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Attacking Without Provocation; Maintaining a Subsequent Occupation; All for the Sake of Democratization: The Constitutionality and Wisdom of Preventive War and Post-Conflict Nation-Building

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Today, the United States has at its disposal a vast range of tools for military intervention.¹ These tools span a wide spectrum, ranging from shipment of arms or military advisers to full, direct military intervention.² The Bush Doctrine³ has not expanded the kinds of tools

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1. In ANDREW BENNETT, CONDEMNED TO REPETITION? THE RISE, FALL, AND REPRIS OF SOVIET-RUSSIAN MILITARY INTERVENTIONISM, 1973–1996 (1999), the author defines military intervention as “the use of force in an intrastate or interstate conflict of a foreign country with the objective of influencing the makeup, policies, stability, or strength of the regime in that country.” *Id.* at 14. Bennett also distinguishes military intervention from war, stating that “in military interventions, there is a regime or at least a powerful faction aligned with the intervening power; otherwise, the use of force takes on the character of an interstate war.” *Id.* In today’s world, U.S. intervention likely will include some other faction aligned with its interests in intervening, whether it is the United Nations, NATO, a “coalition of the willing,” or a powerful religious faction within the invaded nation. It seems that a distinction between military intervention and interstate war should not depend upon whether the intervening nation has support from another group or groups. Accordingly, this Note adopts Bennett’s definition of “military intervention” to also apply to what he calls “war.” That is, in this Note, the term “military intervention” includes direct military intervention in which the intervening nation goes alone into another nation without any outside support or allies.

2. In analyzing Soviet use of military intervention, Bennett lists different dimensions of military intervention by increasing risk of commitment: (1) shipment of arms to client regimes; (2) transport of other nation’s troops to or in a client regime; (3) direct supply of other nation’s troops on the front; (4) deployment of military advisors in the war zone; (5) military aid to allied troops; (6) use of a nation’s own troops in combat roles; (7) use of a nation’s military commanders to direct a large-scale intervention; and (8) use of a nation’s own ground troops. *Id.* at 15. Although this list is not exhaustive, it demonstrates the wide range of military tools a nation has at its disposal for military intervention.

3. The Bush Doctrine asserts “the right to use force preemptively against any country or terrorist group that could potentially threaten U.S. security.” Richard N. Gardner, *Neither Bush nor the “Jurisprudes,”* 97 AM. J. INT’L L. 585, 585 (2003).

available. Rather, it has reconfigured the way in which they are used to include preventive strikes.⁴ Furthermore, although President George W. Bush strictly opposed nation-building during his 2000 campaign,⁵ he maintained troop levels abroad in post-conflict efforts to rebuild invaded nations.⁶ Even with the advent of a new administration, this policy has not changed. Thus, the current warfare policy of the United States includes two major components—preventive military action and post-conflict nation-building.

These facets of military intervention raise significant constitutional and policy questions that must be addressed to assess whether the United States is properly utilizing its military resources to best serve the nation and the world. Current scholarship on the constitutionality of preventive war and post-conflict nation-building is nearly non-existent, and the policy debate has not yet considered the two facets of modern warfare together. This Note examines the constitutionality and wisdom of both aspects of the current warfare policy. Ultimately, the current United States warfare strategy that includes using preventive wars followed by post-conflict military nation-building is constitutional; however, underlying policy concerns suggest that this approach to warfare should be reconsidered and reframed.

Part I of this Note examines the current warfare policy of the United States. It first shows the origins of the policy of preventive war and then explains the distinction between preemptive and preventive war. Next, it defines post-conflict nation-building, reveals an American attitude of nation-building through an historical analysis, and examines modern efforts of nation-building. Finally, it

4. *See, e.g.*, Press Release, George W. Bush, The National Security Strategy of the United States of America 6 (Sept. 17, 2002).

5. For example, in a 2000 Presidential Debate between George W. Bush and Vice President Al Gore, Mr. Bush explained:

The vice president and I have a disagreement about the use of troops. He believes in nation building. I would be very careful about using our troops as nation builders. I believe the role of the military is to fight and win war and therefore prevent war from happening in the first place.

George W. Bush, First Gore-Bush Presidential Debate (Oct. 3, 2000) (transcript available at <http://www.debates.org/pages/trans2000a.html>).

6. The President has not simply maintained, but increased the number of troops (“the surge”). George W. Bush, President’s Address to the Nation (Jan. 10, 2007).

discusses other scholarship on the constitutionality of the current warfare policy.

Part II analyzes the constitutionality of the current warfare policy and finds that preventive war with post-conflict nation-building is constitutional. Part III examines the wisdom of this warfare policy and concludes that preventive war is not a sound policy, but post-conflict nation-building is.

Part IV proposes an American warfare policy for the twenty-first century that utilizes means other than preventive war. It also advocates a restructuring of military and political institutions to ensure adequate nation-building efforts after future conflicts have ended.

I. THE CURRENT WARFARE POLICY OF THE UNITED STATES

After the terrorist attacks of September 11, 2001, the United States significantly modified its national security policy to include preventive military attacks.⁷ Today, the United States military is involved in an effort to rebuild a nation it invaded under this policy of prevention.⁸ Accordingly, the current American warfare policy includes both preventive wars and post-conflict nation-building.

A. Preventive War

One of the most controversial changes to America's national security strategy was the utilization of preventive strikes as a means of self-defense.⁹ Although the United States has considered and carried out first strikes against security threats in the past,¹⁰ the Bush Doctrine overtly emphasized prevention as a strategy, marking an unprecedented shift in American national security policy.¹¹

7. KARL P. MUELLER ET AL., STRIKING FIRST: PREEMPTIVE AND PREVENTIVE ATTACK IN U.S. NATIONAL SECURITY POLICY 2 (2006).

8. See Press Release, The White House, Fact Sheet: Rebuilding Iraq (Dec. 7, 2005) (“Over the course of this war, the Coalition has learned that winning the battle for Iraqi cities is only a first step. The Coalition has adjusted to win the ‘battle after the battle’ by helping Iraqis consolidate their gains and keep the terrorists from returning.”).

9. Bush, *supra* note 4, at 13–16.

10. MUELLER ET AL., *supra* note 7, at 2.

11. *Id.*

1. Distinguishing Preemption from Prevention

Although the National Security Strategy and other policy statements use the word “preemption” to refer to a first strike against a perceived security threat,¹² “generations of historians, social scientists, legal scholars, and policymakers have defined preemption more restrictively, distinguishing preemptive from preventive attack.”¹³ Essentially, a preemptive attack is one launched because of an expectation that “the adversary is about to attack, and that striking first will be better than being attacked.”¹⁴ Generally, a true preemptive attack must involve an imminent threat.¹⁵

On the other hand, preventive attacks involve responses to less immediate threats.¹⁶ Thus, preventive attacks are motivated “not by the desire to strike first rather than second, but by the desire to fight sooner rather than later.”¹⁷ In these situations, trying to assess long-term threats involves forecasting the capabilities of the opponent that will exist in the future—a task that naturally involves much

12. *See, e.g.*, Bush, *supra* note 4, at 6, 15, 16.

13. MUELLER ET AL., *supra* note 7, at 6.

14. *Id.*

15. *Id.* at 6–7; *see also* JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 415 (2004) (defining “preemptive attack” as “[a]n attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent”).

16. MUELLER ET AL., *supra* note 7, at 8; *see also* JOINT CHIEFS OF STAFF, *supra* note 15, at 419 (defining “preventive war” as “[a] war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risks.”).

17. MUELLER ET AL., *supra* note 7, at 8. A state may not prefer to delay fighting for numerous reasons:

The most obvious one is when the balance of military capabilities between the adversaries is shifting, or is expected to shift in the enemy’s favor, because of differential rates of growth, development, or armament; fear that the opponent will acquire or develop nuclear weapons or some other new offensive or defensive capability that will fundamentally alter the correlation of forces is a variation on this theme of particular salience today Anticipating unfavorable shifts in the allegiance or capabilities of allies can produce similar incentives for preventive war. Fighting sooner rather than later may appear to offer the prospect of winning instead of losing, or it may serve merely to make fighting less costly or to delay the emergence of a more serious threat.

Id. at 8–9. For an historical example of why a nation may want to go to war but choose not to, *see* JOHN G. STOESSINGER, HENRY KISSINGER: THE ANGUISH OF POWER 179 (1976); Simcha Dinitz, *The Yom Kippur War: Diplomacy of War and Peace*, in REVISITING THE YOM KIPPUR WAR 104, 108 (P. R. Kumaraswamy ed., 2000).

uncertainty—and using general trends from the past to estimate the opponent’s future intentions.¹⁸

This distinction may seem like an excursion into semantics, but it is important because of its legal perceptions and consequences. Accordingly, “[m]any scholars contend that the boundary between preemption and prevention is also the threshold separating wars of opportunity from wars of necessity, and therefore legitimate from illegitimate use of force.”¹⁹

B. Post-Conflict Nation-Building

Besides permitting the use of preventive war, the current warfare policy of the United States also includes post-conflict nation-building.²⁰ The current state of American warfare policy and the push for “democratization”²¹ abroad has implied that America does not simply fight wars; it rebuilds nations when the battle has ended.²²

18. MUELLER ET AL., *supra* note 7, at 10. This differs from the assessment involved in preemptive strikes, where estimating current military capabilities is fairly straightforward because they already exist, and the more difficult assessment is whether the opponent will attack since preparations for attack do not always mean an actual commitment to attack. *Id.* at 9. The war in Iraq, which was predicated on eliminating the threat that Iraq would directly or indirectly attack the United States or its allies in the future if it were not attacked first, was preventive under this analysis. *Id.* at 15. The war in Afghanistan, however, was neither preemptive nor preventive because it was a response to hostilities initiated by the adversary. *Id.* Still, the war in Afghanistan could be said to have been operationally preemptive as one of its objectives was to eliminate al-Qaeda’s Afghan base of operations before additional terrorist attacks could be launched from it. *Id.*

19. *Id.* at 22. Additionally, “the international community has traditionally considered preemption to be a potentially legitimate form of self-defense while viewing most prevention as illegitimate aggression.” *Id.* at 19.

20. On May 1, 2003, President Bush declared the end of major combat operations in Iraq. George W. Bush, Remarks by the President from the USS Abraham Lincoln at Sea Off the Coast of San Diego, California (May 1, 2003). On January 10, 2007, President Bush announced an increase in the number of U.S. troops in Iraq to bolster security, train the Iraqi army, increase the number of provincial reconstruction teams, bring together military and civilian experts to help Iraqi communities pursue reconciliation, strengthen the moderates, speed the transition of Iraqi self-reliance, and ensure better results for economic assistance being spent in Iraq. Bush, *supra* note 6.

21. Democratization is not a new concept for America. See James Kurth, *Ignoring History: U.S. Democratization in the Muslim World*, 49 *ORBIS* 305, 306 (2005) (“The twentieth century witnessed numerous attempts to bring democracy to countries that hitherto had been ruled by authoritarian regimes. The great majority of these efforts were promoted by the United States, and many of them were backed by U.S. military intervention and occupation.”).

22. See, e.g., George W. Bush, The National Security Strategy of the United States of

Thus, the current warfare policy cannot fully be examined without accounting for post-conflict nation-building.

1. Defining “Nation-Building”

Nation-building refers to the actions undertaken, after major combat operations have ended, to restore structure by means of institutions and security so that the nation may successfully operate on its own.²³ Throughout history, the term “nation building” has taken on different meanings.²⁴ Today, however, “nation building normally implies the attempt to create democratic and secure states.”²⁵ Accordingly, “democratization efforts are part of the larger and more comprehensive nation-building campaign.”²⁶

2. An American Attitude of Nation-Building

Military nation-building has been at the heart of American warfare since the founding of the country, arising out of colonial

America 33 (Mar. 16, 2006). Chapter VII explains that the United States will engage in “[t]ransformational [d]iplomacy and [e]ffective [d]emocracy,” which means that it will work “to build and sustain democratic, well-governed states that will respond to the needs of their citizens and conduct themselves responsibly in the international system. Long-term development must include encouraging governments to make wise choices and assisting them in implementing those choices.” *Id.* The United States “will encourage and reward good behavior rather than reinforce negative behavior.” *Id.* If this is to be true, then the United States must remain in a country after it has fought a war in order to rebuild the country and sustain a democratic, well-governed state.

23. A recent Congressional Research Service issue brief explains:

[N]ation-building is not a precise term, but rather one that is used for both a concept and a variety of activities. On one level, nation-building is used to refer to the concept of creating (or a decision to create) a democratic state, often in a post-conflict situation. The term is also used, however, to refer to any of the range of activities that militaries or civilians undertake to advance that goal.

NINA M. SERAFINO, PEACEKEEPING AND RELATED STABILITY OPERATIONS: ISSUES OF U.S. MILITARY INVOLVEMENT, CRS ISSUE BRIEF FOR CONGRESS IB94040, at 6 (Mar. 27, 2006), available at <http://italy.usembassy.gov/pdf/other/IB94040.pdf>.

24. Nation building “has over the years signified an effort to construct a government that may or may not be democratic, but preferably is stable.” Karin von Hippel, *Democracy by Force: A Renewed Commitment to Nation Building*, 23 WASH. Q. 95, 96 (2000).

25. *Id.*

26. *Id.*

independence and the subsequent territorial expansion.²⁷ Less than one hundred years after the United States gained its independence, America went from thirteen colonies to the continental United States.²⁸

An interventionist impulse developed during this time that “worked from the premise of nation-building,” and was built on the idea that the United States “was a nation with a privileged history.”²⁹

27. Throughout the early history of the United States, seven key turning points created an interventionist spirit in America. Dr. Peter J. Schraeder, Lecture: The Evolution of the Interventionist Impulse (Sept. 06, 2004) [hereinafter Schraeder Lecture]; see also Lloyd C. Gardner, *The Evolution of the Interventionist Impulse*, in INTERVENTION IN THE 1990'S (Peter Schraeder 2d ed., 1992). The birth of the nation left Americans with a revolutionary spirit and the idea that America always had the best ideas. Schraeder Lecture, *supra*. The universality of the American cause led to a desire to spread America's ideas around the world. *Id.* In other countries that were born out of revolutions, such as France and Russia, this spirit was soon extinguished by their neighbors who did not want revolution seeping across their borders. Gardner, *supra*, at 27. Because of America's geography, however, it had no powerful nations bordering it and thus, the revolutionary spirit was able to remain alive and expand far beyond the original thirteen colonies. *Id.* Out of this revolutionary zeal came a pioneer spirit that led to continental expansion. Schraeder Lecture, *supra*.

28. By 1783, the original thirteen colonies had increased their size by almost three times when Britain ceded the land south of Canada from the Atlantic west to the Mississippi River. Definitive Treaty of Peace, U.S.-Gr. Brit., art. II, Sept. 3, 1783, 8 Stat. 81. In 1803, the land size doubled again with the Louisiana Purchase from France. Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 345 (2003). At this point in history, it seemed as though America was forming an empire, if not by conquest, by purchase. Michael Kent Curtis, *The Court and the Empire*, 20 CONST. COMMENT. 163, 164 (2003) (reviewing JAMES G. WILSON, *THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY* (2002)). Florida was purchased in 1819. Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252. Texas entered the Union in 1845. Joint Resolution for Annexing Texas to the United States, J. Res. 8, 28th Cong., 5 Stat. 797, 798 (2d Sess. 1845). Oregon was added from Britain in 1846. Treaty with Great Britain, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869. The Mexican-American War added the California territory in 1848. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922. Additionally, the area just above the Rio Grande was purchased from Mexico in 1853. Gadsden Purchase Treaty, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031. In fact, until the Civil War in 1861, “the nation's foreign affairs had encompassed a single general principle: the steady absorption of all the neighboring territory. The ease of expansion had permitted Americans to carry forward the revolution while maintaining a loose and separately responsible division of government.” Gardner, *supra* note 27, at 28. For a map depicting the territorial expansion of the United States, see Territorial Acquisitions of the United States, <http://www.nationalatlas.gov/printable/territorialacquisition.html> (last visited Apr. 1, 2009). For a discussion of the square mileage of America's territorial expansion, see Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 148 n.18 (1999).

29. Gardner, *supra* note 27, at 34.

In a short time, Americans had seen the nation progress “across the North American continent largely uncontested, brushing aside overextended European empires, opening up the prairies and interning the remnants of Indian nations, and swooping up vast mineral resources as they went along—finally, to make of the nation a land rich beyond previous human experience.”³⁰ United States territory increased in size with such ease³¹ that a new world-view

30. *Id.*

31. In 1823, the Monroe Doctrine declared that “henceforth the Western Hemisphere was closed to European colonization and that European states must refrain from intervening in Latin American affairs.” *Id.* at 27. After the Monroe Doctrine was announced, “the legend grew that the United States had put an end to European intriguing in the Western Hemisphere and had intervened successfully in world politics to protect democracy against repression.” *Id.* During this time, Manifest Destiny gave the perception of a God-given right and duty to expand. *See, e.g.,* John L. O’Sullivan, *The Great Nation of Futurity*, 6 U.S. DEMOCRATIC REV. 426, 430 (1839) (“[T]his will be our future history, to establish on earth the moral dignity and salvation of man For this blessed mission to the nations of the world, which are shut out from the life-giving light of truth, has America been chosen”). In 1898 the Spanish-American War began and it became clear that America would be a world superpower. *See* Gardner, *supra* note 27, at 29; Jan Nijman, *The Limits of Superpower: The United States and the Soviet Union Since World War II*, 82 ANNALS ASS’N AM. GEOGRAPHERS 681, 684 (1992) (explaining that great powers are defined “in terms of ‘global reach,’ ‘control of worldwide networks,’ ‘global projection of power,’ ‘control of territory,’ ‘size of spheres of influence,’ and so on.”). During this time, America expanded beyond the Western Hemisphere. Gardner, *supra* note 27, at 29. Cuba, the Philippines, Guam, and Puerto Rico were the first colonies taken by the ever-increasing American Empire. *Id.*

In the period between the Spanish-American War and the Great Depression, “the United States embarked on an ambitious attempt at ‘progressive’ imperialism in the Caribbean, Central America, and the Pacific.” Max Boot, *Neither New nor Nefarious: The Liberal Empire Strikes Back*, 102 CURRENT HIST. 361, 362 (2003). Administrations acted for a variety of concerns including: strategic reasons (Panama Canal), economic reasons (China), and “The White Man’s Burden” (Philippine Islands). *Id.* Additionally, the United States occupied a number of places temporarily: the Panama Canal Zone, Haiti, the Dominican Republic, Nicaragua, and the Mexican city of Veracruz. *Id.* “The duration of occupation ranged from seven months (in Veracruz) to almost a century (in the Canal Zone).” *Id.*

After the World Wars, the United States emerged as a world superpower, competing only with the Soviet Union. *See* J.C. Hurewitz, *Origins of the Rivalry*, 29 PROC. ACAD. POL. SCI. 1, 1 (1969). With Europe largely devastated, the superpowers “became entrapped on opposing sides in interlocking regional disputes,” and “were engaged . . . in rivalry for prestige, position, and influence.” *Id.* From this emergence of two superpowers came the Cold War and the first globalized Manifest Destiny. *See* Roberta L. Coles, *Manifest Destiny Adapted for 1990s’ War Discourse: Mission and Destiny Intertwined*, 63 SOC. RELIGION 403, 405 (2002) (“[W]hile Manifest Destiny is an enduring myth, it may be changing to suit the globalizing world economy.”). After World War II, the United States inherited “the fruits of a fallen Europe-centric system that had been dominant in international affairs since the sixteenth century, [and policy-makers] perceived the Soviet Union as a distinctive challenge to U.S. goals in the

developed within America.³² As opposed to Europe, which generally believed in generational change, Americans came to believe that they could bring about change quickly—in a matter of years—both at home and abroad.³³

Thus, out of the remnants of this nation's own revolution came a pioneer spirit and an interventionist impulse driven by a belief that change could occur quickly.³⁴ Through the years, enacting this change came to be viewed as the United States' right and duty.³⁵ Consequently, Americans tend to believe that if America is to intervene militarily in another nation, it cannot simply send troops in, destroy the other nation, and leave that nation to pick up the pieces.³⁶

postwar world." Gardner, *supra* note 27, at 33. Moreover, with the atomic bomb, the United States again felt the frontier-days legend of ease of conquest. *Id.* at 35.

With the attacks of September 11, 2001, came the war on terror and the second globalization of Manifest Destiny. See Boot, *supra*, at 365. After 9/11, national security became a reason for the United States to become involved abroad. *Id.* ("We can only wonder what might have happened if, after the Soviet Union was driven out in the early 1990s, the United States had helped build Afghanistan into a viable state.")

It thus became the policy of the United States to not only do battle with existing terrorists, but also to prevent the development of new terrorist organizations by spreading democracy. See Bush, *supra* note 4, at v ("[T]he United States will use this moment of opportunity to extend the benefits of freedom across the globe. We will actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world.")

32. Schraeder Lecture, *supra* note 27.

33. *Id.* This attitude helps explain why the United States was involved in over 160 military interventions before World War II. STAFF OF H. COMM. ON INT'L REL., 94TH CONG., BACKGROUND INFORMATION ON THE USE OF U.S. ARMED FORCES IN FOREIGN COUNTRIES, 1975 REVISION 58–65 (Comm. Print 1975). Additionally, even after the fiasco of Vietnam, while the country suffered from "Vietnam Syndrome," the United States military was involved in over fifteen interventions. See James Meernik, *United States Military Intervention and the Promotion of Democracy*, 33 J. PEACE RES. 391, 395 (1996) (this list does not include more recent interventions such as Somalia, Haiti, Bosnia, Kosovo, Afghanistan, and Iraq).

34. Gardner, *supra* note 27, at 34.

35. See, e.g., George W. Bush, Remarks by President Bush to the U.S. University Presidents Summit on International Education (Jan. 5, 2006), available at <http://www.state.gov/r/summit/58734.htm> ("[F]reedom is the ideology that wins But you can't win in the long run for democracy unless you've got the capacity to help spread democracy.")

36. Nation-building tasks are often viewed as essential to stabilize post-conflict situations because they provide the infrastructure that populations need to help re-establish normal lives. See Serafino, *supra* note 23, at 7 ("Such activities are also viewed as enhancing the legitimacy and extending the presence of weak central governments as they try to assert control in such situations, and as reassuring local populations of the friendly intent of foreign military forces.")

3. The Development of the Current Nation-Building Policy

Throughout history, the United States military has engaged in nation-building efforts both at home and abroad after combat has ended in order to stabilize war-torn regions.³⁷ Modern exercises in nation-building have included excursions in Somalia, Haiti, Bosnia, and Kosovo.³⁸ After September 11, 2001, however, the American

37. For example, after the American Civil War ended, Union soldiers remained in some areas of the South for nearly a decade “to force the will of the victor on a conquered people” by enforcing the reconstruction laws with martial law. Ralph H. Gabriel, *American Experience with Military Government*, 49 AM. HIST. REV. 630, 639 (1944). When World War II ended, Allied soldiers remained in Germany and Japan for nearly eight years. William Rosenau, *Non-Traditional Missions and the Future of the U.S. Military*, 18 FLETCHER FOREIGN WORLD AFF. 31, 46 (1994). This occupation involved as many as 1.6 million U.S. troops in the European theater alone. Matthew Levinger, *Nation-Building Demands Heavy Lifting*, HIST. NEWS SERVICE, Aug. 17, 2004, <http://www.h-net.org/~hns/articles/2004/081704b.html>.

Vietnam saw the United States attempt to build and sustain an independent nation. See Michael R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 105 (1998). This is not often counted as an instance of nation-building because it is viewed as a “prolonged effort to create an entirely new nation in Southeast Asia . . . [and is] deemed ‘too short’ and ‘too limited’ in its political objectives to warrant study.” Marc Jason Gilbert, *Fatal Amnesia: American Nation-Building in Viet Nam, Afghanistan and Iraq*, 21 J. THIRD WORLD STUD. 13, 14 (2004). Nonetheless, for two years, the United States reduced the number of military personnel in Vietnam while providing funds for the South Vietnamese forces. Melvin R. Laird, *Iraq: Learning the Lessons of Vietnam*, 84 FOREIGN AFF. 22, 26 (2005). During those two years, “South Vietnam held its own courageously and respectably against a better-bankrolled enemy.” *Id.* It was not until the United States stopped funding the South Vietnamese that they were overrun by the North. *Id.*

38. Although these nation-building interventions all lacked a major ground war stage by the United States, they nonetheless taught valuable lessons about nation-building. See JAMES DOBBINS ET AL., *AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ* (2003). Somalia taught that the objectives of a nation-building exercise should be scaled to available forces, resources, and staying power; that military forces needed to be complemented by civil capabilities for law enforcement, economic reconstruction, and political development; and that there can be no economic or political development without security. *Id.* at 69.

Nation-building efforts in Haiti taught that short departure deadlines and exit strategies diminished the prospects for enduring transformation. *Id.* at 84. Haiti also revealed that grossly ineffective government needs to be reformed before reconstruction programs can be successful. *Id.*

From Bosnia, the United States learned the importance of unity of command for the civil aspects of peace operation. *Id.* at 107. Furthermore, elections are now seen as an important benchmark in progress towards democracy, and if elections were held too early, they could strengthen opposition forces rather than promote further transformation. *Id.* Moreover, the difficulty of putting a nation back together when its neighbors are pulling it apart became painfully clear. *Id.*

Finally, Kosovo showed that broad participation, extensive burden-sharing, unity of command, and effective United States leadership could be compatible. *Id.* at 126. Still,

attitude towards nation-building came into line with the emerging notion of preventive war.³⁹ That is, Americans sought aggressive reconstruction of nations for the sake of preventing future conflicts.⁴⁰ The attitude developed that nation building “is not an epithet or a slogan. After the attacks of September 11, 2001, it is our duty.”⁴¹ Moreover, this duty did not arise from a notion of goodwill towards others; rather, it developed from a heightened sense of strategic interests and national security.⁴²

Thus, the War on Terror began an aggressive military policy abroad with the goal of stopping terrorists before they came to America.⁴³ To achieve this goal, America initiated a warfare policy that allowed preventive war in order to fight on America’s terms and timeline combined with a commitment to rebuild weak and war-torn nations for the sake of national defense.⁴⁴

uncertainty over final international status showed to be a hindrance to democratic transition, and slow mobilization of civil elements in peace operations was costly. *Id.* at 126–27. Ultimately, Kosovo demonstrated that when countries lack effective governmental institutions, placing expatriate staff in positions of authority can facilitate economic policy-making and implementation quite well. *Id.* at 127.

39. *See, e.g.*, Bush, *supra* note 4, at v (“[A]s a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best.”).

40. *Id.*

41. Laird, *supra* note 37, at 32.

42. American philosopher and political economist Francis Fukuyama explained:

The fact is that the chief threats to us and to world order come today from weak, collapsed, or failed states. Weak or absent government institutions in developing countries form the thread linking terrorism, refugees, AIDS, and global poverty. Before 9/11 the United States felt it could safely ignore chaos in a far-off place like Afghanistan; but the intersection of religious terrorism and weapons of mass destruction has meant that formerly peripheral areas are now of central concern.

Francis Fukuyama, *Nation-Building* 101, 293 ATLANTIC MONTHLY 159, 159 (2004).

43. *See, e.g.*, Bush, *supra* note 22, at ii (“[W]e must maintain and expand our national strength so we can deal with threats and challenges before they can damage our people or our interests.”).

44. President Bush explained:

The events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.

Bush, *supra* note 4, at v.

II. THE CONSTITUTIONALITY OF THE CURRENT WARFARE POLICY

All powers of the government flow from the Constitution.⁴⁵ As Justice Black explained, “The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”⁴⁶ Thus, before a policy judgment can be made on the wisdom of waging preventive war and rebuilding nations after war, the constitutionality of such a policy must be addressed.

A. Scholarship Addressing the Constitutionality of the Current American Warfare Policy

Little scholarship exists on the issue of whether the government has the constitutional power to wage preventive war or use the military to rebuild war-torn nations.⁴⁷ In his article, “*Preemptive*

45. David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT’L L. & FOREIGN AFF. 75, 142 (2007).

46. *Reid v. Covert*, 354 U.S. 1, 5–6 (1957); *see also Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 136–37 (1866) (“[N]o department of the government of the United States—neither President, nor Congress, nor the Courts—possesses any power not given by the Constitution.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument.”); *Graves v. People of State of New York ex rel. O’Keefe*, 306 U.S. 466, 477 (1939) (“[G]overnment derives its authority wholly from powers delegated to it by the Constitution . . .”).

47. An article regarding the constitutionality of nation-building has yet to be found. As of September 29, 2008, a Westlaw search for journal articles with the terms “nation building” and “constitution” in the title (TI(“nation build!” & constitution!)) produced only four results. None of these results dealt with the constitutionality of nation-building. As of September 29, 2008, a Westlaw search for journal articles discussing the constitutionality of preventive war produced only ninety-five results with the search terms ((preempt! /s war) /p constitution!) and only eighteen results using the terms “preventive war” /p constitution!. Generally, the few articles that mention the issue of the constitutionality of preventive war only address that a constitutional question exists before quickly passing an opinion of how that issue should be resolved. *See, e.g.*, Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 376 (2005) (“Does the Legislative branch (or the Legislative and Executive branches acting together) have the power to authorize an unprovoked deployment of troops for the purpose of invading another country? I believe not, or at least believe there are excellent constitutional arguments to the contrary.”).

Others frame a constitutional issue in terms of whether the President can unilaterally declare a preventive war. *See, e.g.*, Mark R. Shulman & Lawrence J. Lee, *The Debate Over War Powers*, 30 HUM. RTS. 6 (2003) (“Because the president still does not acknowledge the constitutional limitations, and Congress has dodged the issue, at least about Iraq, it is important to recognize it and insist that the president must seek congressional approval for future

War”: Is it Constitutional?, John B. Mitchell argues that preventive war, where a threat is not imminent, is not constitutional.⁴⁸ After surveying the academic field, Mitchell explains that the current scholarship addressing the balance of power between the President and Congress in declaring war does not “focus on whether or not the federal government—*both the executive and the legislative branches*—possesses the power to engage in preemptive war under the Constitution.”⁴⁹ Seeing nothing in the Constitution or surrounding literature that permits or prohibits preventive war, Mitchell turns to five categories of “circumstantial evidence” to legitimize his claim that “the federal government does not have the power under the Constitution to commit military force to preemptive war.”⁵⁰

First, Mitchell argues that preventive war is at odds with the Lockean rationale underlying the social contract theory.⁵¹ The

preemptive invasions.”); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533 (2002) (examining whether the President must have the support of Congress to engage in preemptive strikes against other states); Mark J. Yost, Note, *Self Defense or Presidential Pretext? The Constitutionality of Unilateral Preemptive Military Action*, 78 GEO L.J. 415 (1989) (discussing when and how the President is to consult with Congress regarding a preemptive military action initiated by the President).

Most articles focus on international norms as a means of evaluation. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004) (finding that the U.S. invasion of Iraq was not in accordance with international law); J. M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law and the Use of Force in the Long Hard Slog*, 22 CONN. J. INT’L L. 47, 128 (2006) (stating that President Bush’s leadership regarding Iraq undermined the U.N. system, marginalized the rule of international law, and significantly compromised world order). This mode of analysis is relevant to evaluating the policy itself, but does not directly address the constitutionality of the policy.

Only one article deals entirely with the issue of the constitutionality of preventive war. John B. Mitchell, “*Preemptive War”: Is it Constitutional?*,” 44 SANTA CLARA L. REV. 497 (2004). Since this is the primary article available on the subject, its arguments will be discussed in detail.

48. Mitchell, *supra* note 47, at 525. Thus, with the distinction between preemption and prevention in mind, Mitchell argues that preemptive war is constitutional while preventive war is not. *Id.* at 500, 525; see *supra* notes 15–16 and accompanying text.

49. Mitchell, *supra* note 47, at 503.

50. *Id.* at 504. Mitchell explains that “[u]nder accepted principles of evidence and proof, circumstantial evidence has equal force to direct evidence,” and that the “weight of circumstantial evidence legitimates the claim” that the federal government does not have the constitutional power to engage in preventive war. *Id.*

51. *Id.* According to Mitchell:

The social contract theory postulated that back in the mists of time man lived in a state of nature where it was every man for himself . . . [where] each individual had “natural

framers of the Constitution were guided by Locke's notions of natural law and based the Constitution "on the belief that the citizenry had entered into a contract"⁵² in which the federal government promised to "provide for the common defence."⁵³ Moreover, "[t]he only enemies the founders may have envisioned were likely the European countries of the colonists' ancestry and heritage."⁵⁴ Consequently, "military force under the constitutional structure should have been conceived as defensive in nature,"⁵⁵ and "the power provided for the 'common defense' . . . was envisioned to be necessary to repel 'external attacks' (i.e., self-defense)."⁵⁶ Thus, "an 'imminent' threat is still the standard for the constitutional exercise of the power to use military force."⁵⁷

Second, Mitchell argues that preventive war would be antithetical to the framers' notion of a "just war" and that "the founders' view of war would have been circumscribed by the 'just war' doctrine."⁵⁸

rights" revealed by their God-given ability to reason. But each man was his own law with respect to asserting and protecting these rights, with force being the final arbiter. In other words, man possessed a great deal of freedom, but not much security.

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

Id. at 505 (citations omitted); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 2002) (1690).

52. Mitchell, *supra* note 47, at 506.

53. *Id.* (citing U.S. CONST. pmb1.).

54. *Id.*

55. *Id.*

56. *Id.* Mitchell derives this proposition from an excerpt of THE FEDERALIST NO. 23 (Alexander Hamilton), which states that "[t]he principle purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attack." Mitchell, *supra* note 47, at 506 n.43 (quoting THE FEDERALIST NO. 23 (Alexander Hamilton)).

57. Mitchell, *supra* note 47, at 507.

58. *Id.* Mitchell explains that the just war doctrine contains six criteria for judging whether the resort to force is justified: (1) just cause, (2) competent authority, (3) right intention, (4) last resort, (5) probability of success, and (6) proportionality. *Id.* at 508. *See also* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE HARVEST OF JUSTICE IS SOWN IN PEACE 13 (1993). These criteria derive from the writings of Augustine and Thomas Aquinas. In the fourteenth century, Thomas Aquinas stated that only three requirements had to be met for a war to be considered just. Thomas Aquinas, *Summa Theologica*, in SOURCES OF THE WEST: READINGS IN WESTERN CIVILIZATION VOL. I, 184, 184 (Mark A. Kishlansky ed., 2003). The

Even though the world today faces many different dangers than it did at its founding, just cause “still means that the ‘war is permissible only to confront a real national and certain danger’ By definition, this principle cannot encompass preemptive war.”⁵⁹

Third, Mitchell argues that preventive war is inconsistent with the founders’ perspective on war.⁶⁰ Having come out of a bloody war, the founders “had no interest in granting the federal government the power to easily wage the country in war.”⁶¹ The system created was intended to guard against rushing to war, making it “hard to imagine that the founders would have given the federal government the power to make war on the grounds other than true ‘imminent’ danger; i.e., traditional self-defense.”⁶² Furthermore, allowing preventive war would have “given the executive a rationale for constantly maintaining an army,” and the American citizens who had just fought to remove such a government “were not about to fall under the heels of the same form of government, with the title ‘President’ substituted for ‘King.’”⁶³

first of these was “the authority of the sovereign by whose command the war is to be waged.” *Id.* Aquinas derived this principle from Augustine who said that “the natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold supreme authority.” *Id.* For a war to be just, Aquinas’s second principle stated that a just cause was required, “namely that those who are attacked, should be attacked because they deserve it on account of some fault. *Id.* Third, it was “necessary that the belligerents should have a rightful intention, so that they intend the advancement of good or the avoidance of evil.” *Id.* Again, Aquinas derived these principles from the words of Augustine, explaining that “Augustine says: True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, punishing evil-doers, and of uplifting the good.” *Id.*

59. Mitchell, *supra* note 47, at 508 (quoting National Conference of Bishops, *Summary of the Challenge of Peace: God’s Promise and Our Response, a Pastoral Letter on War and Peace* (May 3, 1983), available at <http://www.zero-nukes.org/challengeofpeace.pdf>).

60. *Id.* at 509.

61. *Id.*

62. *Id.* Mitchell also points to the serious debate that occurred during the War of 1812 as to whether the federal government had the power to cross the border into Canada as part of the nation’s defense. *Id.* at 509–10. Although the “question was eventually answered in the affirmative and, the U.S. attacked Canada,” the debate showed “how strongly those in the new nation perceived the use of military force as tied to true self-defense.” *Id.* at 510.

63. *Id.* at 511. In 1848, Abraham Lincoln discussed this issue in a letter to William Herndon:

Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at

pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much as you propose. If to-day he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him,—“I see no probability of the British invading us”; but he will say to you, “Be silent: I see it, if you don’t.”

The provision of the Constitution giving the war making power to Congress was dictated, as I understand it, by the following reasons: kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.

Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), in THE WRITINGS OF ABRAHAM LINCOLN VOL. 2, 18, 18 (Arthur Brooks ed., 1923), available at <http://www.classic-literature.co.uk/american-authors/19th-century/abraham-lincoln/the-writings-of-abraham-lincoln-02/ebook-page-18.asp>.

Note that this analysis, although it discusses the war power in terms of a preventive attack, still is focused on where the war power lies, that is, whether the President has the power to act without Congress. Although this is an important question, it is a different question from whether the Constitution *permits* preventive wars because a preventive war can conceivably be “properly” declared under the constitutional war-power structure. In other words, before analyzing the constitutional procedure for declaring a preventive war, one should address whether the Constitution allows such a war to be waged in the first place. For discussion on the war powers, see generally JOHN H. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (Special Issue 1970); Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461 (1971); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); Sarah M. Riley, Comment, *Constitutional Crisis or Déjà vu? The War Power, the Bush Administration and the War on Terror*, 45 DUQ. L. REV. 701 (2007). See also *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (1973) (holding that Article I, § 8, cl. 11 gives only Congress the power to declare war); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (explaining that the President does not have unlimited power over persons and property of citizens which will justify him in ordering seizure of private property simply because it may be useful or beneficial to the Armed Forces); *Hirabayashi v. United States*, 320 U.S. 81, 92 (1943) (holding that the principal war powers of the President arise from the President’s position as Commander-in-Chief of the Armed Forces); *Ex Parte Quirin*, 317 U.S. 1, 10 (1942) (stating that the Constitution invests the President with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the government and regulation of the Armed Forces); *Mathews v. McStea*, 91 U.S. (1 Otto) 7, 12 (1875) (explaining that the President has the power to recognize the existence of a state of war); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627 (1871) (stating that the public danger must be immediate, imminent, and impending before the government can seize private property useful to the Armed Forces); *The Prize Cases*, 67 U.S. (2 Black) 635, 659 (1862) (holding that the President has no legal power to initiate or declare

Fourth, Mitchell argues that permitting preventive war risks permanent alteration to the basic constitutional structure.⁶⁴ Pointing to recent Tenth Amendment jurisprudence,⁶⁵ Mitchell contends that “the federal government faces the limits of its powers when its actions threaten a permanent alteration of the basic constitutional structure.”⁶⁶ Thus, the concern remains that “excessive federal encroachment into matters affecting the states risks erosion of state sovereignty, and with it, the basic federalist constitutional structure.”⁶⁷ Should preventive war become legitimized, a dominating federal government would result where states and civilians “principally exist to endlessly support the federal military-industrial complex [T]he federalist conception reflected in the constitutional structure of American government would exist only in the most diluted form”⁶⁸

war); *O’Neal v. United States*, 140 F.2d 908, 912 (6th Cir. 1944) (explaining that Congress may invoke the action of the executive branch so long as it is not an assumption of its own constitutional field of action); *Campbell v. Clinton*, 52 F. Supp. 2d 34, 36 (D.D.C. 1999) (holding that if the President fails to report to Congress within forty-eight hours of introducing troops into hostilities, the court may order that the report be filed or the troops be withdrawn sixty days after the report was filed or required to be filed); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982); *Perkins v. Rogers*, 35 Ind. 124, 167 (1871) (stating that the President cannot initiate or declare war against a foreign nation or a domestic state); 50 U.S.C. § 1541(c) (2000) (stating that the constitutional powers of the President to introduce United States Armed Forces into hostilities are exercised only pursuant to (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces); 50 U.S.C. § 1542 (2000) (stating that the President must consult with Congress before introducing United States Armed Forces into hostilities); 50 U.S.C. § 1543(a) (2000) (stating that when troops are introduced in the absence of a declaration of war, the President must submit a written report within forty-eight hours to the Speaker of the House and the President pro tempore of the Senate); 50 U.S.C. § 1544(b) (2000) (stating that the President must terminate the use of Armed Forces after sixty days unless Congress declares war, extends the sixty-day period at a maximum of thirty days, or is unable to meet because of an armed attack on the United States).

64. Mitchell, *supra* note 47, at 511.

65. *United States v. Morrison*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1995). According to these cases, “an enumerated power given to the federal government to benefit the federal-republic . . . [cannot] constitutionally be employed in a manner actually tending to erode that same federal republic (i.e., weaken the federal state relationship embodied in the concept of federalism).” Mitchell, *supra* note 47, at 511.

66. Mitchell, *supra* note 47, at 511.

67. *Id.*

68. *Id.* at 513.

Fifth, Mitchell argues that prior to the attack on Iraq, the United States never engaged in preventive war.⁶⁹ While numerous rationales have been given to justify the use of force by the United States,⁷⁰ preventive war has never been attempted as a rationale for using force.⁷¹ Accordingly, “[i]f America creates a precedent through its practice . . . [a]ny state that believes another regime poses a possible future threat—regardless of the evidence—could cite the United States invasion of Iraq.”⁷² These five factors lead Mitchell to conclude that preventive war is not a constitutional military policy.⁷³

B. The Constitutionality of Preventive War: Problems with Mitchell’s Approach

The lack of scholarship on the issue of the constitutionality of preventive war may be indicative of a belief that the Constitution simply does not address the issue of preventive war. Before

69. *Id.*

70. *Id.* at 514–16. Over the past two hundred years, the United States has given a variety of rationales to justify force, including protection of U.S. citizens and property (e.g., Haiti 1915–1934; Nicaragua 1912; Panama 1903, 1989; Grenada 1983; Lebanon 1957); preventing chaos when local governments could no longer maintain order (i.e., Florida in the early 1800s, Panama and the Dominican Republic in the early twentieth century); rescuing U.S. hostages (i.e., Iran 1980); upholding the Monroe Doctrine by sending troops to nations incapable of keeping foreign powers out of the Western Hemisphere (i.e., Cuba 1906); responding to a foreign state that sponsored terrorism resulting in the death of American citizens in Europe (i.e., Libya in the 1980s); restoring governments to power in the Western Hemisphere (i.e., Haiti 1994); upholding a neutrality obligation of a treaty (i.e., Panama 1903); preserving the status quo while negotiating for the annex of foreign-held territory in North America (i.e., Florida in the early 1800s); pursuing pirates, bandits, and outlaws (i.e., Pancho Villa into Mexico, Seminoles into Florida, Noriega into Panama); protecting U.S. military personnel (i.e., responding to Cambodian attack on U.S. naval ship *Mayaguez* in 1975); responding to hostility while providing humanitarian aid (i.e., El Salvador 1984); preventing nations from preying on U.S. shipping and commerce (i.e., Tripoli 1802, Algiers 1815, War of 1812, World War I); responding to nations that have invaded disputed territory claimed to have been annexed by the United States (i.e., Mexican War 1846); responding to an attack on U.S. naval bases (i.e., Pearl Harbor); responding to a nation intertwined with terrorists who attacked U.S. soil (i.e., Afghanistan 2001); responding to a nation that refused to leave its colony and declared war on the United States (i.e., Spanish-American War 1898); and upholding a regional or bilateral defense pact (Vietnam and the SEATO mutual defense pact, Kosovo and NATO), treaty obligation (Vietnam and the 1954 Geneva Accord), and U.N. membership (Korea 1950, Iraq 1991, Somalia 1993). *Id.*

71. *Id.* at 516.

72. *Id.* at 517–18.

73. *Id.* at 525.

beginning his discussion, Mitchell concedes that there is a lack of direct textual or case material on the issue.⁷⁴ His discussion thereafter is based on a principle of evidence law that circumstantial evidence has equal force to direct evidence.⁷⁵ From the outset, it is questionable whether this notion of evidence law applies to constitutional analysis.⁷⁶ If one assumes it does, he or she must then evaluate the weight of the circumstantial evidence presented by Mitchell.

1. Is Preventive War at Odds with the Social Contract Theory?

Although the federal government was formed based on the social contract principles of John Locke, and part of that Lockean bargain was to provide for the common defense,⁷⁷ it is unclear why the “philosophical roots of that bargain . . . would unlikely construe the ‘common defense’ to include any notion of ‘preemptive’ defense.”⁷⁸ Mitchell begins with the presumption that “imminence” is a constitutional standard that limits the federal government in going to war.⁷⁹ Unfortunately, he provides no support for this notion. Moreover, the Constitution itself does not give any criteria of imminence that must be present before the United States can go to war. If imminence were a deciding factor, one might question the constitutionality of U.S. involvement in such places as Haiti, Somalia, or Kosovo, where it is questionable that a U.S. interest was in “imminent” danger.⁸⁰

Furthermore, it is unclear why the Lockean social contract philosophy would not *include* preventive attacks because “[t]he great and chief end therefore, of Mens [sic] uniting into Commonwealths,

74. Mitchell, *supra* note 47, at 504.

75. *Id.*

76. *See, e.g.*, United States v. Scheffer, 523 U.S. 303, 311 n.7 (1998) (“It would be an odd inversion of our hierarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution.”).

77. *See* Mitchell, *supra* note 47, at 506.

78. *Id.*

79. *See id.* at 507.

80. Using force in humanitarian aid missions would also be problematic if imminence is to be used as a constitutional standard. Similarly, construing the “common defense” as a (the) rationale for the United States to use force would severely limit military operations abroad, including humanitarian efforts where America is not acting for the common defense.

and putting themselves under Government, is the Preservation of their Property.”⁸¹ Finally, “whoever has the Legislative or Supream [sic] Power of any Common-wealth, is bound . . . to imploy [sic] the force of the Community at home, only in the Execution of such Laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion.”⁸²

2. Does Just War Theory Enter the Constitutional Calculation?

While the founders perhaps were “persons whose Lockean political philosophy and Christian religious conceptions were intellectually intertwined,”⁸³ it is unclear that this should affect a constitutional analysis, since the Constitution mentions no criteria for going to war justly. Rather, the Constitution outlines a procedure for legitimizing war. Hence, in analyzing the constitutionality of a warfare policy, one would examine whether it could be executed according to the requirements of the Constitution.⁸⁴ Accordingly, the Christian just war theory should not enter the constitutional calculation.

3. Did the Founders Limit the Reasons for War?

Undoubtedly, the founders wished to fight wars out of necessity and avoid them if possible;⁸⁵ however, their way of preventing hasty wars was through a constitutional system involving a process for declaring war.⁸⁶ The Constitution nowhere explains the criteria necessary for going to war or the terms of war. It merely explains the procedure necessary for making the determination to declare war.⁸⁷ While the preamble does hint that war should be fought to “provide

81. LOCKE, *supra* note 51, at 350–51.

82. *Id.* at 353 (emphasis added).

83. Mitchell, *supra* note 47, at 507.

84. This is not to say that just war considerations should not be made in analyzing the wisdom of a warfare policy. For a discussion of Christian Just War Doctrine, see *supra* note 58 and accompanying text. See also JEAN BETHKE ELSHTAIN, *JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD* (2003); PETER S. TEMES, *THE JUST WAR: AN AMERICAN REFLECTION ON THE MORALITY OF WAR IN OUR TIME* (2003).

85. Mitchell, *supra* note 47, at 509; see also Yoo, *supra* note 63, at 190, 263.

86. U.S. CONST. art. I, § 8.

87. *Id.*

for the common defense,”⁸⁸ the rationale of preventive war is not inconsistent with this notion.⁸⁹ The Constitution requires congressional approval of war⁹⁰ to prevent a President from acting like a king and to let the American people at any given time decide for what they wish to fight. For example, the debate by early Americans as to whether Canada could be invaded⁹¹ shows not a constitutional question being played out, but rather a policy debate as to whether the nation should use a particular method to fight a war. Hence, the Constitution prevents a President from becoming a dictator and gives the American people the power⁹² to decide whether and why to go to war.⁹³

4. Is the Federalist Structure Threatened at the Expense of the Constitution?

It is unclear how preventive war risks the basic federalist constitutional structure any more than any other rationale given for going to war. Mitchell provides a scenario in which preventive war becomes acceptable and the United States becomes engaged in endless actions from Afghanistan to Iraq, Iraq to Syria, Syria to Iran, Iran to Somalia, Somalia to North Korea, and on until “society’s almost exclusive focus becomes the current war,” resulting in a dominating federal government.⁹⁴ While this sounds horrible, the same endless war scenario could equally apply to repeated U.S. military engagements that seek to provide humanitarian aid, enforce a treaty, act in accordance with the U.N., protect U.S. commerce abroad, or prevent regional instability—all of which have been held to be “valid” rationales for the use of American military force in the

88. U.S. CONST. pmbi.

89. Arguably, it would be in the common defense to strike a nuclear facility based on intelligence that a weapon was being made to be used against America, even though no weapon had yet been made.

90. U.S. CONST. art. I, § 8.

91. See *supra* note 62 and accompanying text.

92. In this context, the American people act through their representatives.

93. This system likely accounts for the numerous rationales given for using force in American history. See *supra* note 70 and accompanying text.

94. Mitchell, *supra* note 47, at 512–13.

past.⁹⁵ In order for the federal government to continue with military action, the people would have to continuously approve of them, and in doing so would preserve the federalist structure.⁹⁶ Additionally, such a nightmare scenario is constitutionally possible so long as the constitutional procedures are met. Thus, the Constitution limits the method of declaring war and leaves it to the people to decide if they want a dominating federal government to develop out of continued military engagements.

5. Do Past Justifications and Other Countries' Actions Affect a Constitutional Analysis?

It is unclear whether the United States has ever engaged in preventive war.⁹⁷ Even if it had, however, it would not make preventive war any more or less constitutional since every rationale given for war was at one time never before used by the United States. Furthermore, it may be true that fighting preventive wars will create a precedent for other countries to engage in similar action; however, this does not make preventive war unconstitutional. For instance, during World War II, the United States established internment camps for Americans of Japanese descent and the Supreme Court held that this action by the President was constitutional.⁹⁸ Under Mitchell's logic, any nation could put a certain group of its citizens in camps and point to the U.S. decision for legal justification. Such an action by another nation, while it may reveal the serious faults of the American policy, does not automatically make the American policy unconstitutional.

95. See *supra* note 70 and accompanying text.

96. It is more likely, however, that the people would not approve of continuous military adventures as exemplified by the decreasing amount of support for the war in Iraq. See, for example, a CNN/Opinion Research Corporation Poll, Jan. 14–17, 2008, <http://www.pollingreport.com/iraq.htm?loc=interstitialskip>, in which 34% of respondents said they favored the U.S. war in Iraq, 63% said they opposed the war in Iraq, and 3% were unsure.

97. See MUELLER, *supra* note 7, at 18, app. A. The authors explain that during the Cold War, the United States was ready to take military action for preventive purposes against the Soviet Union from 1945–55, during the Cuban Missile Crisis in 1962, and to prevent China from acquiring nuclear weapons in 1963–64. *Id.* Additionally, the authors characterize the American invasion of Grenada in 1983 as an act of preventive force resulting in regime change. *Id.*

98. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

C. *The Constitutionality of Post-Conflict Nation-Building*

Questions regarding the constitutionality of nation-building arise less than questions on the constitutionality of preventive war.⁹⁹ Given the long history of American nation-building that stems from America's founding, however, the use of the U.S. military to rebuild war-torn nations is seemingly constitutional. If the absence of preventive war throughout American history may be used as evidence of its unconstitutionality,¹⁰⁰ surely the repeated use of nation-building since the country's founding supports its constitutionality. The long history of nation-building in and by America supports the conclusion that the Framers of the Constitution would have understood nation-building to be simply a part of war. If nation-building is considered an extension of war, then, so long as that war is entered into according to the constitutional procedure, it is constitutional.¹⁰¹ Additionally, even if one holds that war may only be constitutionally waged to "provide for the common defense,"¹⁰² post-combat nation-building efforts that seek to provide American security should not offend the Constitution.¹⁰³ Ultimately, the use of nation-building is less a constitutional question and more a policy question.

III. THE WISDOM OF THE CURRENT WARFARE POLICY

The Constitution merely establishes a system to follow when declaring war. That system gives the people a voice in deciding what reasons are sufficient to send troops into battle and how long to remain once the fighting has ended.¹⁰⁴ The use of preventive war, for

99. See *supra* note 47 and accompanying text.

100. See Mitchell, *supra* note 47, at 513–19.

101. The Constitution does not explain or dictate how to fight a war. See *supra* note 89 and accompanying text.

102. U.S. CONST. pmbl.

103. This rationale for nation-building emerged after September 11, 2001. See *supra* notes 8, 39 and accompanying text.

104. As Secretary of State Dean Acheson put it in dismissing the need to articulate a legal justification for U.S. actions during the Cuban missile crisis:

The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of

example in the case of Iraq, can comply with that system.¹⁰⁵ Still, a policy can be both constitutional and unwise.¹⁰⁶ Though the current warfare policy appears to be constitutional, a question remains whether it is a sound policy.

A. *The Wisdom of Preventive War*

Mitchell's arguments, while not supporting a constitutional challenge to preventive war, reveal the implications and policy weaknesses of preventive war.¹⁰⁷ Besides the potential harm to America and the world that Mitchell describes, others argue that preventive attacks are also "ineffective, costly, unnecessary, and potentially even counterproductive."¹⁰⁸ Historically, attacks have been made against targets that were not likely to acquire weapons of mass destruction.¹⁰⁹ Underlying these episodes is poor intelligence about a target's weapons program.¹¹⁰ If America is going to have a solid preventive war policy, it must first have a system of reliable intelligence.¹¹¹ Moreover, it has become more difficult to strike a

law that say we must accept destruction of our way of life The survival of states is not a matter of law.

Dean Acheson, Remarks at the Proceedings of the American Society of International Law, 57th Annual Meeting 13–15 (1963), *in* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 108 (Robert J. Beck et al. eds., 1996).

105. *See* Riley, *supra* note 63, at 733. ("[T]he conflict in Iraq is within the constitutional bounds of President Bush's power as Commander in Chief Congress authorized a preemptive war against Iraq. The policy debate . . . is an important and necessary debate, but it has no effect on Bush's essential constitutional authority to conduct such a war.")

106. Internment camps during World War II are an example of a constitutional policy that many would consider unwise. *See supra* note 98 and accompanying text.

107. Rather than discuss each point again, Mitchell's previous arguments will be adopted and presumed valid *policy* considerations against the use of preventive war.

108. DAN REITER, PREVENTIVE WAR AND ITS ALTERNATIVES: THE LESSONS OF HISTORY 2 (2006).

109. *Id.* at 3. For example, a series of attacks was launched against the nuclear program of Nazi Germany, though scientific and other error likely would have prevented Germany from building a nuclear device in the time available. *Id.* The 1998 missile attacks against chemical weapons facilities in Sudan also made little difference and the evidence associating the installation with chemical weapons was quite weak. *Id.* The 1993 and 1998 cruise missile strikes against Iraqi targets were also aimed at a dormant weapons of mass destruction program. *Id.*

110. *Id.*

111. As Greg Thielmann, former head of the Office of Strategic Proliferation and Military Affairs in the State Department's Office of Intelligence and Research said, "The effectiveness

weapons facility because of the anticipation of and precautionary moves made by the target.¹¹²

Furthermore, while there may be long-term benefits to preventive wars in which regime change is the goal,¹¹³ these engagements come at a large cost. First, American casualties are unavoidable and military assets are drawn away from other priorities.¹¹⁴ Second, preventive wars can reduce the number of people that volunteer for military service.¹¹⁵ Third, regime-change operations are expensive and current estimates state that the Iraq war has cost over \$1 trillion.¹¹⁶ Finally, preventive wars have the potential to stimulate terrorism, the very thing they are designed to prevent.¹¹⁷ Accordingly, because it is unlikely that any potential benefits would outweigh

of any first-strike military doctrine depends on reliable intelligence. The U.S. intelligence community's inability to produce accurate information on enemy threats renders such a doctrine feckless and reckless." *Id.* at 4 (quoting Greg Thielmann, Preventive Military Intervention: The Role of Intelligence, Ridgway Center Policy Brief 04-01 (October 2004)).

112. Ever since the Israeli attack against the Iraqi Osiraq nuclear reactor in 1981, states with weapons programs "have been much more aware of the possibility of being the target of a preventive attack" and have "taken steps to reduce the vulnerability of their [weapons] programs by hardening facilities, building duplicate facilities, and keeping the existence and location of facilities secret." REITER, *supra* note 108, at 4–6.

113. These long term benefits could include stopping the proliferation of weapons of mass destruction and adding another peaceful democratic member to the international community. *Id.* at 7.

114. *Id.* at 8. In May 2005, the Chairman of the Joint Chiefs of Staff wrote in a classified report to Congress that the Iraq War had limited the ability of the military to fight in other conflicts due to depleted stockpile of weapons, stress on reserve units, and other factors. *Id.* (citing Thom Shanker, *Iraq Role Military Ability, Congress Is Told*, N.Y. TIMES, May 3, 2005, at A1).

115. REITER, *supra* note 108, at 9. "In the fiscal year ending September 30, 2005, the Army missed its recruiting goals, achieving only 84 percent of the enlistment goal for the Reserve, 80 percent for the National Guard, and 92 percent of the active duty forces." *Id.* (citing Tony Perry, *Marines Hit Recruiting Goal, Won't Lower Bar*, L.A. TIMES, Oct. 14, 2005, at A-30).

116. Tyler Cowen, *What Does Iraq Cost? Even More than You Think*, WASH. POST, Nov. 18, 2007, at B03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/16/AR2007111600865.html>; David Leonhardt, *What \$1.2 Trillion Can Buy*, N.Y. TIMES, Jan. 17, 2007, available at <http://www.nytimes.com/2007/01/17/business/17leonhardt.html>.

117. REITER, *supra* note 108, at 10. This can happen in four ways: (1) use of force can increase global anti-Americanism, which may increase the motivation of some individuals to join terrorist groups; (2) U.S. troops abroad may create targets of opportunity for terrorists; (3) preventive attacks open the door for insurgency wars, effectively generating training opportunities for terrorist organizations; and (4) even if regime change does occur, the state may be overrun by chaos and disorder, allowing terrorists and rogue elements to seize material useful for producing weapons. *Id.* at 10–11.

these risks, engaging in preventive war is not in the best interest of the United States.

B. The Wisdom of Nation-Building After Combat Has Ended

The question of how long the United States should remain rebuilding a nation after combat has ended is a political question left to the people. What the citizens decide, however, makes a statement to the world.¹¹⁸ Thus, half-hearted efforts at nation-building increase tension and weaken the policy goals behind post-conflict nation-building. If nation-building is to be effective, it must be carried out fully. If the people do not wish to be engaged in another nation for so long, then nation-building should be removed as a component of warfare policy so as not to prolong American intervention abroad.

Ultimately, once a war has started, the United States should engage in post-conflict nation-building. Critics observe that “outsiders can never build nations.”¹¹⁹ This criticism, however, fails to make a distinction between two very different aspects of nation-building. The first aspect involves creating or fixing the cultural, social, and historical ties that bind a nation¹²⁰—a task that indeed is difficult for outsiders to accomplish. What critics overlook, however, is the second aspect, which might be more appropriately named state-building. This refers to creating or strengthening government institutions such as armies, police forces, judiciaries, central banks, tax-collection agencies, and health and education systems.¹²¹ State-building has two very separate yet critical phases. The first phase “involves stabilizing the country, offering humanitarian assistance and disaster relief, rebuilding the infrastructure, and jump-starting the economy.”¹²² After stability has been achieved, the second phase begins, which “consists of creating self-sustaining political and

118. Hence, in 1998, Osama bin Laden stated, “We have seen in the last decade the decline of the American government and the weakness of the American soldier, who was ready to wage cold wars and unprepared to fight long wars.” Garrick Utley, *CNN Saturday Morning News: Is bin Laden’s Mindset Similar to Hitler’s?*, CNN.COM/ TRANSCRIPTS, Dec. 8, 2001, <http://transcripts.cnn.com/TRANSCRIPTS/0112/08/smn.15.html>.

119. Fukuyama, *supra* note 42, at 159.

120. *Id.*

121. *Id.*

122. *Id.*

economic institutions that will ultimately permit competent democratic governance and economic growth.”¹²³ It is this aspect of nation-building, that is, state-building, in which outsiders can become involved and in which America should become involved once combat has ended.

Thus, if America is to intervene militarily in another nation, America must remain after major combat has ended to rebuild that nation. Nation-building has become an essential aspect of U.S. foreign policy in order not only to promote democracy abroad, but to ensure security at home. The history of nation-building has been a mixed bag of both failure and success.¹²⁴ It is in the national interests of the United States to learn from both the good and the bad experiences, and to continue its nation-building efforts. America must recognize the strategic value of nation-building and work to change the current system into one that is fully prepared, equipped, trained, and patient enough to deal with the long, difficult, costly, yet crucial task of building nations. Thus, in accordance with the pottery store rule,¹²⁵ and in the interests of national security, the United States should help rebuild nations after combat has ended.

IV. A WARFARE POLICY FOR THE TWENTY-FIRST CENTURY

While preventive war may be a constitutional warfare policy, it does not appear to be a sound policy. Although there may be some long-term benefits, these are greatly outweighed by the short-term and long-term costs as well as the uncertainty of success. Accordingly, the United States should utilize other policies to deal with potential threats to national security. Rather than rushing to war to prevent a future attack, the United States should focus its policy on other areas including, “diplomacy, deterrence, ballistic missile defense, and . . . counterterrorism polices . . . likely to be more

123. *Id.*

124. *See supra* note 38 and accompanying text.

125. *See* Thomas L. Friedman, *Present at . . . What?*, N.Y. TIMES, Feb. 12, 2003. The rule is an expression in foreign policy circles that if “you break it, you own it.” *Id.* In other words, if a nation causes turmoil in another nation, the nation that caused the trouble must deal with the problem itself.

effective at containing the spread and use of [weapons of mass destruction] and less costly in human lives.”¹²⁶

Additionally, for the United States to be more effective and efficient at nation-building, several military and political changes must take place. First, several changes must be made within the military. Fighting an insurgency and keeping peace are operations that involve manpower that the United States currently lacks.¹²⁷ Furthermore, because the troops that are available are not trained for irregular warfare, the United States military needs a restructuring in its training. Veterans of combat explain “that it is easier for troops trained for high-intensity combat to deal with peacekeeping than it is for peacekeepers to deal with high-intensity combat.”¹²⁸ Accordingly, some call for “high-quality general-purpose forces that can shoot terrorists one minute and hand out candy to children the next.”¹²⁹

While one solution would be to have current branches of the military trained in both conventional warfare and nation-building tactics, an ideal solution would be to create a new division of specially trained “nation-builders” that would enter a nation alongside an occupying military force once traditional combat has ended. Perhaps a new branch of the military could be created, tasked with post-combat nation-building and trained more heavily in police tactics and civilian control than conventional combat. As the branches do now, this new branch could work alongside the current branches in post-combat settings to secure peace in a region.

Second, whatever changes occur in the military realm, changes in political institutions are also essential to an effective nation-building policy. The United States should create a “government agency specifically tasked with rebuilding war-torn lands in cooperation with international agencies, allied governments, and nongovernmental

126. REITER, *supra* note 108, at 2.

127. See Max Boot, *The Struggle to Transform the Military*, 84 FOREIGN AFF. 103, 107 (2005) (“[C]ontrolling a civilian population requires using soldiers to patrol the streets like cops on the beat, and the United States does not have nearly enough of them.”). Boot proposes that the number of troops in the Armed Forces should be increased by at least 100,000. *Id.* at 108. He suggests possible cuts to help this expenditure, such as cutbacks on the F-22 fighter, national missile defense, and the Virginia-class submarine, which would free up nearly \$205 billion. *Id.*

128. *Id.* at 108.

129. *Id.*

organizations.”¹³⁰ Such an agency, however, should not allow the military to remain unchanged, and both military and political reorganization is essential for successful nation-building efforts in the future.

These structural changes are necessary for successful nation-building, which should be part of the military policy of the United States. While quick wars in which America invades, fights, wins, and exits are attractive, they ultimately leave political vacuums, do not serve the interests of the United States, and create problems for future generations. Therefore, although preventive wars should be removed from America’s warfare policy, post-conflict nation-building should be included as a necessary element of America’s warfare policy in the twenty-first century.

CONCLUSION

The current American warfare policy includes waging preventive wars and rebuilding war-torn nations when combat has ended. These two aspects of America’s current policy are not contrary to the Constitution. This conclusion, however, does not automatically make these two facets of modern warfare wise. Preventive war is not a sound policy because of its short-term and long-term costs combined with the uncertainty of success. Once a war has started, however, it is in America’s best interest to remain after combat has ended and rebuild the nation. Accordingly, the United States should focus its warfare policy away from preventive attacks and more on other methods of dealing with future threats, such as diplomacy, deterrence, and counterterrorism. Furthermore, America should restructure military and political institutions in order to become more efficient and effective at post-conflict nation-building. By doing this, America will enter the twenty-first century with a warfare policy that is constitutional, practical, effective, and wise.

130. *Id.* at 111. Boot says that such an agency would help America “to be better prepared the next time—and yes, there will be a next time.” *Id.* Still “[n]o matter how much civilian management improves, the bulk of the manpower for any nation-building assignment would still have to come from the Pentagon.” *Id.*