative of nuclear-related items headed to Libya repudiated Libyan assertions that it had no illicit program.

Colonel Qadhafi's decision, and his subsequent cooperation with US and British experts, led directly to the exposure of A.Q. Khan's nuclear proliferation network. The exposure of this network has yielded important further evidence of nuclear proliferation to other countries, such as North Korea and Iran. That evidence, in turn, is contributing in very important ways to ongoing diplomatic efforts to reverse the nuclear programs in those two countries.

We are often asked whether preemption is consistent with the United Nations Charter and other principles of international law. In the end, as the State Department's Legal Adviser has said, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary, and each such use of force should be judged not on abstract concepts, but on the particular events that gave rise to it. In the case of Iraq, the United States had ample authority under pertinent Security Council resolutions to use force to compel compliance in the face of material breaches of Iraqi obligations under

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relevant obligations imposed by the Security Council, and as the final episode in a conflict initiated over a dozen years earlier by Iraq’s invasion of Kuwait.\(^8\) The Security Council authority was relied upon by us and our allies, Britain and France, for much of the 1990s in the face of earlier material breaches by Iraq of its obligations, including by the Clinton Administration in carrying out large-scale air strikes during Operation Desert Fox in 1998, as well as many other smaller air strike operations over a period of many years.

We expect that this kind of Security Council authorization will exist in many, if not most, of the cases where we might contemplate application of the preemption policy. This is because the kinds of regimes whose activities will make them candidates for application of this policy are likely to have engaged in actions that destabilize the international community and result in Security Council authorization to use all necessary measures under Chapter VII of the UN Charter to restore international peace and security. This is not to say, however, that Security Council action is a \textit{sine qua non} for the use of force in a manner that might be termed preemptive, as the doctrine of self-defense may be available to justify use of force in cases where the Council has not acted. Each case must be judged on the particular facts.

It is instructive to recall in this context the use of force by the United States during the Cuban Missile Crisis. The naval quarantine imposed by the United States on Cuba was not authorized by the Security Council, but was in the view of the United States Government an appropriate and lawful response to the threat posed to our nation.\(^9\) As President Kennedy explained at the time:

> We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.\(^10\)

These same words could be spoken with regard to many of the threats we face today. Any application of the preemption policy to the kinds of threats described in the 2002 National Security Strategy of the United States will need to be assessed in light of the facts and circumstances surrounding the threat, just as was President Kennedy’s response to the threat that our nation faced from weapons of mass destruction in Cuba in 1962.

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\(^8\) See id at 563.

